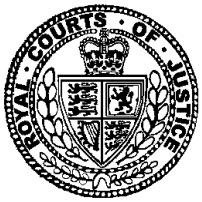

Neutral Citation Number: [2020] EWHC 210 (Admin)

Case No: CO/3817/2018

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

Leeds Combined Court Centre
1 Oxford Row
Leeds LS1 3BG

Date: 6th February 2020

Before :

MRS JUSTICE JEFFORD DBE

- -

Between :

THE QUEEN **On the application of THE CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE**	**Claimant**
- and -	
THE CROWN COURT AT SHEFFIELD	**Defendant**
-and-	
LLOYD PATRICK KELLY	**Interested Party**

- -
- -

Dijen Basu QC (instructed by **the Force Solicitor, South Yorkshire Police**) for the **Claimant**
David Lock QC (instructed by **Slater and Gordon**) for the **Interested Party**

Hearing date: 16 May 2019

- -

Approved Judgment

MRS JUSTICE JEFFORD:

Introduction

1. These proceedings concern the judicial review of the decision of His Honour Robert Moore on 20 July 2018 on a statutory appeal under Regulation 34 of the Police (Injury Benefit) Regulations 2006. The Crown Court is accordingly a defendant in this action but, in reality, this is a dispute between the Interested Party, Mr Kelly, and the Chief Constable as the relevant police pension authority.

2. An application was made to the judge to state a case which the judge refused to do. That was the basis of the first ground for judicial review. Lane J granted permission on all grounds, giving the claimant permission to challenge directly the conclusions of the Crown Court addressed in Grounds 2 to 4 without the need for the matter to be referred back to the Crown Court to state a case. That follows the approach in *R (Skelton) v Winchester Crown Court* [2007] EWHC 3118 of taking the fewest additional steps to resolve the matter. Accordingly, I am concerned with the three grounds of challenge: (1) that the Crown Court lacked jurisdiction over the dispute; (2) that there is, in any event, no retrospective entitlement to an injury award; and (3) that the Crown Court had no power to award interest.

The regulations

3. I set out first the relevant Regulations in order to put the largely uncontroversial facts in context.

4. The Police Pensions Act 1976 (as amended) provides for the making of regulations in relation to police pensions. In particular, section 6 (Appeals) provides:
"(1) Subject to the following provisions of this section regulations made under section 1 above shall make provision as to the court or other person by whom appeals are to be heard and determined in the case of any person who is aggrieved –

(a) by the refusal of the police pension authority to admit a claim to receive as to right a pension, or a larger pension than that granted, under regulations made under that section, or
(b) …."

5. The Police Pensions Regulations 1987 were such regulations and were followed by the Police (Injury Benefit) Regulations 2006 (which are specifically concerned with awards on injury or death as a result of the execution of the duties of a police officer and included relevant amendments to the 1987 Regulations).

6. So far as the 2006 Regulations are concerned, the following are referred to in the course of this judgment:

(i) Definitions:
(a) Regulation 2(c) provides that, unless the context otherwise requires, "any reference to an award, however, expressed, is a reference to an award under these Regulations".
(b) Regulation 6 provides the definition of an injury received in the execution of duty by a member of a police force.
(c) Regulation 7(1) provides that:

"… a reference in these regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being at that time likely to be permanent."

(ii) Regulation 7(7) provides:
"Where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the police pension authority."

(iii) Regulation 11 (Police Officer's Injury Award):
"(1) This regulation applies to a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received without his own default in the execution of his duty (in Schedule 3 referred to as the "relevant injury").

(2) A person to whom this regulation applies shall be entitled to a gratuity and, in addition, to an injury pension, in both cases calculated in accordance with Schedule 3; but payment of an injury pension shall be subject to the provisions of paragraph 5 of that Schedule and, where the person concerned ceased to serve before becoming disabled, no payment shall be made on account of the pension in respect of any period before he became disabled."

(iv) Regulation 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 pension authority.

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

(a) whether the person concerned is disabled;

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

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

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

(c) whether the disablement is the result of an injury received in the execution of duty, and
(d) the degree of the person's disablement;

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

…

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

7. Regulation 31 then provides for an appeal to a board of medical referees where a person is dissatisfied with the decision of the medical practitioner. Under Regulation 31(3), the decision of the board of medical referees shall, if it disagrees with the report of the selected medical practitioner, also be in the form of a report and the decision of the board shall, subject to Regulation 32, be final. Regulation 32 makes provision for reconsideration of the decision of a medical authority, in summary, in two circumstances: (i) where a court (hearing an appeal under Regulation 34) or a tribunal (hearing an appeal under Regulation 35) considers that the evidence before the medical authority that has given the final decision was inaccurate or inadequate and (ii) where the police pension authority and the claimant agree.

8. Regulation 34 (appeal by a member of a home police force):
"Where a member of a home police force, or a person claiming an award in respect of such a member, is aggrieved by the refusal of the police pension authority to admit a claim to receive as of right an award or a larger award than that granted, ….he may, subject to regulation 36, appeal to the Crown Court and that court after enquiring into the case, may make such order in the matter as appears to it to be just."

9. Regulation 43 (Payment and duration of awards):
"(1) Subject to the provisions of these Regulations, in particular of regulation 11(2) (limitation on payment of an injury pension to a person who ceased to serve before becoming disabled) and Part 5 (revision and withdrawal or forfeiture of awards), the pension of a member of the police force under these Regulations shall be payable in respect of each year as from the date of his retirement.

….."

10. As set out in regulation 11(2), the calculation of an injury pension is dealt with in Schedule 3 and I refer to this Schedule below.

The facts

11. Mr Kelly was, between December 1976 and June 2005, a serving police officer. As a result of various incidents which took place during his service, the detail of which it is not necessary to set out, he developed Post Traumatic Stress Disorder. Mr Kelly was referred to a duly qualified medical practitioner, Dr Shahed Khan, under regulation H1(2) of the 1987 Regulations (equivalent to Regulation 30(2) in the 2006 Regulations) for a decision as to whether he was disabled and whether the disablement was likely to be permanent. I shall refer to the selected duly qualified medical practitioner as the "SMP". On 11 April 2005, Dr Khan decided that Mr Kelly was disabled and that that was likely to be permanent. Mr Kelly was required to retire, pursuant to Regulation A20, on 5 June 2005. That answered questions (a) and (b) as set out above. The police pension authority did not go on to consider whether to grant an injury pension and did not refer the further questions (c) and (d) to the SMP. Mr Kelly did not make any claim for an injury pension.

12. On 19 May 2016, however, Mr Kelly did make such a claim. He was seen by a second SMP, Dr Zahid Iqbal, who, on 14 July 2017, determined that his disablement was the result of an injury received in the execution of his duty. He subsequently assessed his degree of disablement.

13. On 25 July 2017, Mr Kelly was awarded an injury pension backdated to the date of his claim in May 2016.

14. In February 2018, Mr Kelly appealed to the Crown Court at Sheffield under Regulation 34. The matter proceeded to a 2 day hearing in July and judgment was given in Mr Kelly's favour on 20 July 2018.

15. The main thrust of Mr Kelly's appeal was that he was aggrieved by the refusal of the police pension authority to admit a claim to receive a larger award than that granted, that is, a claim for an amount that represented an injury pension backdated to the date on which he was originally required to retire. Firstly, the judge accepted that he had jurisdiction over that claim under Regulation 34. The key submission on behalf of the Chief Constable was that a claim for a backdated payment was not a claim for a larger award. The judge considered that that submission fell foul of Regulation 11(2) which was headed "Police officer's injury award". The award, he said, was both the gratuity and the pension; the gratuity would stay the same whether or not the appellant won the appeal; and, in ordinary language, if the appellant succeeded he would be getting "a larger award than that granted". Secondly, the judge held that Mr Kelly was entitled to have the award, in effect, backdated. He noted that the Chief Constable's case was that an application for an award was required but the Judge held there was no such requirement in the regulations. I note that that argument was not, in those terms, pursued before me. The judge considered that in 2005, Mr Kelly did not know his rights and the police pension authority owed a duty of case to inform him of his rights. He rightly stated that he was not, however, hearing an appeal from a decision in 2005/2006 and his decision was not made on the basis of those views. However, he regarded them as going to the justice of the situation. Referring to the case of *Schilling* (see paragraph 27 below), he considered that Mr Kelly's disability arose before 2005 and never changed. Mr Kelly would, therefore, have been entitled to be paid the injury pension from 2005 (in accordance with Regulation 43(1)) and it was unjust that he did not receive it. The only way to remedy that injustice was to allow the appeal so that Mr Kelly received the injury pension as from 2005 together with interest. As I have indicated, the argument before me was in some respects different but on the Interested Party's case Regulation 43 continued to take centre stage.

The Claimant's case

16. The Claimant's first point is that the Crown Court simply lacked jurisdiction and that this was not a matter that could be appealed within Regulation 34. There is no complaint here that the Chief Constable (as the police pension authority) has refused to admit a claim to receive an award as of right, nor is there any complaint about the amount of the annual award, but only as to the period in respect of which that award is to be paid. That, it is argued, does not fall within the meaning of "a larger award than that granted".

17. If the Chief Constable is wrong in that argument, Mr Basu QC submits that, in any event, the larger award cannot be generated by backdating it to June 2005. The Chief Constable no longer founds his case on an application being required but, as I set out more fully below, the Chief Constable's position is that the Regulations impose no obligation on the police pension authority to consider the award of an injury pension, and that the provisions of regulation 30(2) (or previously H1(2)) are not engaged - and the questions posed thereunder do not fall to be answered - until the police pension authority does consider the questions. An obligation to pay the pension does not arise until this time. On the facts, although there is no requirement for the police officer to make a claim for

the injury pension, no consideration was given to granting such a pension until Mr Kelly's claim was made on 19 May 2016. Therefore, no obligation to pay the injury pension arises until that time. Mr Basu QC emphasises that there is no express provision for backdating the injury pension; that the assessment of the disablement takes place at the time the questions are referred to the SMP and there is no provision for some kind of retrospective assessment of the extent of the disability at an earlier date; and that the authorities he relies upon support the view that the SMP's assessment is prospective and not retrospective.

18. Further, and in any event, it is submitted that there is no power under the Regulations to award interest and that there is no other legal or equitable basis for an award of interest.

The Interested Party's case

19. So far as the jurisdictional issue is concerned, Mr Lock QC, on behalf of Mr Kelly, submits that the point is a simple one. The word "award" is used throughout the Regulations – Mr Lock tells me 122 times - and is defined as an award under these Regulations. He submits that it is clear from the use of the word in the Regulations that it means the precise financial sum which the police pension authority is to pay to the retired officer. For example, Regulation 29 refers to *"an award by way of periodical payments or a gratuity ("the relevant award")"*. There is no basis for limiting the meaning of award, and thus the meaning of a larger award, to the annual amount of the award or pension. In this case, the award is what is to be paid to Mr Kelly in respect of an injury pension; the award the Chief Constable accepts should be paid is the gratuity together with the injury award backdated to May 2016; and Mr Kelly is aggrieved that he is not to be paid a larger amount (calculated by backdating the injury award to an earlier date). His appeal was, therefore, properly brought under Regulation 34.

20. In any event, Mr Lock QC submits that the jurisdictional issue is not material and invited me to address the substantive questions raised by grounds 2 and 3 first because, he submits, if my conclusion is in Mr Kelly's favour, it does not matter whether the issue has reached the High Court through the Crown Court appeal route or by way of Part 8 proceedings.

21. I do not accept that submission. If the Crown Court had no jurisdiction, that would be an end to the matter. Anything I might say about the substantive issues raised by the appeal would be obiter. I do not see that these proceedings can be treated as if they were Part 8 proceedings for declaratory relief brought by the Interested Party, as claimant, against the Chief Constable, as defendant. Where proceedings are brought for declaratory relief, there may be issues that the defendant wishes to raise as to the exercise of the court's discretion to grant such relief, which may itself bring into play delay in making a claim, and limitation. To the extent that any such issues were raised by the Chief Constable, this was in the context of his case that the appropriate course for Mr Kelly to have taken was to commence a Part 7 claim whether for some breach in failing to consider at the time whether Mr Kelly was entitled to an injury pension (a claim which would almost certainly be time barred) or on some other basis. These issues were not fully argued in the context of the grant of declaratory relief. If I were simply to treat this action brought by the Chief Constable as if it were a wholly different action brought by the Interested Party, I would be doing so without affording the Chief Constable a proper opportunity to defend the claim.

22. In this context, I note that, following the hearing, I was provided with a copy of a decision of the Divisional Court in *Carter v Chelmsford Crown Court and the Chief Constable of Essex* [2019] EWHC 1484 (Admin). That case was concerned with the potential payment of a police pension to Mrs Carter in the event that Mr Carter (already 95 and referred to by Coulson LJ as a remarkable man) predeceased her. The issue arose because they had married after he retired. In correspondence, Essex Police told solicitors for the Carters that Mrs Carter would not be entitled to a pension. An appeal was brought in the Crown Court which did not, in the event, consider that it had jurisdiction to make the orders sought because Regulation H5[1] limited the court to considering whether a person has "a claim to receive as of right an award". The Divisional Court held that the only claim was Mrs Carter's and that it was a contingent claim which would usually be dealt with by way of a claim for declaratory relief (whether a Part 7 or Part 8 claim).

23. The Divisional Court nonetheless considered whether Mrs Carter was entitled to make a claim under Regulation H5(1). The court considered the wording of Regulation H5 to be restrictive, Coulson LJ saying that *"It does not allow an aggrieved party to appeal to the Crown Court in relation to any decision by the Police Pension Authority. If that were the case, it would simply say so."* The circumstances in which an appeal could be made were restricted to (a) a refusal to admit a claim as of right, (b) a refusal to admit a claim to a larger amount than that granted; (c) a decision as to whether a refusal to accept medical treatment was reasonable and (d) forfeiture of any award. The only one of these that might have been relevant was (a) but Mrs Carter was not someone with a claim to receive an award as of right since her claim remained contingent. The Divisional Court was, however, anxious not simply to dismiss the claim and, following what was described as a helpful discussion with counsel, the agreed solution was that the matter should be referred to a single judge of the Queen's Bench Division as a Part 8 claim with the findings of fact in the Crown Court to be treated as binding.

24. Whilst I am grateful to counsel for having drawn this decision to my attention, it does not seem to me to assist in this case. So far as the scope of Regulation 34 (in like terms to Regulation H5(1)) is concerned, the decision merely states that matters which may be appealed are restricted. That does not sit well with Mr Lock QC's submission that the Regulations are intended to provide a complete code but it does not otherwise assist with whether the claim in the present case would fall within the scope of this appellate jurisdiction. So far as the court's approach in converting the proceedings into Part 8 proceedings is concerned, that appears to have been a sensible course taken following discussion and by agreement and, further, reflected the fact that this was a contingent claim. It does not, in my view, justify my deciding that the judicial review arising out of the appeal in this case, if that appeal was not properly brought, can be treated without more as a Part 8 claim.

25. So far as the substantive issues are concerned, on the "backdating" of the award, Mr Lock QC submits that the issue turns on the Regulation 43. He submits that the pension is to be paid from the date of retirement. Once it is determined that Mr Kelly is entitled to an injury pension, that pension is to be paid from the date of retirement. Further, Regulation 34 gives the Crown Court power to make such order "as appears to it to be just" and that is sufficiently wide a discretion to allow for the award of interest.

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[1] In terms equivalent to Regulation 34

The authorities

26. It is convenient next to refer to the authorities, or those of them that seem to me to be relevant, relied on by either or both parties.

27. Mr Kelly relies principally on the decision of the Court of Appeal in *R(McGinley) v Schilling* [2005] EWCA Civ 567. The Court of Appeal was concerned with two unrelated cases that raised the same issue. In each the police officers had retired on grounds of permanent disablement as a result of injury received in the execution of duty. The question of degree of disablement was referred to an SMP (under Regulation H1(2)(d) of the 1987 Regulations) and the officers appealed the SMP's decision to the medical referees (under Regulation H2(2) equivalent to Regulation 31(2)). The dispute that arose was as to whether the medical referees should assess the extent of disablement as at the date of the SMP's certificate or as at the date of their own assessment. The Court of Appeal decided that the appeal to the medical referees was a full reconsideration, taking account of but not constrained by the SMP's decision, and that the medical referees were, therefore, required to determine each officer's degree of disablement as at the time the referees were making their assessment. Accordingly, the assessment is not a retrospective one of the degree of disablement at an earlier date.

28. The contrary argument was advanced by counsel for the police authority, that is, that the medical referee should look at the degree of disablement as at the same date as the SMP: *"32. Miss Slade submits, further, that since the pension is payable from the date of retirement (see Regulation L3)*[2]*, a decision of the medical referee on appeal might result in an increased pension backdated to the date of retirement for a degree of disablement which did not exist at that date."*

29. The logic of the argument thus was that, because the pension was payable from the date of retirement, the medical referee should look at the degree of disablement at that earlier date – or at least the date of the first SMP's assessment – because if the degree of disablement had increased the alternative would result in the greater amount being payable from the date of retirement.

30. At [46] to [48], May LJ then said this:
"46. I acknowledge that there is some force in the submissions which Miss Slade makes with reference to regulations K2[3] *and L3, but they lose much of their force when it is appreciated that the Regulations expect an appeal to take place quite soon after the selected medical practitioner's decision. In addition, regulation L3 provides for the pension to be paid from the date of retirement, and there is no necessary link in all cases between the decisions of the selected medical practitioner or the medical referee and that date.*

47. Acknowledging, as I do, that these submissions have some force, they nevertheless do not persuade me that what I consider to be the clear import of regulation H2(2) should be seen as wrong.

48. In any case, there may be an element of swings and roundabouts here. The police authority suggest that backdating may result in over-compensation. But if the police authority's construction is correct, there could equally be undercompensation if the

[2] In the same terms as Regulation 43
[3] Providing for periodic re-assessment of the degree of disablement

officer's condition deteriorated to an extent greater than had been anticipated by the selected medical practitioner."

31. Mr Lock QC submits that that decision shows a clear acceptance by the Court of Appeal that the pension is payable from the date of retirement even if the degree of disablement is assessed at a later date. Mr Basu QC responds that the Court of Appeal recited the argument of counsel but made no decision to that effect. In my view, Mr Lock QC's submission is right and the Court of Appeal went further than simply reciting the submission of counsel. In rejecting that submission, and recognising the possibility of over or under compensation, it seems to me that May LJ must have accepted that the pension was payable from the date of retirement.

32. In *R v Tully*, a decision of His Honour Judge Morris sitting in the Crown Court in Cardiff in 2006, the judge was concerned with an appeal against a refusal of the North Wales Police Authority to admit a former officer's claim for payment of a deferred pension under the 1987 Regulations. Regulation B5.2 provided for the payment of such a deferred pension and the officer's submission was that that pension was payable from the date of retirement (under Regulation L3). Regulation B5.4 expressly provided, however, that where the officer becomes permanently disabled before the age of 60, no payment shall be made in respect of the period before the officer became permanently disabled. The judge identified the questions arising as (i) when the officer became permanently disabled for the purposes of Regulation B5.4, (ii) whether that was at the date of retirement or (iii) whether that was only when the question arose as to when he was disabled and, if so, whether this was likely to be permanent.

33. The court was satisfied (at [14]) that *"Parliament intended that, generally speaking, pension entitlements should be payable from the date of an officer's retirement unless or until that was limited or excluded by operation of an express provision to that effect elsewhere in the same regulations."* Further, in respect of the deferred pension, Regulation B5.4 was the only possible regulation disapplying the provision that the pension be paid from the date of retirement.

34. The respondent relied on the wording of Regulation B5.4 and that of Regulations A12.1 and A12.4 to argue that the date on which the officer became disabled was the date when a claim was made. These latter regulations are in the same terms as Regulations 7(1) and 7(7) respectively of the 2006 Regulations. The Judge concluded that Regulation A12.4 only operated where the date on which the officer became disabled was unclear and provided that, in those circumstances, the date was the date of first notification of the claim.

35. At [21] the Judge continued:

"Further, we are fortified in that view by asking the question, "What would be the purpose of including A12.4 and B5.4 in the regulations if A12.1 bears the meaning suggested by the respondent?". For, if that were the case, the permanent disablement would arise in every case on a date which would be readily ascertainable, namely the date when the question of disablement arose for decision under A12.4 and/or B5.4. The position, in our view, is this, that Parliament would not then have included A12.4 or B5.4 in the regulations at all as their terms would then be wholly otiose."

36. In *R (Laws) v Police Medical Appeal Board* [2010] EWCA Civ 1099, the claimant had been retired from the police force in 1998 on grounds of ill health. Her degree of

disablement was determined under Regulation 7(5) of the 2006 Regulations and periodically reviewed under Regulation 37(1). In 2008 the percentage degree of disablement was reduced on review. The claimant appealed unsuccessfully, but then successfully challenged the decision of the review board by way of judicial review. The police authority's appeal was dismissed on the basis that, on a periodic review of an injury pension, it was not open to the SMP or the review board to redetermine the merits of an earlier decision and that their only duty was to decide whether there had been an alteration in the degree of disablement since a previous decision or review.

37. In *R (Fisher) v Chief Constable of Northumbria Police* [2017] EWHC 455 (Admin), Garnham J considered the role of the appeal board in considering the degree to which an officer's earning capacity had been affected as a result of injury. In that case the officer had retired in 1999 with an injury pension. In 2015, the SMP reported a significant change in the degree of disability, resulting in a reduction in pension. The officer appealed to the police medical appeal board. The final report of that board, in June 2016, found that his earning capacity whether injured or uninjured were the same. So far as is relevant to the present case, Garnham J held that, because the appeal to the board was to be conducted on the basis of current evidence - which could result in a change to the award - the date when any change of the award took place was the date of the appeal decision and not the date of the original report. In other words, there was to be no backdating of the monetary effect of the appeal decision.

38. Garnham J referred to the decision in *Schilling* on which both parties had relied. He then said this:

"55. It follows that the focus of that decision was on whether the effect of the injury should be addressed on appeal by the medical referee taking account of evidence as at the date of his decision. In my judgment, that decision says nothing directly about the date on which a change to the pension should take effect. ....

56. However, if it is right that appeals are to be conducted on the basis of current evidence, and if it is right that current evidence can result in a change to the level of pension, it seems to me necessarily implicit in the scheme of the Regulations that the date on which the changed pension is to take effect is the date of the appeal. It would be odd in the extreme if an appeal were to be decided on the basis of evidence of recent change in disability, yet the altered pension were to run from some earlier date. In my judgment, it must be inherent in the scheme that the altered pension should take effect on the date when it is recognised that altered circumstances justify a change in pension."

39. In *McLoughlin v Chief Constable of West Yorkshire* [judgment dated 10 April 2019], Her Honour Judge Belcher heard an appeal under Regulation 34 against the refusal of the Chief Constable to backdate the appellant's increased pension award to cover the period from her retirement in December 1983 to November 2007. I note, and it was not in dispute, that no jurisdictional issue was raised on this appeal. The appellant was injured in the course of her duties and was retired on medical grounds in December 1983. She received an injury award based on 25% disablement. In May 2004, she was told by the Chief Constable that her injury pension would be reviewed under Regulation 37. This appears to have led to a complicated process which concluded with the decision of the medical appeal board in May 2009 that the appellant's degree of disablement was 85%. Payment of an injury pension on the basis of the greater degree of disablement was backdated, for reasons that are not relevant to the present case, to November 2007. At a

later date, Ms McLoughlin and the Chief Constable agreed to a reconsideration under Regulation 32(2) of the original assessment. The SMP who conducted the reconsideration assessed a greater degree of disablement. The appellant contended that the greater pension ought to be backdated to December 1983. Her case was that, under Regulation 32(2), the report which determined the greater degree of disablement replaced the original report (in December 1984) and the increased pension was, therefore, payable from the date of retirement.

40. Many of the arguments that were deployed before me were raised before HHJ Belcher and, indeed, she was referred to the decision of the Crown Court in this case. In a detailed written judgment, HHJ Belcher concluded that the reconsideration was in substitution for the earlier decision and took effect as if it replaced the earlier decision. The judge accepted that it followed that not only the finding as to the level of pension was backdated but also the payment obligations that went with it. The payments were backdated to the date of the appellant's retirement. The judge distinguished *Fisher* as a case in which there was a reassessment or review under Regulation 37 which did not affect the finality of the earlier decision.

The period or amount of the award

41. Although I do not accept Mr Lock QC's submission as to why I could and should address the substantive issue as to backdating first, I do nonetheless address this issue first because, for the reasons I explain below, it seems to me to be relevant to the scope of the appellate jurisdiction in Regulation 34.

42. In short, there is a fundamental difference between the approach of the Chief Constable and Mr Kelly to the construction of the Regulations.

43. On the Chief Constable's construction, the driving provision is the regulation (Regulation 30(2)) which refers to the Chief Constable's consideration of disability (sub-paragraphs (a) and (b)) and whether to grant an injury pension (sub-paragraphs (c) and (d)). Until the Chief Constable embarks on such a consideration of whether to grant an injury pension, there can be no obligation to pay the relevant pension. The Chief Constable is under no obligation to embark upon such a consideration. Once the medical views have been expressed, the police pension authority comes under an obligation to pay the pension and the officer has a legal right to the pension. The Chief Constable, however, accepts that that should be "backdated" to the date when the consideration commenced. In practice that is equated to the date when a claim is made. This approach, it is argued, is consistent with the fact that the medical assessment is made at the date of the claim/ consideration and is forward looking not retrospective. There is no express provision for a retrospective assessment.

44. The difficulty with this construction, however, is that it involves reading into the Regulations a number of propositions that are not found in the Regulations. Most obviously it involves reading in the date at which the legal entitlement to payment of an award arises and correlatively when the obligation to pay arises. It also arguably places a burden on the officer to make a claim which is not otherwise found in the Regulations. Although that is not how it was put in terms, that is a variation on the argument that His

Honour Robert Moore referred to as the Chief Constable's argument that there needed to be an application.

45. The Chief Constable relies on the "concession" made in the skeleton argument on the appeal that Mr Kelly had no legal right to claim an injury pension until 2016. The relevant passage reads as follows:

"The Appellant accepts that he acquires no legal right to claim a police injury pension until 2016. He is owed nothing by the PPA unless and until the SMP has made a decision in his favour under Regulation 30(2)(c) and (d). A referral ought to have been made in 2005 but it was not made. As a result of the failure of the Police Authority to make the appropriate referral, the appellant failed to be paid the pension he ought to have been paid in a timely manner between 2005 and 2006."

46. Mr Lock QC's answer to that point or explanation of that passage is that, until 2016, Mr Kelly had no legal right to be paid an injury pension but was entitled to have the mechanism gone through to establish that legal right. Once that had happened Mr Kelly had a right to have the pension paid and, in accordance with Regulation 43, to have it paid from the date of retirement and not some later date.

47. The Chief Constable also places reliance on Regulation 43(3) which provides that a pension is payable in advance but may be delayed "pending the determination of any question as to the liability of the police pension authority in respect thereof, …". That, Mr Basu QC submitted, explained the Chief Constable's acceptance that the date from which payment was to be made was the date of Mr Kelly's claim, and not date of the SMP's determination, because the pension was payable in advance but was delayed until that determination had been made. That does not seem to me to avoid the need, on the Chief Constable's case, to read words into the Regulations. It does not provide that the pension is payable from the date of a claim to have the relevant question determined.

48. Mr Kelly's construction avoids these difficulties because it focusses on the date of retirement as the date when an obligation to pay arises irrespective of when any claim is made or any consideration given to the award. Further, as Mr Lock QC submitted, there are four potential candidates for the starting date for payment: the date of retirement, the date of notification of a claim, the date of referral to the SMP, or the date of the decision that the officer is entitled to an injury pension. The only one of those dates identified in the Regulations as the date from which the injury pension is to be paid is the date of retirement. Further, Mr Lock QC made the point that the wording of Regulation 43(1) is that the pension is payable <u>in respect of</u> each year as from the date of retirement and not in each year. That approach is entirely consistent with the decision in *Schilling*.

49. For the Chief Constable, Mr Basu QC submits that the effect of Regulation 43(1) is simply to ensure that no pension is payable until the date of retirement or any earlier than the date of retirement, even if the relevant questions are determined earlier. Whilst Regulation 43(1) may have that belt and braces effect of ensuring that a pension is not payable earlier than the date of retirement (as one would expect), it does not seem to me to be the principal purpose of the Regulation which is more naturally read as providing the date from which the pension is payable.

50. Further, he relies on the decisions which I have considered above (in particular in *Laws* and *Fisher*) which, he submits, show that the medical assessment is one that is forward looking. There is no provision for a retrospective assessment and, as I understand the argument, it is submitted that the entitlement to payment may also only be prospective (albeit, as I have indicated above, it may be delayed pending determination of liability).

51. Firstly, whilst it is right that the Regulations provide that the determination of the answer to questions (a) to (d) is to be made at the time of the medical assessment, there is no correlative provision that the payment of the injury pension is also to be prospective and is to follow after the relevant determination. As I have said, the only provision as to date of payment is Regulation 43 and the Regulations do not expressly or by implication identify the date of notification of a claim (which is the date the Chief Constable has adopted in this case) or the date of referral or determination as the date for payment.

52. Whilst it is right that taking the answers to (c) and (d) to establish the amount of the annual award and paying the award from the date of retirement may result in what could be regarded as an overpayment (by reference to what the answers to (c) and (d) would have been at the date of retirement), it is equally possible that they may result in an underpayment. This is the sort of swings and roundabouts to which the Court of Appeal referred in *Schilling*.

53. Secondly, the cases the Chief Constable relies on do, of course, support the contention that the assessment is forward looking and not retrospective. However, they do not deal with the issue of the date from which payment of an injury pension is to be made. In *Fisher* the court was concerned with a revised award, and the date from which a revised award became payable, rather than with the principle of entitlement to any award. As Garnham J said it would be very odd if the revised amount of the award was then treated as if it were the award that had been payable since retirement. In these cases, the Regulations provide for the payment of an award from the date of retirement; that award has been assessed and paid from that date; but the Regulations have made express provision for the amount of the award to be revised.

54. Although both parties addressed me at some length on the relevance of HHJ Belcher's decision in *McLoughlin*, it does not seem to me to provide any particular assistance. It is consistent with Mr Lock QC's case, and indeed he was counsel for the appellant in *McLoughlin*, but it is not binding on me and the focus of the argument appears to have been on the effect of the later assessment of the level of disablement.

55. The decision in *Fisher* does provide some support from Mr Basu QC's submission that Regulation 43 does not require the same (annual) amount of pension to be paid throughout the period from retirement but it does not decide some general point of principle that the pension, or amount of the pension, is to be paid from the date of claim or determination.

56. Mr Lock QC also submits that Regulation 7(7) supports his case. It addresses the position where a person becomes disabled after he ceases to be a police officer, and is not entitled to a pension for the period before he became disabled. That provision in Regulation 11(2) is an example of an express provision where Regulation 43(1) does not apply and the pension is not payable from retirement. Regulation 7(7) provides that, if the date on which the former officer became disabled is not known, it is taken to be the date on which

a claim was made. That provision, he submits, would serve no purpose if the date from which the pension became payable was the date of the claim in any event. That was the view of the court in *Tully* and there seems to me to be real force in that argument.

57. Having said all of that, there is no doubt that Mr Kelly's construction of the Regulations also faces its difficulties.

58. One difficulty arises from the terms of Regulation 7(1) and the provision that the reference to a person being permanently disabled is to be taken to be a reference to the person being permanently disabled at the time when the question arises for decision. That might be thought to be consistent with a finding of permanent disablement only being made once the question has arisen (whether at the police pension authority's instigation or on an application by the claimant) so that no entitlement to an injury pension can possibly arise before then. But that provision is equally capable of doing no more than stating how the assessment of disability is to be made and it says nothing about the date from which any pension that flows from that assessment is to be payable.

59. The further and related difficulty is that Mr Kelly's approach has the effect that the only assessment of disability is one that does not necessarily bear any relationship to the date when the award became payable. That difficulty, however, seems to me to be met by the approach of the Court of Appeal in *Schilling* (whether it is binding or persuasive) and the recognition that there is an element of swings and roundabouts in accepting that an award based on the officer's condition at the date of assessment determines the amount of an award payable from the date of retirement.

60. Overall, it seems to me that the Regulations are deficient in the manner in which they deal with the type of scenario that has arisen here and were not drafted with this scenario in mind. But it also seems to me that Mr Kelly's construction does the least damage to the wording of the Regulations and is the construction which relies on the clear provision of the Regulations as to the date from which payment of the injury pension is to be made. For those reasons, and subject to the issue of my jurisdiction, I would find in Mr Kelly's favour on this ground and uphold the Crown Court's decision.

The appellate jurisdiction

61. The issue then remains as to whether the Crown Court and, in turn, this court has that appellate jurisdiction.

62. Consideration of the operation of the Regulations, in my view, assists in the construction of Regulation 34. As relevant to this case, there are two respects or limbs on which an aggrieved person may appeal to the Crown Court under Regulation 34. The first limb is where he is aggrieved by the refusal of the police pension authority "to admit a claim to receive an award as of right". The wording of the Regulation is not entirely consistent with the balance of the Regulation which makes no reference to either the making or admitting of claims but the reference to an award "as of right" distinguishes that award from the gratuity referred to in Regulations 11(2). So far as that Regulation is concerned, therefore, the award as of right must be the injury pension and this limb of the appellate jurisdiction relates to the entitlement in principle to that pension calculated in accordance

with Schedule 3. The second limb is that where the officer is aggrieved at the refusal to admit a claim to receive "a larger award than that granted".

63. Taking those two together, there is undoubted attraction in the Chief Constable's argument that the "larger award than that granted" must refer to the amount of the injury pension calculated in accordance with Schedule 3 (on an annual basis). Despite the attraction of the argument, I have come to the conclusion that it is wrong and that the appellate jurisdiction of the Crown Court is broader.

64. If the second limb had been intended to be limited to the calculation of the annual injury pension (or any other pension), it could easily have said so. Instead it uses the expression "a larger award". That itself is sufficiently wide to encompass the total amount of the award – that is both the calculated amount in accordance with Schedule 3 and the period over which that amount is payable. That is another way of expressing Mr Lock QC's argument that the award is the precise financial amount to which the claimant is entitled. Further, the Regulation expressly gives the Crown Court power to make such order as appears to it to be just. That implies a broad jurisdiction and not one limited to matters of calculation.

65. So far as Schedule 3 is concerned, Mr Basu QC placed reliance on the fact that the calculation in accordance with this Schedule would produce an annual injury pension to be paid at intervals. That supported his case that the award, and the larger award referred to in Regulation 34, must be the annual amount. The Regulations use different terminology in different places. Schedule 3 (which provides how an injury pension is to be calculated) is headed "Police Officer's Injury Award". The Schedule then provides how "an injury pension" is to be calculated. That is provided to be by reference to the person's degree of disablement, his average pensionable pay and his period in years of pensionable service. The table setting out the percentages to be used in calculation provides a minimum income guarantee expressed as a percentage of average pensionable pay (varying depending on number of years' service). Average pensionable pay is the sum earnt in the 12 months prior to retirement (with deductions, for example, for overtime which is not pensionable). I was told by Mr Lock QC, and it was not disputed, that that amount is then increased by indexation from year to year. That results, therefore, in the calculation of an annual amount of injury pension but there is no express correlation between "the amount of the award" and the amount of the annual pension so calculated and, as I have said, different terminology is used. Further, as His Honour Robert Moore observed, the award may include both the injury pension and the gratuity so that "award" and "injury pension" are not necessarily co-terminous.

66. Mr Lock QC also submitted that the extent of this jurisdiction should be considered in its statutory context; that the Regulations are intended to provide a complete regime for dealing with injury pensions; and that by implication at least the officer's right to appeal where the issue is the period over which the injury pension is to be paid (thus determining whether a larger award is to be paid) falls within Regulation 34. The Chief Constable says that if there is a lacuna that is the product of the Regulations and that the proper course for Mr Kelly to have taken would have been, as I indicated above, a Part 7 claim for breach or some other such claim.

67. The difficulty, in this respect, with the Chief Constable's argument is that it is inconsistent with his case on the construction of the Regulations. The Chief Constable's

case is that he had no obligation "to consider whether to grant an injury pension" under Regulation 30 and that he came under no obligation to make payment of any injury pension until he had commenced such consideration. The following scenarios are possible:

(i) The Chief Constable considers whether to grant an injury pension without the officer having made any claim for the injury pension, and decides not to grant an injury pension. The officer may appeal under Regulation 34.

(ii) The Chief Constable considers whether to grant an injury pension without the officer having made any claim for the injury pension and decides to grant the pension, but the officer is aggrieved at the amount of the annual pension calculated in accordance with Schedule 3 and the period over which the pension iss to be paid. The officer would then have the right to appeal under Regulation 34 in respect of the amount but, in respect of the period, his route of challenge would, on the Chief Constable's case, be a claim perhaps for declaratory relief or for damages for breach of a statutory duty to pay.

(iii) The officer makes a claim for an injury pension but the Chief Constable refuses to consider the claim. The officer may appeal under Regulation 34. This appeal route is the officer's only route of challenge because there is, on the Chief Constable's case, no breach in refusing to consider the claim.

(iv) Alternatively, the Chief Constable considers the claim but refuses to grant an injury pension. The appeal route is again open but it is difficult to see how there is any claim for damages for breach if the Chief Constable has acted in accordance with the decisions of the SMP.

(v) The officer makes a claim for an injury pension. The Chief Constable considers the claim and grants an injury pension but the officer is aggrieved at the annual amount and/or period of payment. Again, on the Chief Constable's case, the appeal route is open in respect of the annual amount but not the period of payment. On the Chief Constable's case, the officer should make a claim for damages for breach on the basis that an obligation to pay arose at an earlier date, albeit it may be pure chance whether that date is within or outside any limitation period.

68. In effect, this last scenario (which is closest to the present case) places an obligation on the officer to make a claim for an injury pension in sufficient time from the date at which payment is said to be due (which in accordance with Regulation 43 is the date of retirement) that, once the police pension authority's decision is known, there is still time to bring proceedings for damages for breach within the limitation period.

69. It is, in my judgment, highly unlikely that the Regulations were intended to produce such a bifurcated system of challenge and such a complex matrix of appeals and claims for damages for breach. Far from accepting that there is a lacuna which is the product of drafting, I prefer the construction that produces a coherent means by which the officer can challenge the police pension authority's decisions as to the injury pension payable to the officer. The Interested Party's interpretation, which the judge below also preferred, produces that coherent means of challenge.

70. In this context I bear in mind that the Divisional Court in the *Carter* case observed that the equivalent Regulation H5(1) provided a restricted right of appeal to the Crown Court, but that does not itself dictate that a particularly restrictive interpretation should be given to the second limb.

71. Accordingly, in my judgment that Crown Court had jurisdiction over this appeal and, for the reasons set out above, the appeal on the "backdating" issue was rightly decided and the challenge by way of judicial review fails.

Interest

72. Although I am persuaded in Mr Kelly's favour both on the jurisdictional issue and the backdating issue, in my judgment, he was not further entitled to interest and the Chief Constable's challenge succeeds to that extent.

73. Mr Kelly's case was that, under Regulation 34, the Crown Court had power to make such order in the matter as appeared to it to be just and that that was a broad discretion which encompassed the power to award interest. The judge below considered that Mr Kelly had been unjustly kept out of his money and/or that the Chief Constable had had a windfall such that it was just to make an order for interest.

74. In my view, however, the Crown Court's power to make an order, and one that appears to it to be just, has to be placed in the context of the nature of the appeal. In this case, Mr Kelly was aggrieved at the Chief Constable's refusal to admit a claim to receive a larger award than that granted. It follows that the order which the Crown Court has power to make is one of a larger award than that granted. But that itself is circumscribed by the powers and obligations of the police pension authority under the Regulations. It would not, for example, be open to the Crown Court to form the view that the percentages in Schedule 3 were unfair and then make an order of a larger award based on a greater annual injury pension simply because the Crown Court thought that was just.

75. Mr Lock QC did not, as I understood it, argue that there was some other basis on which interest could be awarded but he referred to the court's equitable jurisdiction to award interest if it was just to do so[4] as supportive of his submission on the proper interpretation of Regulation 34. In my view, however, this is a matter of statutory interpretation where reliance on a general equitable power (and one which in most cases is irrelevant because of statutory provisions) does not assist.

76. The Regulations themselves make no provision for the payment of interest and it seems to me that it follows that the Crown Court has no power to include interest in its "larger award".

[4] *Wallersteiner v Moir* [1975] QB 373