PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	**:**	Mr R T Ayre
Scheme	**:**	Police Injury Benefit Scheme
Respondents	**:**	Humberside Police Authority (**HPA**)

Subject

Mr Ayre complains that when his injury pension was reviewed in 2007 (following his 65th birthday the year before) his degree of disablement was wrongly assessed at 0% which resulted in his injury pension being substantially reduced.

The Ombudsman's determination and short reasons

The complaint should be upheld because:

- the Selected Medical Practitioner (**SMP**) and the Police Medical Appeal Board (**PMAB**) each took into account an irrelevant factor in reaching their decisions; and
- although Mr Ayre was made aware that his injury pension would be reviewed when he reached age 65 he was not made aware of HPA's approach to assessing the degree of disability after age 65; and
- a letter dated 18 July 2006 from HPA led him to believe that that review had already been undertaken with the result that his injury pension had increased.

DETAILED DETERMINATION

Relevant legal provisions

1. The Scheme is now governed by the *Police (Injury Benefit) Regulations 2006* (the **2006 Regulations**) which came into force on 20 April 2006. Previously injury benefits were contained in part K of the *Police Pensions Regulations 1987* and earlier provisions. As the review which is the subject of this complaint took place after the 2006 Regulations had come into force, I refer below to those Regulations.

2. Essentially the Scheme provides a gratuity and a minimum income guarantee for a police officer who is permanently disabled as a result of an injury received on duty. How much a police officer gets depends on the degree of disablement suffered and the officer's length of service.

3. Regulation 7 deals with how disablement is determined. Sub paragraph (5) says:

> "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 member of a police force:"

4. Regulation 11 deals with a police officer's injury award and says:

> "(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;"

5. Paragraph 3 of Schedule 3 provides for an injury pension to be calculated by reference to the person's degree of disablement, average pensionable pay and length of pensionable service. A table in Schedule 3 sets out four degrees or bands of disablement: 25% or less (slight disablement); more than 25% but not more than 50% (minor disablement); more than 50% but not more than 75% (major disablement); and more than 75% (very severe disablement).

6. Part 4 deals with Appeals and Medical Questions and in so far as is relevant says:

> "30(1) Subject to the provisions of this Part, the question whether a person is entitled to any, and if so what, awards under these Regulations shall be determined in the first instance by the police authority.
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> (2) Subject to paragraph (3) [relating to disablement gratuity and not relevant here] where the police authority are considering whether a person is permanently disabled they shall refer for decision to a duly qualified medical practitioner selected by them the following questions –
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> (a) whether the person concerned is disabled;
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> (b) whether the disablement is likely to be permanent,
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> except that, in a case where the said questions have been referred for decision to a duly qualified medical practitioner under regulation H(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;
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> and, if they are further considering whether to grant an injury pension, shall so refer the following questions –
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> (c) whether the disablement is the result of an injury received in the execution of duty, and
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> (d) the degree of the person's disablement;
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> and, if they are considering whether to revise an injury pension, shall so refer question (d) above.
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> ….. (6) The decision of the [SMP] 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 deals with appeals to a board of medical referees and provides:

> "31(1) Where a person is dissatisfied with the decision of the selected medical practitioner as set out in a report under regulation 30(6), he may, within 28 days after he has received a copy of that report or such longer period as the police authority may allow … give notice to the police authority that he appeals against that decision.
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> (2) In any case where within a further 28 days of that notice being received (or such longer period as the police authority may allow) that person has supplied to the police authority a statement of the grounds of his appeal, the police authority shall notify the Secretary of State accordingly and the police authority shall refer the appeal to a board of medical referees, appointed in accordance with arrangements approved by the Secretary of State, to decide."

8. Regulation 37 deals with reassessment of injury pension. Paragraph (1) says:

> "…… 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."

9. Regulation 43 deals with payment and duration of awards. Subsection (3) provides (subject to certain exceptions which do not apply here) that an injury pension is payable for life.

Material Facts

10. Mr Ayre was born on 16 June 1941. He was a police officer and in 1974 he was involved in a serious road traffic accident whilst on duty. He was granted ill health early retirement. He was also granted an injury pension under the Scheme. His degree of disablement was initially assessed at 33%. Over the years he made a number of appeals and by 2007 (when the review about which Mr Ayre complains took place) he had for some years been receiving a band 3 injury pension.

11. In 2004 HPA had written to Mr Ayre advising that, in accordance with the (then) regulations his degree of disablement would be reassessed at intervals. Mr Ayre was told that his injury pension would be reassessed at or around his 55th or 60th birthday (whichever was the normal retirement age for his previous rank) and at his 65th birthday (state retirement age). It is unclear if the reassessment took place at age 55 or 60 and, if so, what the outcome was, but it is not relevant in any event.

12. HPA wrote to Mr Ayre again on 18 July 2006. The letter, so far as is relevant, said:

> "I have now received confirmation from the Department of Social Security of the amount of benefit that you have received since 16 June 2006 your 65th birthday. As you will be aware, this information is particularly important in assessing your injury pension as any DSS benefits need to be taken into account in establishing your entitlement.
>
> As from 16 June 2006 you became eligible to receive only retirement allowance of £12.71 per week, therefore as you are no longer in receipt of Reduced Earnings Allowance and Retirement Allowance is not deducted from your Injury Pension, your Injury Pension has increased.

13. The letter went on to set out the amounts of Mr Ayre's ill health and injury pensions (a total of £9,369.99 of which £8,689.23 was injury pension).

14. On 26 April 2007 HPA wrote to Mr Ayre again saying that it was "in the process of reviewing all cases where retired police officers are in receipt of [IB] in addition to their police pension". Enclosed with the letter were two forms which HPA asked Mr Ayre to complete and return. The first was to allow access to Mr Ayre's medical records and to obtain an up to date medical report. The second, a questionnaire, sought details of any current employment and raised a number of general questions as to Mr Ayre's functional abilities (such as whether he could drive, participate in sports etc).

15. Mr Ayre completed and returned both forms under cover of his letter of 3 May 2007 in which he stated that he would be 66 the following month and he would not be looking for any future employment. Mr Ayre indicated, in answer to several of the questions on the second form that he was "retired".

16. The matter was considered by the SMP on 23 May 2007. His report read:

> "Many thanks for passing me the file on the above retired police officer. I understand that he is now 66 years old, and it is clear that the original sever (sic) incident resulting in the Injury on Duty [award] caused significant injuries.
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> Mr Ayre's letter ….on May 3rd 2007, does clearly indicate that he is not looking for future employment, and since he is now past the age of 65 both myself and [another doctor's name] feel it is reasonable to place him in band 1 at 0% loss of income since he is not expected to be able to work at this time."

17. The SMP issued a certificate on 6 June 2007 certifying that Mr Ayre's degree of disablement had substantially altered and the degree to which his earning capacity had been affected was 0 per cent.

18. HPA wrote to Mr Ayre on 19 June 2007 notifying him as to the outcome of the review, ie that his degree of disability had been revised to 0% which still entitled him to an injury pension but at the band 1 level, the change being effective from the date of the certificate. As Mr Ayre had been paid at the higher (band 3) rate from 6 June 2007 to 31 July 2007, an overpayment of £1,142.27 had arisen. The letter set out that

Mr Ayre had a right of appeal. Enclosed with the letter was a copy of Guidance (the **Guidance**) issued by the Home Office.

19. HPA later notified Mr Ayre that it proposed to recover the overpayment over 12 months by deduction from Mr Ayre's injury pension. Although Mr Ayre was unhappy (particularly as he initially thought that repayment from his 65th birthday was being sought) he sent a cheque for £600 and offered to repay a further £400 in October 2007. He suggested that the remaining £142.27 be written off but HPA refused.

20. Mr Ayre appealed to the PMAB and there was a hearing on 26 February 2008 which Mr Ayre (who was examined at the hearing by a consultant orthopaedic surgeon and a consultant psychiatric specialist) attended with his wife and Police Federation representative (who also represents him in his application to my office). The PMAB reported on 11 March 2008. The report referred to paragraphs 20 and 21 of the Guidance which, under the heading, "Degree of disablement after age 65", said:

> "Once a former police 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.
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> 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 Pension 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.
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> *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.*"

21. The PMAB's report concluded:

> "The Board accepts entirely that Mr Ayre is an honourable, ex military man with a strong work ethic.
>
> [HPA] have defined cogent as compelling or convincing.

> [Mr Ayre] gave his reason for not working beyond 65 that he was not able to do so because of the injury on duty. He could have earned a significant sum even if he had earned the minimum wage.
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> However there is no certainty that he would have continued to work beyond age 65 whether or not he had been injured previously.
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> The Board concluded that there was no cogent reason put forward as to why the SMP should not assume that he was required to reduce the award to Band 1, post age 65, and therefore why he should not reduce the award to Band 1 as detailed in the [Guidance].
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> As a consequence the Board unanimously agreed that [HPA] had acted within the framework of the [relevant Regulations] and [the Guidance] and that no cogent reason had been put forward as to why the injury award should not be reduced to Band 1.
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> **Determination of the Board**
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> The Board rejects the appeal of Mr Ayre and finds on behalf of [HPA] that his injury on duty award can be reduced to Band 1."

22. Mr Ayre, after consulting the Pensions Advisory Service who entered into correspondence with HPA whose stance remained the same, complained to my office.

Mr Ayre's position

23. The reduction to his injury pension (from about £800 to about £120 per month) came as a huge shock to him and his wife. The letter he received in 2004 suggested that he would be reassessed on his 65th birthday but this did not happen. He then received the letter dated 18 July 2006 which led him to believe that he would not be reviewed at age 65 and thus his award was for life.

24. Mr Ayre was unaware that his injury pension could be reduced and he was given no information about the "cogent reason" approach. In any event automatic reduction is not permitted under the Regulations which the Guidance cannot override. Mr Ayre has reached state pension age (**SPA**) and is no longer working, due to his injury on duty. Otherwise he might have continued to work up to and after age 65.

25. Although the case of *Turner v The Police Medical Appeal Board* [2009] EWHC 1867 (Admin) does not concern a review at age 65 on age grounds it does suggest that a review cannot be instigated simply because the police authority decides and that certain conditions must be met. In that case the relevant SMP carried out a review in 2007 of Mr Turner's injury benefits, granted in 2001, and concluded that Mr Turner's degree of disablement had substantially altered, on the basis that he could do one of

three identified jobs, such that there was a reduction in his potential loss of earnings as a result of his injury. Mr Turner did not dispute that he could do one of the jobs suggested (which he had in fact held, with minor adjustments, for some time) but he appealed to the PMAB that he could not do the other two jobs. The PMAB accepted that but went on to re open the 2001 causation decision, concluding that Mr Turner's injury on duty accounted for only 50% of his overall disability, and not 100% as decided in 2001. Mr Turner's application for a judicial review of the PMAB's decision succeeded.

26. Mr Justice Burton, citing the case of *R v on the application of South Wales Police Authority v The Medical Referee (Dr Anton) ex parte Crocker* [2003] EWHC 3115 and referring to the SMT's review, said:

> "It is apparent, therefore, that in considering questions of disablement earning capacity is important, but of course Crocker would not apply straightforwardly to the present case. It would not justify starting from scratch in relation to earning capacity because in the present case what is posed under Regulation 37 is the degree if any to which the pensioner's disablement has altered. By virtue of Regulation 7(5) that would include a scenario in which the degree of the pensioner's disablement had altered by virtue of his earning capacity improving. To that extent, therefore the approach by the SMP, had it been justifiable, which it was not because it had been overturned on appeal by the PMAB, would have been relevant. [It is accepted] that if there is now some job available which [Mr Turner] would be able to take by virtue either of some improvement in his condition of 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 interval as may be suitable". There is no question of relitigation and, of course, suitable intervals suggest that this is not a matter which should be revisited every year, nor is it."

HPA's position

27. Although Regulation 43 provides that an injury pension is for life, under Regulation 37 the police authority is required, at such intervals as may be suitable, to consider whether the pensioner's disablement, which is "synonymous" with earnings capacity, has altered. If there is a substantial alteration then the injury pension is revised (up or down) accordingly. This provision is not new and has always formed part of the Scheme.

28. The decision as to when to review an injury pension rests with the police authority concerned but HPA, taking into account the Guidance, decided that it was appropriate to review injury pensions at the normal retirement age for the rank in which the officer last served and the normal retirement age for state pension purposes as these were key occasions when a pensioner's earning capacity might well have changed. Mr Ayre (along with all other recipients of an injury pension) was made aware of such reviews.

29. The police authority has discretion to advise the SMP, in the absence of a cogent reason otherwise, to place the former officer in the lowest band of earnings capacity since it is likely that a retired officer who has reached age 65 would no longer be expected to be earning a salary in the employment market. But the final decision is the SMP's. If an ex officer can give cogent reasons to support an assertion that he would still be working after age 65 then the police authority is required to take these into account when referring the matter to the SMP. "Cogent reason" is not defined, as every officer's situation is different and trying to define all acceptable cases could lead to a deserving officer being denied.

30. It is not appropriate to use the police salary after officers reach compulsory retirement age so another comparator, which can be applied consistently, is used. When guidance was first published it was suggested that the National Average Earnings (**NAE**) should be used in the absence of a cogent reason for a higher or lower earnings level. This is designed to ensure former officers are treated in a consistent way across police authorities, whilst allowing discretion to deal compassionately with individual cases. NAE has now been replaced by **ASHE** (Annual Survey of Hours and Earnings) but the principle is the same.

31. HPA applies the same methodology to the calculation of the degree of disablement under Regulation 7(5) regardless of the age at which a review transpires. Because the capacity to remain in work at certain points alters, then so does the comparator used. By way of example:

> i) For a police constable under the compulsory retirement age (60) for his rank who is entitled to an injury award, the salary of a police constable will be used (currently circa £35,000). If the SMP decides the officer is capable of earning £15,000 in other employment then the calculation is £35,000 - £15,000 = £20,000. A loss of earnings of

> £20,000 expressed as a percentage of £35,000 equates to a 57% degree of disability and therefore a Band 3 award.
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> ii) When the same officer reaches compulsory retirement age for their rank (60) a new comparator must be used as they would no longer have been able to have continued in their police career. The comparator is therefore the ASHE figure published by the Government. The current calculation would therefore be (circa) £29,000 - £15,000 = £14,000 which, expressed as a percentage of £29,000 equates to a 48% degree of disablement and therefore a Band 2 award.
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> iii) At SPA (and current legislation allows employers to use a default compulsory retirement age) then again a new comparator must be found. No earnings comparator is available as the majority of the population have ceased active employment (the Government produces no ASHE figure). Entitlement to a state pension commences and other state benefits may alter. The comparator therefore has to be £0 and regardless of earning capacity the degree of disablement will always be 0%. However, if the officer could provide a cogent reason as to why a different comparator should be used for this last calculation then the resultant degree of disablement may well be different.

32. HPA always relies on the SMP to consider loss of earning capacity/degree of disablement. The SMP's decision is based on information available at the time of the review, including a questionnaire completed by the individual. The SMP acts in accordance with the Regulations, taking into account the Guidance, which assists the SMP as to the purpose and meaning of the Regulations.

33. When Mr Ayre's injury pension was reviewed in 2007 the SMP considered all the information available and came to the conclusion, on the facts, that Mr Ayre was no longer experiencing any loss of earnings and therefore his disablement should be 0%. The SMP was fully aware of the Guidance but there was never any presumption that would be the outcome and the decision wholly depended on the information at the time of the review. As Mr Ayre provided no cogent reason to the SMP (or PMAB) the comparator was £0 and Mr Ayre's degree of disability 0% (Band 1). The reduction was not automatic and only resulted following the usual thorough review procedure.

34. HPA accepts that Mr Ayre's decision not to seek work does not necessarily mean that he has no earning capacity. But the fact that Mr Ayre could earn some money if he wanted but chooses not to is an indirect indicator that he would not have sought to

earn after 65 if he had not been injured. The fact that Mr Ayre has no intention of working is not substantial but is still relevant. It may support an individual's contention of a cogent reason for the SMP to consider continuing to use the ASHE comparator or, conversely, it may provide indirect evidence that the individual has no need or intention to continue working after age 65. But in any event it was only one of the factors taken into account.

35. The Guidance is a common sense approach to the assessment of earning capacity and thereby determination of the degree of disablement. At worse, it places the onus on the pensioner to show that their earning capacity does endure beyond their 65th birthday. For those that indicate on reaching 65 that they have effectively retired, it is contrary to common sense and any sensible purposive construction of the Regulations to suggest that earning capacity should be assessed at other than 0%.

36. Although Mr Ayre's review was not carried out until 6 June 2007, almost a year after his 65th birthday on 16 June 2006, the delay (due to administrative reasons) was to his advantage: his injury pension was not reduced until the review was completed in June 2007and recovery of the higher amounts paid from 16 June 2006 to 6 June 2007 was not sought. By the time the decision had been processed it was too late to change the July 2007 payment and it was that payment which had to be recovered. Mr Ayre was given the option to repay over several months but he chose not to do so.

37. Mr Ayre would have been aware of the difference between an administrative adjustment to his injury pension (as notified in the letter of 18 July 2006) and a medical review, having undergone ten medical reviews between 1974 and 1996 and two appeals, and he could not have understood the letter dated 18 July 2006 to mean that his injury award was for life. The letter came from a different department to that which usually dealt with medical reviews, was couched in different terms and did not include the usual questionnaire. Mr Ayre knew that although the right to an injury pension under Regulation 37 was for life, the amount of the award, determined by the degree of disablement, is subject to review. Even if the degree of disablement had remained unaltered at age 65, a later review might have led to a reduction.

38. Any presumption on Mr Ayre's part that if his medical condition remained unchanged then his injury pension would remain at the same level is wholly incorrect and HPA is

not responsible for Mr Ayre's failure to understand the implications of the Regulations. Mr Ayre could not have believed that a pension which was dependent on his loss of earning capacity would extend into his 70s, 80s or 90s. He must have understood that his injury pension could only continue during the time that he might reasonably be supposed to have undertaken paid employment and that there would come a time when it would be reasonable to conclude that he no longer had any paid earning capacity, at which point his injury pension would be reduced.

39. HPA recognises Mr and Mrs Ayre's difficulties on learning of the reduction, but it should have been within their contemplation and they, like other pensioners who have not raised this issue, should have planned for it. But it would have been wrong for HPA to have informed Mr Ayre that the review at age 65 was different or that the outcome was a foregone conclusion, which it was not. .

40. Even if Mr Ayre was not made aware of the approach to assessing the degree of disablement at age 65, any misunderstanding could only have prevailed for a few days and until he received HPA's letter of 19 June 2007 which explained how the SMP's decision had been reached and enclosed the Guidance. HPA also wrote to Mr Ayre on 9 August 2007 (referring Mr Ayre to the Guidance and suggesting that he might wish to seek assistance from the Police Federation) and again on 24 September 2007. So, prior to his appeal, Mr Ayre was made fully aware of the process, practice, Regulations and Guidance and could prepare fully for the hearing. But, despite being advised to contact his Police Federation representative, Mr Ayre only did so a week before the hearing.

41. HPA has tried at all times to be fair to Mr Ayre. In 2003 when he failed to notify the commencement of a social security benefit that should have triggered a significant downward adjustment to his injury pension, HPA decided against reclaiming the overpayments (approximately £23,600). Since then HPA writes to all injury benefits recipients annually to check any changes to their social security benefits.

Conclusions

42. I have not set out all Mr Ayre says about the serious accident he sustained, his resulting health problems and his difficulties in securing and retaining employment.

These are not disputed. The issue is whether HPA acted correctly when Mr Ayre's injury pension was reviewed in 2007 and his degree of disablement reassessed at 0%.

43. I do not see that Mr Ayre can successfully challenge HPA's decision to carry out a review. Regulation 37(1) imposes a duty on the police authority to review the degree of disablement at such intervals as may be suitable. Further Mr Ayre was informed that reviews would be undertaken, including a review when he reached 65.

44. But I can see why Mr Ayre might have understood, from HPA's letter of 18 July 2006, that the review at age 65 had taken place, and with the result that his injury pension had increased. I note also that HPA's letter of 26 April 2007, although it set out that a review was being undertaken, indicated that this was a general review rather than a review brought about by Mr Ayre having reached age 65.

45. Whilst Mr Ayre knew that his injury pension was subject to review, he was unaware that, at age 65, his degree of disablement could be reassessed at 0% and his injury pension dramatically reduced. I have seen nothing to support HPA's assertion that Mr Ayre was advised as to HPA's usual approach (in line with the Guidance) to the degree of disablement on reaching age 65. On the contrary, it is easy to see why Mr Ayre presumed that, if his medical condition remained unchanged, his injury pension would continue to be paid at the same level (aside from any changes resulting from payment of his state pension etc.)

46. The failure to alert Mr Ayre to what might happen at age 65 was maladministration. At the very least it deprived Mr Ayre of the opportunity to prepare for the very considerable reduction in his injury pension and income overall which caused him considerable distress and inconvenience. The situation was compounded by HPA's letter of 18 July 2006 which led Mr Ayre to believe, at least until he received HPA's further letter of 26 April 2007, that the review at age 65 had already taken place.

47. Despite all HPA says about Mr Ayre's experience of the system, I am not persuaded that Mr Ayre ought to have realised from the letter of 18 July 2006 that the review at age 65 had not taken place. But even if that was not the case, the fact remains that it was only after Mr Ayre had reached age 65 that he became aware of HPA's approach to the degree of disablement at that age. It is therefore not the case that any misunderstanding on Mr Ayre's part prevailed for a few days only. Rather he was

unaware for many years as to what was likely to happen when he reached age 65. I have made below a direction for the payment of compensation for distress and inconvenience suffered when Mr Ayre did find out.

48. But any claim that Mr Ayre suffered financial loss would depend on him being able to show that, had he been made aware earlier that, when he reached age 65, his degree of disablement was likely to be reassessed at 0%, he would have acted other than he actually did. It may be that it would simply not have been open to him to have taken any steps to avoid the reduction in his income at age 65. However, I have not considered that issue further in view of the further direction I make below.

49. The crux of this case is whether Mr Ayre can successfully challenge the decision that his degree of disablement had reduced to 0% on reaching age 65. The degree of disablement is a matter for the SMP (or where there is an appeal, as in this case, the PMAB) to decide. I can only interfere with the decisions reached if I consider that the SMP or the PMAB failed to construe the legal position correctly, asked themselves the wrong question, failed to take into account all relevant factors or took into account irrelevant matters or reached a decision which was perverse, ie one which no reasonable decision maker could have reached.

50. The SMP and the PBAB, in assessing Mr Ayre's degree of disablement at 0%, acted in accordance with the Guidance which, in effect, set out a policy of placing the former officer in the lowest band of degree of disablement on reaching 65 in the absence of a "cogent reason" otherwise. But compliance with the Guidance would not preclude a finding of maladministration if I concluded that such a policy was inconsistent with the Regulations or was wrongly applied in Mr Ayre's case.

51. I can see the logic behind a review at age 65. The Scheme is after all aimed at compensating an injured police officer for loss of earnings and on reaching normal retirement age most police officers will retire and cease earning. It also might seem fair to treat a person who reaches age 65 and who is still working differently from another person who has taken the decision to cease working. But the Scheme is governed by Regulations and Mr Ayre is right when he says that the Guidance cannot override the relevant Regulations, as HPA accepts. Although I agree with HPA that I should adopt a common sense and purposive interpretation of the relevant

Regulations I cannot go beyond that. Such an approach does not extend to imposing a meaning on the Regulations that they do not hold – even if that meaning is the one that HPA (and possibly Home Office) think that the Regulations should in all logic hold.

52. Under Regulation 37 an injury pension is for life but the degree of disablement is subject to review. The degree of disablement and earning capacity are clearly linked: Regulation 7(5) provides that the degree of disablement is determined by reference to the degree to which the person's earning capacity has been affected as a result of the on duty injury received. There are no special provisions in the Regulations relating to degree of disablement at age 65. So, in accordance with Regulation 7(5), the degree of disablement at that age remains to be determined by reference to the degree to which the person's earning capacity has been affected. If earning capacity is correctly assessed at zero, then it follows that the degree to which earning capacity has been affected by the injury on duty is also zero and that person's degree of disablement can properly be put at 0%.

53. So the question is whether it was correct to assess Mr Ayre's earning capacity at zero because he had reached age 65, was no longer working and did not intend to work again. In saying that I recognise that, while the SMP's decision seems to have been reached solely from that perspective, the PMAB's consideration was ostensibly wider (and included Mr Ayre being examined). But, in the end, Mr Ayre's age and the fact that he had "retired" prevailed.

54. My dictionary defines "capacity" as "power of containing, receiving, experiencing, or producing". On that basis a person's earning capacity is his or her power to earn a certain amount. A power is exercisable, ie it may or may not be used, so a person may have the power (ie capacity) to earn but may choose not to work. Although there is likely to be a correlation between actual earnings and earning capacity that will not always be the case such that a person's earning capacity will normally be assessed on the basis of what he or she could earn, ie potential earnings, rather than actual earnings and without reference to any decision not to work.

55. At age 65, can a different approach be taken? In my view, no. I do not see that willingness to work is directly relevant to earning capacity. It seems to me that Mr

Ayre's earning capacity (as opposed to his actual earnings) might be the same as that of another person of the same age who is still working. Simply because Mr Ayre has decided against seeking further work does not mean that he has no earning capacity.

56. The "cogent reason" approach recognises that and seeks to differentiate between those aged 65 and over who are still working and those who are not and who have decided against seeking further work. But under Regulation 7(5) it is solely by reference to earning capacity that the degree of disablement is determined. Whilst whether or not a person is still working may be a relevant consideration in determining his or her earning capacity, if the same is not true of an expressed intention not to seek further work, then the cogent reason approach is fundamentally flawed. I do not think that he can nullify his earnings capacity. It exists whether declares an intent to use it or not. And if it could be nullified after age 65, then why not before?

57. If the view that on reaching age 65 Mr Ayre's earning capacity was reduced to zero is flawed because an irrelevant factor (the fact that Mr Ayre had indicated that he was not seeking future employment) was taken into account, then it follows that the conclusion that his degree of disablement was 0% (on the basis that his earning capacity was zero and thus unaffected by his on duty injury) is also flawed. I make below a further direction, requiring Mr Ayre's degree of disablement to be reconsidered.

58. Mr Ayre should be aware that this does not necessarily mean a decision in his favour will be made. There may be other factors which did not feature in the SMP's and the PMAB's decisions which may be relevant and which may or may not assist Mr Ayre. For example, the Guidance refers to the *Employment Equality (Age) Regulations 2006* which, it is suggested, "add extra weight to the requirement …… 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."

59. Under the Regulations, which came into force on 1 October 2006, discrimination on the grounds of age is unlawful. But the Regulations allow compulsory retirement at age 65, subject to certain conditions. That was challenged by Heyday, a group connected to the charity Age Concern, with the European Court of Justice ruling:

> "National legislation may provide, in a general manner, that this kind of difference of treatment on the grounds of age is justified if it is a proportionate means to achieve a legitimate social policy objective related to employer policy, the labour market or vocational training."

The case has now been referred back to the High Court to decide if the government's aims behind compulsory retirement at age 65 are justified and a decision is awaited.

60. Thus the impact of the Regulations is at present not entirely clear. If compulsory retirement at 65 is lawful, that might adversely affect Mr Ayre's earning capacity by reason of a limited availability of jobs for those aged over 65. On the other hand, if a compulsory retirement age cannot be justified, this might mean, in theory at least, that jobs remain available after age 65. But I make no further comment as this is a matter for consideration on review.

61. Neither have I dealt with what HPA says about when it is no longer appropriate to use the police pay scale as the basis for an officer's pre injury earning capacity or whether the ASHE figure is an appropriate substitution. These issues did not feature in Mr Ayre's review although they may be relevant when the matter is reconsidered.

62. Lastly, to deal with *Turner*, that case is of limited relevance as it concerns an impermissible attempt to re-open an earlier and final decision as to causation. Perhaps of more relevance is what Mr Justice Ouseley said in the case of *Crocker*:

> "The task, in my judgment, in assessing earning capacity is to assess what the interested party is capable of doing and thus capable of earning. It is not a labour market assessment, or an assessment of whether somebody would actually pay him to do what he is capable of doing, whether or not in competition with other workers. There are two passages in particular which show that the Medical Referee has adopted a wrong approach in part. He comments that few employers would offer Mr Crocker a job if they knew his history, and that despite the Disability Discrimination Act, he is effectively unemployable. Both those comments relate to whether he would be employed to do what he could do rather than to the assessment of what actually he could do."

63. Similarly, the fact that Mr Ayre may have decided against seeking further employment seems to me to relate to whether he would be employed to do what he could do rather than to the assessment of what he actually he could do.

Directions

64. I direct HPA to pay to Mr Ayre £300 as compensation for distress and inconvenience caused by HPA's maladministration as identified above.

65. I direct HPA to instruct its SMP to reconsider Mr Ayre's degree of disablement, taking into account what I have said above.

TONY KING
Pensions Ombudsman

24 August 2009