

1. Introduction.

- 1.1. This document is an attempt to produce a guide to the important aspects of the law around decision-making for police pensions. It covers standard (i.e. deferred pensions), police ill-health retirements, ill-health pensions and the police injury pension system. It is not a comprehensive guide to every aspect of the law relating to police pensions but sets out the broad approaches that decision-makers are required to follow when making decisions about whether police officers should retire and, if so, whether he or she is entitled to an ill-health and/or a police injury pension.
- 1.2. The government has published detailed guide to “member benefits” under each of the three pension scheme currently operating, namely the scheme under the Police Pensions Regulations 1987¹, the New Police Pension Scheme under the Police Pensions Regulations 2006² and the namely the scheme under the Police Pensions Regulations 2015³. This document is not intended to replicate the details set out in each of the detailed guide which set out the rights that police officers and former police officers have under each of the pension schemes but instead to look at the legal processes of decision making that operate under each pension scheme and to consider some of the legal issues that arise as a result of the way in which the schemes are structured.
- 1.3. There is no similar Guide to members’ rights to Police Injury Pensions and thus this document will look at injury pensions in greater detail. However the government has published reasonably detailed non-statutory Guidance for medical decision makers, notably the SMP and the PMAB⁴. The Guidance is in 10 parts with some annexes. A very large part of the Guidance is accurate and sensible, and it explains the relevant

¹ See <https://peninsulapensions.org.uk/wp-content/uploads/2013/07/Members-Guide-1987.pdf>

² See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/658041/NPPS_Members_Guide.pdf

³ See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/658720/PPS_2015_Members_Guide.pdf

⁴ See <https://www.gov.uk/government/publications/police-medical-appeal-board-guidance>

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statutory provisions in reasonably straightforward language. However the Guidance has 2 drawbacks. First, parts of it have not been amended to reflect the changing case law in this area in the last 10 years. Thus, in parts, the Guidance needs to be treated with a degree of caution. Secondly, there are parts which set out approaches to the meaning of the Regulations which does not appear to accord with the meaning of the same sets of words in other contexts, and does not appear to realise the meaning advanced is at variance with such an approach⁵. Thus there are other parts of the Guidance which also need to be treated with some caution.

Who is this Guide for?

1.4. This Guide is written for a number of different potential readers including:

- Serving and retired police officers who want to know whether they are entitled to an ill-health or injury pension
- Police Federation staff and representatives
- Staff employed by Chief Constables who have to provide advice to and make decisions on behalf of Chief Constables in their capacity as Police Pension Authorities
- Doctors who are working as a Selected Medical Practitioner or as members of the Police Medical Appeal Board
- Solicitors and counsel working for either pension claimants or for Police Forces.

Nomenclature.

1.5. The relevant Regulations speak of the officer as “he”. However, in accordance with the Interpretation Act 1978, “*words importing the masculine gender include the feminine*”. Hence, everything in this guide which relates to male officers applies equally to female officers, and vice versa. Police officers are referred to as “he” because that is how the legislation describes police officers, and it remains the case

⁵ An example is the approach taken to an officer’s earning capacity. This is a term which where there has been thorough examination by the courts in a personal injury context. It is unclear why a different approach should be taken in construing the meaning of the Regulations.

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that about 85% of police officers continue to be of the male gender. However female serving and retired officers have played a key part in the development of the law around police pensions because some of the leading cases in police injury pensions have involved female officers⁶ and I hope that adopting “he” for the sake of simplicity and consistency will not be interpreted as anything other than a shorthand convenience. To balance things out, I have referred to the SMP and Chief Constables as “she” throughout this Guide but clearly those references will apply equally to male SMPs and male Chief Constables. Section numbers of statutes are referred to as “S1” or “s1” for “section 1”.

The nature of legal obligations owed under police pension scheme.

- 1.6. A pension is a form of deferred pay which a member of a pension scheme earns during the period of service and falls to be paid during defined periods after the period of service has finished⁷. This was explained by the Court of Justice of the European Union in *Barber v Guardian Exchange Assurance Group* [1991] QB 344 at §28 where the Court said “*It must therefore be concluded that, unlike the benefits awarded by national statutory social security schemes, a pension paid under a contracted-out scheme constitutes consideration paid by the employer to the worker in respect of his employment and consequently falls within the scope of article 119 of the Treaty*”.
- 1.7. In the case of a private pension scheme, the rights of the member derive from the contract created by the pension scheme rules. Thus a claim to monies owing under a private pension scheme is essentially a private law claim for breach of contract, akin to any other claimed breach of contract.
- 1.8. The position is different for public sector pensions where the rules are set by a statutory scheme, usually in Regulations⁸. There is no private law contract between the scheme members (i.e. former police officers) and the scheme administrators, who

⁶ For example, the officers in the case of both *Laws* and *Boskovic* were both women officers, namely Belinda Laws and Colene Boskovic.

⁷ See

⁸ References in this document to “Regulations” is a reference to a statutory instrument made by the Secretary of State under powers granted by an Act of Parliament, usually the Police Pensions Act 1976.

in the case of the police pension scheme is the Chief Constable⁹ in his or her capacity as Police Pensions Authority (“PPA”). Instead, decision makers under a regulatory scheme have a different form of legal obligation, namely a “statutory duty”, to take decisions under the scheme and pay amounts due to beneficiaries as required under the scheme. Thus any claim for monies owed is a claim for a breach of statutory duty¹⁰.

1.9. If a PPA fails to pay monies due to a member of the scheme, the PPA acts in breach of statutory duty. Any claim to enforce that duty can be the subject of an action commenced in the High Court under Parts 7 or 8 of the Civil Procedure Rules. The limitation period for such an action is 6 years: see section 9 of the Limitation Act 1980. In addition, former police officers are (in some circumstances) entitled to enforce a right to payment by a Crown Court Appeal¹¹. However, the rights under the Pensions Regulations appear to be in addition to the right to bring a standard action for breach of statutory duty and do not oust the right of a pensioner to bring an action for damages for breach of statutory duty.

1.10. Police injury pensions have similarities and differences from a large number of other public sector schemes, such as schemes to provide pensions to NHS workers, armed forces personnel or fire fighters. Each pension scheme is set up its own statutory framework and has individual features which differentiate it from other schemes. The approach to the pension entitlement of police officers under the 3 relevant schemes follows a structure which is broadly similar to a large number of other public sector pension schemes. There are, however, significant differences between (for example) the schemes for police officers, fire fighters and members of the armed forces. Nonetheless decisions relating to one public sector pension scheme can be hugely

⁹ Or, in London, The Commissioner of the Police of the Metropolis.

¹⁰ The procedure for claiming monies owed for breach of statutory duty is largely the same as a claim for a monies owing under a contract. Both are subject to a 6 year limitation period under the Limitation Act 1980.

¹¹ For example, see the right to seek a larger award under Regulation 34 of the Police (Injury Benefit) Regulations 2006 and *R (Chief Constable Of South Yorkshire Police) v The Crown Court At Sheffield & Anor* [2020] EWHC 210 (Admin).

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influential in the proper interpretation of the meaning of similar provisions in another public sector pension scheme¹².

Background to the present police pensions schemes.

1.11. Police pensions have a long history, dating back to 1829 when the Metropolitan Police Act 1829 introduced certain benefits on disablement for London officers “*worn out by length of service*”. Police officers are office holders and, as such, are not employees of the Chief Constable (or the Police and Crime Commissioners who have taken over some functions of Police Authorities). The pensions were originally discretionary but a full system of police pensions was introduced by the Police Pensions Act 1921, based on the entitlement of an officer to a pension and not just the discretionary decision of Police Authorities.

The lack of a real fund.

1.12. The usual way of operating a pension fund is for contributions to be made each year by the employer and the employee into a real “fund” which is independently managed from the employer in order to avoid the temptation for the employer to use the pension fund assets to support the employer’s business¹³.

1.13. The independent fund then purchases assets and the capital in the fund grows both from contributions and from investment earnings. Actuaries calculate the level of funds that are needed to meet future pension obligations to pensioners who are members of the fund the fund, and compare that against the present value, with additions for projected growth in future years.

1.14. In such a fund, the risk is all taken by the employer because the pensions payable to the fund members are at a set rate. It follows that any reduction in the capital value

¹² For example, the meaning of the causation provisions in the police injury scheme was influenced by decisions in the fire fighters scheme as set out in *R (London Fire and Emergency Planning Authority) v Board of Medical Referees* [2008] EWCA Civ 1515: see *Commissioner of Police of the Metropolis v The Police Medical Appeal Board* [2013] EWHC 1203 (Admin).

¹³ As was notoriously the case with the Mirror Group Pension Funds when the late Robert Maxwell lead the Mirror group of companies.

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of the investments or a present or future reduction in investment income can lead to substantial demands on employers to make additional contributions to the fund. Those can be additional revenue contributions or substantial capital contributions. This is how the Local Government Pension Scheme (“LGPS”) operates¹⁴ and, even before the substantial reductions in investment values caused by Coronavirus, the increasing life expectancy of former local government officers has led to local authorities having to make substantial additional contributions to the LGPS.

1.15. The police pension scheme does not operate with a real fund. All police pensions are paid out of current year tax receipts. However contributions are made by both police officers and forces. Officers pay at least 9.5% of their salary into the pension scheme, depending on which scheme they are in and their salary. The contribution rate varies and can be as high as 15%¹⁵. Police forces have an annual amount back from their Force allocations, which is calculated on the basis of that Force’s liabilities¹⁶. Whilst the total value of contributions from police officers varies between schemes, the overall position is that about 1/3rd of the costs of future pensions are paid by contributions made by police officers and about 2/3rds are met by the contributions made by Forces. Further, the value to the an average police officer of being a member of the pension scheme is between about a quarter and a third of his average pensionable pay. Thus, instead of relying on the security of an actual fund, police officers have to rely on the government keeping its promises that taxpayers funds will be provided to meet the cost of police pensions in future years.

The different types of police pensions.

1.16. The police pension scheme offers a variety of different types of pensions in return for the contributions made by police officers that are members of the scheme. These are:

¹⁴ The 2016 valuation for the LGPS explained that it had assets of £216,600M (i.e. £216Bn) and projected liabilities of £254,300M, and was thus about 85% funded. Local authorities receive regular demands to increase the level of payments to the LGPS in order to ensure that it becomes fully funded.

¹⁵ The latest contribution rates are at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/100501/annexes-ab.pdf Section 1 of the Guidance is out of date suggesting that contribution rates are 11%.

¹⁶ See <https://www.gov.uk/government/collections/police-pension-schemes>

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- a) An ordinary pension;
- b) A deferred pension;
- c) An ill-health pension; and
- d) An injury pension.

1.17. The times are pensions to remain consistent between the different schemes and therefore will be described by reference the 1987 scheme. The details of each pension will vary depending on the individual scheme.

- a) **An Ordinary Pension:** The 1987 scheme provides that a police officer who is over the age of 50 and has 25 years service is entitled to something called an ordinary pension. This pension scheme is a 60ths final salary scheme, meaning that an officer will accumulated a pension based on one 60th of his average pensionable pay for his last year of year of police service for each year he has served, except that service between years 20 and 30 counts double. So an officer who had 30 years complete service is entitled to 40/60th of his average final pensionable pay as a pension for life. The term “average pensionable pay” is a term of art in police pensions and broadly means the pensionable earnings of a police officer in a 12 month period. Hence, for example, over time is paid service but is not pensionable pay;
- b) **A deferred pension:** Not all police officers complete 25 years service. The 1987 regulations Officers who serve less than 25 years under the 1987 scheme are entitled to a “deferred pension” based on a 60ths of final salary for each completed year’s service. It is called a deferred pension because payment is generally deferred until the pensioner reached the age of 60. Officers who are members of the 1987 scheme and become disabled after leaving the police service are entitled to apply for early payment of the deferred pension;
- c) **Ill-health pension:** Policing is a hard physical and psychological job, and sadly there will be a number of police officers who are physically or psychologically injured as a result of their police service or as a result of other things that life

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inflicts upon them. Police officers who are members of the 1987 scheme and leave police service on the grounds that they could not continue to execute the duties of a police officer due to any form of disablement - whether caused by police service or not - become immediately entitled to a lifelong ill-health pension. In broad terms this is early payment of the deferred pension plus a top up of six years deemed pension contributions. So in ill-health retired officer who served for 10 years will get a pension based on his average pensionable pay of 16 years - payable for life from the date of retirement;

- d) ***Injury Pension:*** Finally, the police pension scheme recognises that there are particular risks to the health of police officers in discharging this important public function. Unlike people injured in factories, police officers are very often injured without the person who inflicted the injuries being worth suing. An officer who is assaulted by a criminal has a civil right of action for assault, but the criminal is highly unlikely to have sufficient assets to pay damages or have an insurance policy. Further, the fact that the police officer has been injured may well not be the fault of the chief Constable directly or through the actions of his or her fellow officers. These dangers are recognised by providing that police officers are entitled to no-fault additional pension where an officer has become disabled as a result of the execution of his duties. These pensions are referred to as “injury pensions” but are also known as injury on duty or IOD awards.

The engagement of ECHR rights in pension decision making.

1.18. The government’s promise to pay future pensions is a promise which is made by the government of the day with the intention that it binds future governments. But are future UK governments of a different political party and with a fresh electoral mandate, bound to abide by promises made by a previous government? The answer is generally that future governments can be held to perform promises made by previous governments but can change policy for the future. However governments can legislate to make changes and, subject to ECHR issues, parliament has no limits on

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its power to pass legislation. Hence, at least in theory, a future parliament could legislate to reduce the value of police pensions.

1.19. However the promises contained within the police pensions system must be treated as being reasonably secure as long as the UK remains a member state of the Council of Europe and thus remains a signatory of the European Convention on Human Rights (“ECHR”) because a pension is a form of deferred income and accordingly the rights of a pensioner engage a person’s rights under Article 1 of Protocol 1 to the ECHR (“A1P1”). Any attempted reduction or removal of a police officer’s established right to a pension can amount to an “*unlawful interference with the claimant’s convention rights under Article 1 Protocol 1 the ECHR*”: see King J in *R (Haworth) v Northumbria Police Authority* [2012] EWHC 1225 (Admin) at §109. That promise could not be overturned by the UK courts by secondary legislation but could, at least in legal theory, be overturned by primary legislation. However, if a future UK government tried to legislate to reduce the value of police pensions, a complaint could be made to the European Court of Human Rights in Strasbourg (although enforcement in the UK of any such judgment would not be straightforward).

1.20. There would, of course, be very considerable political consequences for any government that attempted to reduce the value of any established pension rights of police officers, and in normal political times it would be virtually impossible. Further, if the UK were to leave the ECHR, ministers and future parliaments may have greater freedom to seek to reduce the pension rights of police officers¹⁷.

1.21. As well as producing substantive rights under A1P1 ECHR, it appears reasonably clear¹⁸ that a decision to pay, to cease to pay or to reduce the value of a former police officer’s pension is a determination of the members civil rights within the meaning of article 6 of the ECHR: see *Duemeland v Germany* (1986) 8 EHRR 448 and *Salesi v Italy*

¹⁷ This is not a present problem but could, at least in theory, be a problem in the future if the UK government left the Council of Europe (CoE). The CoE is, of course, entirely separate from the European Union.

¹⁸ This point has not yet been the subject of a judicial decision. However it may arise in the forthcoming trial of *R (Wright and Others) v Chief Constable of Staffordshire* if that case proceeds to trial.

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(1993) 26 EHHR 187, as confirmed by the Supreme Court in *Tomlinson v Birmingham City Council* [2010] UKSC 8. The fact that decisions made in respect of a police injury pension are determination of civil rights for the purposes of article 6 has been confirmed by the Pension Ombudsman: See *determination (2001: L0007) : Flynn v Humberside Police Authority*¹⁹. Accordingly, the decision making processes of the PPA are required to comply with the provisions of article 6 ECHR.

- 1.22. The fact that ECHR rights are engaged in pension decision making and the lack of a separate fund from which to pay police pensions gives rise to a difficult problem of conflicts of interest between the position of the Chief Constable, as PPA decision maker, and the Chief Constable's other duties to fund services out of the same fund.
- 1.23. The police scheme is highly unusual in providing for police injury pensions to be paid out of the same fund as the Chief Constable uses for the discharge of his other obligations, so that every £1 saved on pensions provides a £1 that is available to fund front line policing. That sets up a difficult conflict of interest because the PPA, as decision maker, is not just deciding "*should this officer be paid this level of pension on these facts*" but "*should this officer be paid this level of pension on these facts in preference to the other uses I could make for this money*".
- 1.24. This problem arises directly with respect to police injury pensions, which are payable out of the Force budget, but also operates with respect to ill-health pensions because the Force is required to make additional contributions to the Home Office in respect of every officer who is awarded an ill-health pension.
- 1.25. The problem of the potential conflict of interest under the 2006 Regulations between the PPA as "paymaster" and the PPA as decision maker is illustrated by provisions which permitted the PPA to take the decision that an ill-health pension, which would

¹⁹ See <https://www.pensions-ombudsman.org.uk/decision/2002/l00007/police-pension-plan-l00007>

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otherwise be payable under the 2006 Regulations, should not to be payable if the officer was dismissed under the Conduct Regulations. Regulation 54 provides:

“In a case where a person to whom regulation 32 applies ceased to serve by reason of dismissal or requirement to resign under the Conduct Regulations and was permanently disabled for engaging in any regular employment at the time when he so ceased to serve or becomes so disabled before he attains the age of 65 years, no payment shall be made on account of the pension in respect of the period before he attains the age of 65 years unless the police pension authority in the exercise of their discretion determine to make such payment”

1.26. Regulation 32 applies to any police officer who is entitled to a deferred pension at aged 65 and only applies to an officer who is “permanently disabled for engaging in any regular employment at the time when he so ceased to serve or becomes so disabled before he attains the age of 65 years”. It thus only applies to an officer who has an enhanced ill-health pension but not to an officer who is in receipt of a standard ill-health pension. For such a person, “*no payment shall be made on account of the pension*” until the officer becomes 65. This appears to refer to the “deferred pension” which is payable under Regulation 32(4). Thus the effect of this appears to be that the deferred pension could be withdrawn but not the ill-health pension.

1.27. However, in making this discretionary decision, the PPA faces an obvious conflict of interest because, even though ill-health pensions are paid by the Home Office²⁰ and not the Force, the amount of the Force’s pension payments to the Home Office reflects the number of officers on ill-health pensions. Hence, in effect, the Force meets the costs of ill-health pensions. That means that savings from not paying an in such circumstances can be used to meet other pressures on the police budget.

1.28. Decisions about the pension rights of a scheme member engage the member’s A1P1 ECHR rights and it seems highly likely that decision making by the PPA must therefore

²⁰ Unlike injury pensions which are payable directly by Forces.

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comply with article 6 of the ECHR. Any exercise of this discretion cannot ignore the huge pressures on police budgets.

- 1.29. Thus a strong argument could be advanced that the PPA cannot function as an “independent and impartial tribunal because of his financial interest in the outcome of the decision making process: see *Tsfayo v United Kingdom* (2009) 48 EHRR 18. If there was an appeal against this type of decision to an independent decision maker which was independent, then this might mean that the overall decision making system was ECHR compliant: see *Albert and Le Compte v. Belgium* (1991) 13 EHRR 415 (ECtHR judgment of 10 February 1983). However, there does not appear to be an appeal to either the PMAB or the Crown Court against a decision made by the PPA under this Regulation.
- 1.30. The only challenge to a discretionary decision under Regulation 54 would be by way of judicial review. However that potential areas of challenge is probably insufficient because the Judicial Review Court can only review the legality of the decision as opposed to exercising the discretion afresh.
- 1.31. Hence, the limitation of the *Tsfayo* principle in *Crompton v United Kingdom* (2010) 50 EHRR 36 to cases where the primary issue concerned law as opposed to facts or the exercise of discretion probably does not assist the Chief Constable because, as the Court noted in *Tsfayo* the judicial review court “*did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility*”.
- 1.32. It remains unclear how PPAs are supposed to manage these conflicts of interest so as to comply with the requirements of article 6 ECHR. One possible option would be to appoint an independent decision maker to make these decisions on behalf of the Chief Constable, with a specific mandate which prohibited the decision maker from taking account of the other pressures on the Force budget. However, in the long run the only available option to attempt to solve this conflict of interest problem appears to be legislative reform.

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1.33. Police pension schemes have traditionally provided a higher level of pension payment for comparatively longer periods than many pension schemes operating for other public sector workers, and in return have sought higher contributions from officers²¹. Thus police officers can receive pensions at an earlier age than many other public sector workers and, if the officer has a long record of service, can be paid a relatively generous level of pension.

Pension arrangements for Police Staff.

1.34. Many of the staff working for police forces are not constables but have a variety of key administrative and technical skills that Forces need in order to operate and deliver their public services. Police staff are eligible to join the LGPS. Police officers, along with operational firefighters and, in general, teachers and employees eligible to join another statutory pension scheme are not allowed to join the LGPS²².

²¹ The Pensions Policy Institute estimated that the real value of the pension rights contained within the 1987 scheme was equivalent to 35% of the value of an officer's pay. That valuation fell to 29% under the 2006 scheme and fell again in relation to the 2015 scheme.

²² See <https://lgpsmember.org/toj/thinking-joining-who.php>

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