Chapter 3: Ill-health retirement provisions and ill-health pensions.

3.1. The scheme for ill-health retirements for police officers is broadly the same under all 3 police pension schemes[1] although there are some significant differences for officers between the schemes, which are explored below. Policing is a stressful and can be physically demanding job. It is a sad but perhaps inevitable fact that a number of police officers will respond to the physical and psychological stresses of the job by developing illnesses or injuries. The most obvious causes are assaults by suspects or prisoners, injuries when attempting to restrain suspects or prisoners, car accidents or the inevitable injuries that arise in any workplace, but officers can suffer injuries and develop illnesses in a multitude of ways, just as this can happen with the rest of the population. In addition, policing can be a psychologically stressful environment where results matter and officers are under pressure to perform.

3.2. Some officers respond well to those stresses, other manage despite the stresses but a minority develop physical or mental health problems which can become permanent illnesses. Although this is far from universally true now, policing has traditionally been a male, strong, hierarchical environment which, on occasions, has not welcomed members whose background or diversity means that they do not fit the traditional mould of the white, male police officer. It is important to note the enormous strides that the police service has made towards embracing diversity in recent decades, as Forces seek to ensure that the police service reflects the society it serves. However pockets of "traditional" approaches remain and those can present enormous challenges for anyone who does not fit it with a male, "*canteen culture*". Hence, whilst a vast amount has changed in recent decades and there are many examples of the best practices in supporting officers from diverse backgrounds to develop strong and successful careers in the police, there are still examples of officers being treated as outsiders and suffering stress as a result: see for example the facts of *R (Michaelides & Anor) v Police Medical Appeal Board* [2019] EWHC 1434 (Admin).

[1] The 3 schemes are under the Police Pension Regulations 1987, the scheme under the Police Pension Regulations 2006 and the scheme under the Police Pension Regulations 2015. Details of the schemes are set out in chapter 2.

3.3. The Police Service thus needs a process to ensure that officers who cannot perform properly as police officers as a result of injury or illness can, where appropriate, be moved out of the Service with their dignity intact. The ill-health retirement provisions are built on this notion, giving the Force the right to require officers to retire who are assessed to be permanently unable to discharge their ordinary policing duties due to ill-health. The police pension system rightly recognises that those whose career is cut short by illness or injury are deprived of the chance to accumulate a full pension and thus should be provided with pension rights which take full account of this lost opportunity, with pensions paid to former officers for life from the date of an ill-health retirement.

The stages of the ill-health retirement process.

3.4. The ill-health retirement process is a 2 stage process. Stage 1 involves a medical decision as to whether the officer is "*permanently disabled*" from being able to discharge the duties of the office of constable under the 1987 or 2006 Regulations (or "*permanently medically unfit*" to do so under the 2015 Regulations). Stage 2 only arises if the officer is determined to be permanently disabled or permanently medically unfit. Stage two involves a discretionary administrative decision by the Chief Constable as to whether to require the officer to retire. If that decision is not made, the officer continues as a serving member of the Force.

3.5. If medical retirement decision is made by the Chief Constable, the police officer has no choice. He is required to retire and thus loses his job and his income, whether he wishes to retire or not. In practice, many disabled police officers want to retire because of the difficulties in attempting to continue to perform police duties whilst disabled and because, if an ill-health retirement decision is made by the Chief Constable, the officer secures the right to an immediate pension for the rest of his life (subject only to review if his disablement ceases and he is offered the chance to re-join the Force).

3.6. There are 3 features of the decision making process leading to ill-health retirement which are noteworthy at this point. First, not all ill-health issues for police officers will be related to policing functions. Police officers will sadly develop chronic illnesses or develop disabilities as a result of accidents which have nothing to do with the discharge of their policing duties. The police pension schemes provide for pension arrangements for those who develop both duty and non-duty related illnesses or injuries.

3.7. Secondly, the fact that a police officer is deemed to be permanently disabled or permanently medically unfit does not necessarily mean that this officer medically is unable to continue to function effectively as a police officer in a role which is consistent with his injuries or disabilities. There are a large number of officers who function successfully in policing roles with Forces notwithstanding having significant disabilities. The Chief Constable has the same duty under the Equality Act 2010 to make "reasonable adjustments" for disabled officers as all other employers and, in practice, many police officers continue to work successfully in Forces despite their disabilities.

3.8. Thirdly, the fact that a police officer is determined to be medically unfit for continuing policing duties and is then required to retire from the Force does not mean that person cannot undertake any other form of employment. A police officer whose injuries mean that continuing in policing is not a viable option may well be able to perform successfully in another role or employment, and thus earn a living outside of a police career.

The potential conflict of interest facing the Chief Constable in making a medical retirement decision.

3.9. A decision to require the officer to retire carries with it the right for the officer to have access to an ill-health pension for life. However any Force that makes this decision is required to make a significant payment to the Home Office to reflect the additional cost to the police pension system of the ill-health pension payable to the officer.

Hence any medical retirement decision carries considerable cost implications for a Chief Constable.

3.10. The decision whether to require an officer to retire is a decision of the Chief Constable in her capacity as the PPA[2]. On one view, a decision to require the officer to retire is, in effect, also a decision which results in the officer being paid a pension. Any discretionary decision making which results or does not result in a person being awarded a pension has the potential to engage the officer's ECHR rights. Whether it does so and, if so, the extent to which those rights require an objective decision making process to be followed which satisfies article 6 ECHR are complex legal questions. The legal argument would be based onthe decision of the European Court of Human Rights in *Tsfayo v United Kingdom* (2009) 48 EHRR 18[3]. By analogy with that case, the reasoning would be that the Chief Constable, as the person who will (in effect) directly or indirectly pay any pension out her budget, cannot be an article 6 compliant "*independent and impartial tribunal*" decision maker because of her financial interest in the outcome of the decision making process.

3.11. If a medical retirement decision is, in reality, a decision whether to award the officer an ill-health pension, and thus engages the officer's rights under Article 1 of Protocol 1 of the ECHR, does that mean that the Chief Constable cannot take the decision? That depends, as we noted in chapter 1[4], as to whether the decision should be characterised as a determination of the officer's civil rights. Whilst any decision to

[2] This used to be a decision of the Police Authority but Police Authorities were abolished when Police and Crime Commissioners were created. Instead of transferring executive functions relating to pension rights to the Police Authority's successors, namely the Police and Crime Commissioner, amending Regulations created the role of the "police pensions authority" and gave that function to Chief Constables and, in London, to the Commissioner of the Police of the Metropolis.

[3] The facts in *Tsfayo* were that a committee of Councillors decided whether a person who was receiving housing benefit had a good reason for not having taken a required step in the process. However the Council paid the housing benefit out of its own funds, and thus the councillors were sitting in judgement on whether funds should be paid out of the Council's own resources. The ECtHR decided that (a) the process had to be article 6 compliant and (b) the fact that a committee of councillors was judging payment out of the Council's own resources mean that the committee could not be an independent and impartial tribunal for the purposes of article 6. The parallel with the positon of a Chief Constable is clear. This issue may fall to be decided in the case of *R (Wright and others) v Chief Constable of Staffordshire* in late 2020.

[4] See paragraph 1.29 in chapter 1.

award a person a pension or to review (and hence possibly reduce) a pension almost certainly needs to be taken by an "*independent and impartial tribunal*", the counter argument is that the right to a pension only arisies as a result of the ill-health retirement decision but that that decision is not one to which article 6 applies.

3.12. This issue is further considered below in the context of the law around the PPA making decisions to require an officer to retire. Whether this is right or not will have to await a judicial decision.

3.13. This issue is particularly important in cases where police officers find themselves in the situation where they are off sick on reduced or nil pay and have been determined by the SMP to be permanently disabled (or permanently unfit under the 2015 Regulations) but where the Chief Constable is not prepared to make the decision to require them to retire. This can be for entirely legitimate reasons although it can, in effect, mean the officer is left without pay in the meantime.

3.14. This problem will not usually arise in relation to decisions made about injury pensions because (a) injury pensions are only payable to former officers, (b) decision making on a range of medical issues under the Regulations is required to be delegated by the Chief Constable to a doctor who is appointed by the Chief Constable, known as the SMP and (c) a former officer who makes the decision to retire has the same entitlement to an injury pension as an officer who is required to retire.

3.15. Although the impartiality of the doctor could be questioned on the grounds that the doctor is selected by the Chief Constable and paid by her (and thus can be assumed to have an interest in keeping on side with the Chief Constable because of the possibility of further referrals leading to further fees), decisions by an SMP can be appealed by a police officer to the PMAB, whose members are independent of the Force as they are appointed by the Secretary of State and not the Chief Constable. Thus, where

decisions are made by this process, it appears reasonably clear that the requirements of an "*independent and impartial tribunal*" are met.

When does a PPA come under a legal duty to refer an officer to the SMP to determine permanent disability (or medical unfitness)?

3.16. Where an officer is off work for an extended period due to illness or injury, either the officer, usually with the support of his Federation Representative, or the Force can consider whether the officer should be medically retired.

3.17. The necessary first step in any process leading to a medical retirement is a referral of the officer's case to the SMP by the PPA. The question for the SMP will be whether the officer is permanently disabled (under the 1987 and 2006 Regulations) or is permanently medically unfit (the test under the 2015 Regulations) is the first step towards a medical retirement. This step has to be taken by the Chief Constable.

3.18. It is usually uncontentious but there is some anecdotal evidence which suggests that securing a referral to an SMP may be difficult where the Force consider that the request to be considered for ill health retirement is premature. This can be because the Force do not consider that the officer's disabilities are serious or on the grounds that the Force or the Force Medical Officer ("**the FMA**") does not consider that the 'permanence' criterion is likely to be satisfied. There are thus situations where an officer seeks to be referred for an SMP assessment and the Chief Constable (acting through human resources staff) resists making a referral.

3.19. The proper approach in such cases was identified by Mr Justice Latham in *R v Merseyside Police Authority, ex parte Yates* [1999] Lexis Citation 2295 who concluded that the PPA was under a legal duty to make a referral unless the officer's case that he may be permanently disabled was properly considered by the PPA to be "*spurious or vexatious*" and would be acting unlawfully if he failed to do so. The underlying rationale of this case appears to be that the role of the Chief Constable is as "gatekeeper" in the system. Any officer with a reasonable case to claim that he is permanently disabled is entitled through the "gate" because the assessment as to

whether a person is or is not permanently disabled (or permanently unfit) is for the SMP and not for the Force Medical Advisor or the Chief Constable. In that case the Judge said:

> "It follows that a Police Authority[5] is not entitled to pre-empt the answers of the medical practitioner by coming to adverse conclusions as to fact, or law, in relation to the claim in order to avoid reference to the medical practitioner. That would not, however, prevent a Crown Court from declining to require the Police Authority to refer the matter to a medical practitioner in a case where the claim is obviously spurious or vexatious"

3.20. That decision pre-dated the Human Rights Act 1998 and thus did not consider the potential financial conflict of interest that the Chief Constable faces over making such a referral. However, given that the "bar" is set at such a low level before the Chief Constable comes under a duty to make a referral to the SMP, any concerns about the Chief Constable's conflict of interest probably can be properly managed within that decision making process.

3.21. This case suggests that a challenge to any failure by the Chief Constable to make an SMP referral should be made by way of a Crown Court appeal under Regulation H5 of the 1987 Regulations. Whilst that would be a convenient route for such an appeal, this part of the decision appears to be legally incorrect for the reasons set out below[6].

3.22. Once a decision has been made to refer a case to the SMP, Home Office Guidance[7] suggests that the SMP should be a separate doctor from the FMA, who is usually a doctor with occupational health expertise who works within the force (and thus is an employee of the Chief Constable), typically as part of the Force Occupational Health Unit ("**OHU**"). OHU staff have to balance their duties to individual officers with their duties to the Force as a whole. The relevant part of the Guidance provides:

[5] At the time of the case, the decision making body was the Police Authority and, as now, not the Chief Constable, in her role as the Police Pensions Authority.
[6] See paragraph 0.
[7] See paragraph 5 of Section 2 of the Guidance.

"4.57. Occupational health has a role both in giving advice to managers to assist in taking managerial decisions and in supporting officers who seek their advice and assistance. Forces and local policing bodies should ensure that sufficient resources are available to provide a defined level of occupational health service.

4.58. Occupational health is responsible for providing advice on clinical issues affecting officers in the workplace, where this may be affecting performance or attendance. Where the force is required to conduct a risk assessment, officers can be required to co-operate with occupational health and/or health and safety advisors as part of the risk assessment process.

4.59. The Force should clearly define for all officers, the role and range of services they can expect from the occupational health service. It is vital that officers have confidence in the service and that managers are clear regarding the professional confidentiality requirements of occupational health practitioners"

3.23. The legal roles are also different as the FMA has a common law duty of care to the police officer whereas the SMP is undertaking a public law adjudication function and it is (as far as the author is aware) an unresolved question as to whether the SMP has a common law duty of care in negligence to the officer (although the balance of authority probably leans on the side of saying there is such a duty)[8].

The assessment by the SMP of permanent disablement or permanent incapacity.

3.24. An officer's case is usually referred to a single SMP, selected by (and paid for by) the Chief Constable[9]. The function of the SMP is to act as a decision maker on behalf of the Chief Constable and to make a decision which binds the Chief Constable: see Regulation H1(1) of the 1987 Regulations and *R (Crudace) v Northumbria Police Authority* [2012] EWHC 112 (Admin) at §61ff.

[8] But could still be reported to the GMC if there was wrongdoing by the SMP.

[9] Regulation H1(4) provides the decision can be referred to a Board of medical practitioners. Paragraph 8 of section 2 of the Guidance states that the role of the SMP can be carried out by two doctors or a board of doctors in exceptional cases.

3.25. The SMP has a precise set of statutory questions to address and must provide a report which answers those questions, along with reasons for any decisions that she reaches. Under the 1987 scheme, the questions are set out at Regulation H1(2) as follows:

> "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 person concerned is disabled;
>
> (b) whether the disablement is likely to be permanent"

3.26. The meaning of the term "disablement" is set out at Regulation A12 which provides:

> "(1) 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.
>
> (1A) For the purposes of deciding if a person's disablement is likely to be permanent, that person shall be assumed to receive normal appropriate medical treatment for his disablement, and in this paragraph "appropriate medical treatment" shall not include medical treatment that it is reasonable in the opinion of the police pension authority for that person to refuse.
>
> (2) Subject to paragraph (2A), . . . disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force except that, in relation to a child . . ., it means inability, occasioned as aforesaid, to earn a living.
>
> (2A) In the application of paragraph (2) to a specified NCA officer, the reference to "the ordinary duties of a member of the force" shall be construed as a reference to the ordinary duties of a member of the home police force in which the person last served before becoming a specified NCA officer.
>
> (3) Where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force:

Provided that a person shall be deemed to be totally disabled if, as a result of such an injury, he is receiving treatment as an in-patient at a hospital.

(4) 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.

(5) In this regulation, "infirmity" means a disease, injury or medical condition, and includes a mental disorder, injury or condition"

3.27. There are aspects of this complex set of definitions that have been carefully considered in a whole series of High Court cases, as set out in this and other chapters, but for present purposes is enough to note:

a) The question of disability or permanence is assessed at the date of the assessment, not at an earlier or later date;

b) "Disablement" does not have the meaning ascribed to that word in the Equality Act 2010[10] but means an inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force;

c) The question of permanence involves the SMP asking herself whether, on the balance of probabilities, that disablement is likely to be permanent;

d) The test for permanence is affected by the potential outcome of "normal appropriate medical treatment for his disablement" which the officer must be assumed to receive unless it is reasonable for the officer to refuse to have such treatment (as to which see below).

[10] S6 of the Equality Act 2010 provides "A person (P) has a disability if— (a)P has a physical or mental impairment, and (b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities". That is a very different test for disability than under the 1987 Regulations.

3.28. The questions referred to the SMP under the 2006 Regulations are set out in Regulation 71 are substantially the same as those under the 1987 Regulations along with additional questions as set out in Regulation 71(1) which provides as follows:

> "(1) Where the police authority are considering for the purposes of these Regulations 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 for the performance of the ordinary duties of a member of the police force;
>
> (b) whether any such disablement as is mentioned in sub-paragraph (a) is likely to be permanent;
>
> (c) whether the person concerned is also disabled for engaging in any regular employment otherwise than as a regular police officer; and
>
> (d) whether any such disablement as is mentioned in sub-paragraph (c) is likely to be permanent"

3.29. The meaning of the term "disablement" under the 2006 Regulations is set out in Regulation 4 which provides:

> "4.—(1) 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.
>
> (2) For the purposes of deciding if a person's disablement is likely to be permanent, that person shall be assumed to receive normal appropriate medical treatment for his disablement, and in this paragraph "appropriate medical treatment" shall not include medical treatment that it is reasonable in the opinion of the police authority for that person to refuse.
>
> (3) Subject to paragraph (4), disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the police force or, as the case may be, to engage in any regular employment otherwise than as a regular police officer, except that in relation to a child survivor or an adult survivor of a member of a police force it means inability, occasioned by infirmity of mind or body, to earn a living.

(4) Where a person has retired or otherwise ceased to serve as a regular police officer 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 to the police authority.

(5) In this regulation, "infirmity" means a disease, injury or medical condition, and includes a mental disorder, injury or condition"

3.30. This definition is thus in line with the terms used in the 1987 Regulations. Additional questions are needed under the 2006 Regulations because there are 2 levels of ill-health pension under the 2006 Regulations. Thus, if an officer is determined to be permanently disabled, the SMP also has to decide whether the officer can engage in "*any regular employment*". That must be employment outside the police service and "regular" employment means employment for more than 30 hours per week: see the Glossary at Schedule 1 to the 2006 Regulations[11].

3.31. The tests for the SMP under the 2015 Regulations are set out in Regulation 81 as follows:

"(1) Before considering whether a person in service as a member of a police force ("the member") should be compulsorily retired under regulation 82, the police pension authority must refer the following questions to a selected medical practitioner for decision—

(a) whether the member is medically unfit for performing the ordinary duties of a member of the police force;

(b) whether that medical unfitness is likely to be permanent;

(c) whether the member is medically unfit for engaging in any regular employment; and

(d) whether that medical unfitness is likely to be permanent.

(2) The selected medical practitioner must—

[11] Which provides "regular employment" means employment for an annual average of at least 30 hours per week.

(a) examine or interview the member as the selected medical practitioner thinks appropriate;

(b) decide the questions referred to the selected medical practitioner under paragraph (1); and

(c) give the police pension authority and the member a report containing a decision on those questions.

(3) That report is final, subject to—

(a) an appeal under Schedule 1 against the decision of the selected medical practitioner; or

(b) the referral under Schedule 1 of the decision of the selected medical practitioner for reconsideration"

3.32. The term "medical unfitness" is defined in Regulation 74 of the 2015 Regulations and means largely the same thing as the term "disablement" in the 1987 and 2006 Regulations. Regulation 74 provides:

"(1) In these Regulations—

"infirmity" means a disease, injury, or medical condition, and includes a mental disorder, injury or condition;

"injury" includes any injury or disease, whether of body or of mind; and

"medical unfitness", in relation to a member of a police force or a former member of a police force, means inability occasioned by infirmity of mind or body—

(a) to perform the ordinary duties of a member of the police force; or

(b) to engage in any regular employment.

(2) For the purpose of this Part, "ordinary duties of a member of the police force" in relation to a former member of a home police force means the ordinary duties of a member of the home police force"

3.33. The tests to be applied by the SMP in determining whether a medical unfitness is permanent or not are set out in Regulation 75 of the 2015 Regulations which provides:

> "75.—(1) In these Regulations, a reference to a member of a police force or a former member of a police force ("the member") being permanently medically unfit is taken to be a reference to—
>
> (a) the member being medically unfit at the time the selected medical practitioner decides the question; and
>
> (b) that medical unfitness being at that time likely to be permanent.
>
> (2) For the purpose of deciding whether or not the member's medical unfitness is likely to be permanent, the member is taken to receive normal appropriate medical treatment.
>
> (3) In this regulation, "appropriate medical treatment" does not include medical treatment that the police pension authority acting in exercise of its functions as scheme manager decides is reasonable for the member to refuse.
>
> (4) The member may appeal under regulation 207 (appeals to Crown Court) or 208 (appeals to Secretary of State) against a decision of the police pension authority as to whether a refusal to accept medical treatment is reasonable"

3.34. Although the wording is slightly different, the effect of these provisions appears to virtually identical to the provisions in 1987 and 2006 Regulations.

3.35. Paragraph 9 of Section 2 of the Guidance explains that the SMP must carry out a medical assessment of the officer and use that assessment to inform the decision. It states:

> "The SMP will normally be required to examine the officer, but he or she may exercise discretion to consider the case on the papers if management, the officer and the FMA or all content with this. In all cases the SMP should complete a report to the police authority which is separate from the advice from the FMA and which confirms that he or she has not dealt with the case before"

3.36. Section 3 of the Guidance covers the approach that the SMP should take to determining the statutory question as to whether the officer is permanently disabled. Hence an assessment has to be made by the Force that (a) the officer is disabled and (b) the disablement is likely to be permanent. The time frame for working out whether a disablement or medical unfitness is "permanent" for does not mean for the rest of the officer's life but means "*until the date of the officer's date of compulsory retirement*". This was established in *R (Scardfield) v Police Appeal Board & Anor* [2013] EWHC 3822 (Admin)[12] where Lewis J said:

> "…. means whether during the period of service, that is up until the date when they would normally retire, they would be able to carry out the ordinary duties of the member of the Force. If they would not be able to carry out the duties of a member of the Force for the period up to retirement, they are permanently disabled within the meaning of the regulation. But I do not think that "permanent" there means for life; it means until the date of retirement[13]"

Disablement or medical incapacity means being unable to perform all the normal duties of a police officer.

3.37. The statutory test under the 1987 Regulations is whether the officer has an inability to "*perform the ordinary duties of a member of the force*". Those words mean an ability to perform <u>all</u> of the ordinary duties that a police officer is called upon to perform from time to time: see *R v. Sussex Police Authority ex parte Stewart* [2000] EWCA Civ 101 [2000] ICR 1122[14]. The Court said:

> "...the hypothetical member of the force whose ordinary duties the Regulation must have in mind is the holder of the office of constable who may properly be required to discharge any of the essential functions of that office, including operational duty"

3.38. That test is clearly replicated in the 2006 and 2015 Regulations using the words set out above.

[12] See http://www.bailii.org/ew/cases/EWHC/Admin/2013/3822.html
[13] The section of the Guidance giving a different view should be ignored.
[14] See http://www.bailii.org/ew/cases/EWCA/Civ/2000/101.html

3.39. The Guidance explains the range of duties that a police officer is likely to be required to perform. It states at paragraphs 11 to 14 of Section 3:

"11. However, core policing tasks go wider than those mentioned above. The PNB Guidance lists the following as the ordinary duties of a member of the force for the purpose of assessing permanent disablement under regulation H1/30:

- Managing processes and resources and using IT;
- Patrol/supervising public order;
- Incident management, such as traffic and traffic accident management;
- Dealing with crime, such as scene of crime work, interviewing, searching and investigating offences;
- Arrest and restraint;
- Dealing with procedures, such as prosecution procedures, managing case papers and giving evidence in court.

12. One point to note is that these duties are applicable to all ranks even if not all duties will be carried out in exactly the same way on all occasions. All members of the force will need to be able to effect an arrest, whatever their rank. Similarly, all members of the force will need to manage an incident, whether it is a road accident or a protest march.

13. In order to make it easier for a medical practitioner to assess whether someone is disabled for these duties the PNB Guidance goes on to list the key capabilities for each of the ordinary duties. Taking each of these duties in turn, inability, due to infirmity, as defined by the Police Pensions Regulations, in respect of any of the following key capabilities renders an officer disabled for the ordinary duties:

- the ability to sit for reasonable periods, to write, read, use the telephone and to use (or learn to use) IT;
- the ability to run, walk reasonable distances, and stand for reasonable periods;
- the ability to make decisions and report situations to others;
- the ability to evaluate information and to record details;
- the ability to exercise reasonable physical force in restraint and retention in custody;
- the ability to understand, retain and explain facts and procedures.

14. An officer, who because of infirmity (as defined) is able to perform the relevant activity only to a very limited degree or with great difficulty, is to be regarded as disabled"

What is the meaning of "as a member of the force".

3.40. The officer must be disabled from performing these duties as a member of "*the force*". There has been litigation on what is meant by "the force" and whether this means the particular police force in which the officer is serving or any police force. This issue first arose in *R (Sussex Police Authority) v Beck and another* [2003] EWHC 1361 (Admin) Keith J decided that "the force" meant the police service as a whole. However in *R (Corkindale) v Medical Appeal Board* [2006] EWHC 3362 (Admin) Underhill J disagreed and found that "the force" in this Regulation meant the police force for the area in which the Claimant was serving.

3.41. The issue appears to have been resolved by Mr Justice Charles in *R (Ashton) v Police Medical Appeal Board & Anor* [2008] EWHC 1833 (Admin) where the Judge concluded that "*the force*" in Regulation A12(2) means the police force for the area in which the officer is serving at the time that the question of permanent disablement arises for decision. This conclusion is reflected in paragraph 7 of Section 3 the Guidance and appears right, and thus should be followed.

The inability to perform police duties must arise from an "infirmity of mind or body".

3.42. In order to be a qualifying inability for the purposes of each set of regulations, the inability to perform police duties must arise from an "*infirmity of mind or body*" as opposed to arising from any other cause (such as a stubbornness or a refusal to obey reasonable orders). The concept of an "infirmity" is widely defined in Regulation A12(5)[15] as follows:

> ""infirmity" means a disease, injury or medical condition, and includes a mental disorder, injury or condition"

Thus a psychiatric condition which prevents a police officer from being able to perform his duties is just as much of an infirmity as a physical injury. There is Home

[15] And in a similarly wide way in the 2006 and 2015 Regulations.

Office Guidance on these aspects[16] but the Guidance does not add a great deal to the Regulations.

Normal appropriate medical treatment for his disablement

3.43. In assessing whether a condition is likely to be permanent, as a result of amendments Regulations brought into effect in 2003[17], the SMP have a difficult task where there (a) there is a form of medical treatment that the officer has not yet had to treat the relevant condition giving rise to the disablement or medical unfitness and (b) the doctor considers that, if the officer had the treatment, there is a more than 50% chance that the officer's disablement would be cease. The relevant provisions are in Regulation A12(1A) of the 1987 Regulations, Regulation 4(2) of the 2006 Regulations and Regulations 75(2) and (3) of the 2015 Regulations.

3.44. The existence of a form of "*normal*" medical treatment which could, in the future, alleviate the disabilities caused by an illness cannot prevent an officer being assessed by the SMP to be disabled at that time. However, the existence of medical treatment which has yet to be given to the officer could affect the question as to whether the disability is likely to be permanent. The problem for the doctors is assessing the chance that, if the medical treatment is given, what is the chance that it will be successful and, if so, will the disablement will cease. However medical treatment which will improve a form of disablement but is still likely to leave the officer unable to perform all the duties of a police officer is not relevant as it will not lead to the disablement ceasing.

3.45. This area is addressed in the Guidance at paragraphs 19 and 20 of Section 3 which provides:

> "19. When assessing whether appropriate medical treatment can assumed to be given in a particular case, the SMP will have to consider the following:

[16] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117709/section-3.pdf

[17] The relevant Regulations were the Police Pensions (Amendment) (No 2) Regulations 2003 which amended various parts of the 1987 Regulations and came into force on 1st April 2003.

- the extent to which the treatment is likely to be effective in preventing permanent disablement, taking account of the officer's condition and of any other factors, such as allergies, which could lead to complications or harmful side-effects;
- the extent to which the treatment is tried and tested;
- the extent to which the treatment is available to the officer in time for it to be effective, taking account of general availability unless there are special reasons for that not being relevant.

20. The definition of appropriate medical treatment in the Regulations expressly excludes treatment to which the officer has a reasonable objection. In a case where the SMP decides that the officer is not only disabled because specific appropriate medical treatment is available to the officer, it will be for the police authority[18] to consider whether any objection to that treatment is reasonable or not. NB any appeal against a decision on reasonableness of treatment is to the Crown Court"

3.46. This part of the Guidance appears to be partly correct but also appears to be partly incorrect. Whilst the first part is clearly correct, the Guidance appears to be erroneous in suggesting this element of decision making falls to the PPA. Prior to the amendment of the Regulations in 2003, the question of the reasonableness of the refusal of any medical treatment as a matter to be determined by the SMP or the PMAB was upheld by the High Court: see *R (Metcalf) v Marcus and West Yorkshire Police* [2002] EWHC 2892 Admin. That case is of limited relevance as it occurred before the Regulations were amended in 2003. Nonetheless, as the reasonableness of the refusal of any medical treatment is a medical matter, it would be very strange arrangement of functions under the statute if the medical question relating to the reasonableness or otherwise of a refusal to have medical treatment was a matter to be decided by the Chief Constable and not by a doctor.

3.47. Regulation A12(1A) refers to the question as to whether it is "*reasonable in the opinion of the police pension authority*" for the officer to refuse appropriate medical treatment, which would, on a first reading and as set out in the Home Office Guidance, suggest that decision making on this issue should be a matter for the PPA. However, that is almost certainly incorrect because a decision as to whether an

[18] Now the Chief Constable.

officer's disablement is or is not permanent can only be taken by the SMP and not the Chief Constable. Such a decision is, in law, a decision of the PPA but it must delegated by the PPA to the SMP: see Regulation H1(1) and (2) and *Crudace.*

3.48. Only the SMP can take the decision whether a disablement is likely to be permanent and once that decision has been taken by the SMP, the decision is "*final*" and is binding on both the officer and the PPA: see Regulation H1(5). Given that any question as to whether an officer has unreasonably refused normal appropriate medical treatment is part of the SMP's decision on permanence, the decision making process can only operate if the SMP takes the "reasonableness of refusal" decision as part of her overall decision on permanence. It follows the decision concerning the reasonableness of a refusal by an injured officer to agree to undertake any form of normal appropriate medical treatment can only be a decision for the SMP and not a decision for the Chief Constable.

3.49. When deciding whether the officer is acting reasonably in refusing treatment, the SMP can be in a difficult position in making the assessment because the SMP is not the treating clinician. If the treating clinician is not recommending the treatment then, almost regardless as to the assessment made by the SMP, the officer will be acting reasonably because this is not treatment which is on offer to the officer.

3.50. However if the treating doctor has offered the treatment and it has been refused, the SMP is obliged to look at the reasons that the officer has given for refusing a form of medical treatment which the SMP considers may assist the officer. The SMP will take account of the advice the officer has received in assessing whether that decision is reasonable or not.

3.51. The right approach is for the SMP to ask himself or herself whether the decision by the officer, as a medical patient, not to undertake the proposed medical treatment is a decision which is within the range of reasonable decisions that medical patients with the officer's presenting medical condition could properly take: see *R (Metcalf) v Marcus and West Yorkshire Police* [2002] EWHC 2892 Admin.

3.52. All forms of medical treatment have potential advantages and potential side-effects, and the final decision as to whether to agree to any form of medical treatment applies exclusively with the competent patient. However much a doctor might consider that it would be advisable for a patient to have a particular medical treatment, no doctor can undertake any form of medical treatment unless the patient gives informed consent.

3.53. If the SMP concludes that some patients, acting reasonably (but is not irrationally) with that officer's presenting medical condition would agree to undertake the specified treatment and others would decline to do so, it seems inevitable that the SMP should conclude that the decision by the police officer not to undertake the specified treatment is "reasonable".

3.54. That will be the case, regardless as to whether the SMP considers strongly that this is a treatment that could be beneficial for the patient. Conversely, if the specified treatment is one that no reasonable patient in the officer's presenting medical condition would refuse, the decision of the officer to refuse that treatment can be classified as being unreasonable.

3.55. Further, even if there is medical treatment which has not yet been tried, that untried treatment will only be relevant to the question of permanent disablement if the treatment is "*likely*" to resolve the medical condition sufficiently to mean that the officer ceased to be disabled. The test for the SMP is thus whether he or she considers that, in the particular circumstances of this individual officer, the proposed treatment has a more than 50% chance of improving the officer's health status so that the officer is no longer disabled. A former treatment which has a lower than 50% chance of achieving this outcome will not, on the balance of probabilities lead to the officer ceasing to be disabled and thus must be irrelevant to the statutory test. Hence any other form of treatment will not affect the outcome of the assessment, even if it is

strongly indicated by the officer's condition, is recommended by the SMP, and would be likely to lead to improvements in the officer's health status.

3.56. The key question for the SMP is whether the proposed medical treatment would be likely to lead to a loss of disablement, not whether it is something that a reasonable doctor would recommend to a patient in this clinical situation.

3.57. There is, however, a slight complication in that the route of appeal against any decision by the SMP that an officer is not permanently disabled or permanently medically unfit because he has unreasonably refused to undertake medical treatment is to the Crown Court: see Regulation H5(1) of the 1987 Regulations, Regulation 66 of the 2006 Regulations and Regulation 207 of the 2015 Regulations. If an officer disagrees with the decision of the SMP on permanence in a case where the issue is the reasonableness of the officer's refusal to agree to undertake any form of normal appropriate medical treatment, the decision on permanence can be the subject of an appeal to the PMAB or the discrete issue can be the subject of an appeal to the Crown Court. The best way to approach the matter is probably to appeal to the PMAB in the first instance and then to appeal that decision to the Crown Court as opposed to challenging the PMAB decision by way of judicial review.

The SMP report.

3.58. Regulation H1(5) of the 1987 Regulations provides:

> "The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and shall, subject to regulations H2 and H3, be final"

The duty on the SMP to produce a report is also set out in like form in Regulation 71(7) of the 2006 Regulations and in Regulation 81(2)(c) of the 2015 Regulations.

3.59. The function of the SMP is to operate as a statutory decision maker, making a decision that could affect the career and pension rights of a police officer, in a process that has to be article 6 compliant[19]. There are 3 areas the report should demonstrate:

a) That the SMP has set out the material facts and made findings on any disputed facts;

b) The SMP has reached a clear diagnosis of the officer's medical condition (or lack of medical condition); and

c) The SMP has addressed and answered the 2 statutory questions on disability and permanence.

3.60. If there are factual disputes which are relevant to addressing the questions that the SMP has to consider, the SMP has a duty to make factual findings: see *R (Williams) v PMAB and Merseyside Police Authority* [2011] EWHC 1119 (Admin) and *R (Michaelides & Anor) v Police Medical Appeal Board* [2019] EWHC 1434 (Admin). Whilst, factual findings made by a medical decision maker will generally only be overturned by the Court on the grounds that the SMP has acted irrationally in making that finding, the PMAB approaches the matter as a *de novo* decision and thus must makes its own factual findings on any disputed matters, independently of the SMP.

3.61. The question of factual disputes is more likely to arise in relation to injury pensions and so there is a more detailed examination of that issue below. However, in order to reach medical conclusions, the doctor needs to reach decisions about the relevant medical diagnosis and to give reasons for that conclusion.

3.62. The legal duty on the SMP is to write a report giving answers to the statutory questions with reasons for those conclusions, not merely to complete the form which expresses his or her conclusions without giving reasons. Reasons do not need to be extensive or elaborate in order to comply with the legal duty to give reasons. The

[19] See paragraph 45 above.

classic explanation of the duty to give reasons was set out by Lord Brown in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, who said at §36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

3.63. A reasons challenge has been upheld as a valid ground of challenge against a medical decision maker in a police pensions case: see *R (Sharp) v West Yorkshire Police & Anor* [2016] EWHC 469 (Admin) at §69. In *R (Fisher) v The Chief Constable of Northumbria & Anor* [2017] EWHC 455 (Admin) Garnham J said at §40:

> "In my judgment, however, the reasoning given must be sufficient to identify, at least, the basis for the Board's conclusion"

3.64. It is probable that the requirement in Regulation H1(5) of the 1987 Regulations (and similar provisions in the 2006 and 2015 Regulations) that any decision reached in an SMP report should be "*final*" refers not only to the final decision but also to the

"*essential judgment or judgments on which the decision is based*": see Laws LJ in *Metropolitan Police Authority v Laws & Anor* [2010] EWCA Civ 1099 at §16[20].

3.65. The Report has to be sent to both the Chief Constable and the officer (see Regulation H2(1) of the 1987 Regulations, Regulation 71(9) of the 2006 Regulations and Regulation 81(2)(c) of the 2015 Regulations). A few years ago advice appears to have been given by a Police Authority solicitor that individual officers needed to consent to a report about them being sent to the Force and thus SMPs found that they completed a report but were unable to send it to the Chief Constable. There is no basis in the Regulations to require the officer's consent. It is the practice of some SMPs to send a draft of the report to the officer to check for factual accuracy (just as draft judgments are sent to barristers in a legal case) so that the SMP can correct any factual errors. Whilst that is entirely lawful (and arguably sensible), it is not a requirement under the Regulations.

The officer's right to appeal to the Police Medical Appeal Board.

3.66. A police officer who disagrees with any part of a decision of the SMP is entitled to appeal to a Board of Medical Referees under Regulation H2 of the 1987 Regulations and under like provisions in the 2006 and 2015 Regulations. There is no reciprocal right of appeal by the Chief Constable.

3.67. The Board replaced the single "Medical Referee", which was the original appeal mechanism under the 1987 Regulations. In practice, the Board is known as the Police Medical Appeal Board or the "**PMAB**". The rules for the PMAB are set in Schedule H to the 1987 Regulations[21], Regulation 74 of the 2006 Regulations and in Schedule 1 to the 2015 Regulations. All of these rules are in materially the same form and so reference is made here to the 1987 rules.

[20] Although there may be an element of doubt about whether this remains good law following the Court of Appeal decision in *R (Boskovic) v Chief Constable of Staffordshire Police* [2019] EWCA Civ 676 which is considered in detail in another part of this Guide.

[21] See below for a more detailed description of the procedure to be adopted by the PMAB. Like provisions are set out in Schedule 6 PIBR.

3.68. The officer has 28 days to appeal or such longer period as the Chief Constable permits. Regulation H2(3) makes it clear that the PMAB's decision is a *de novo* hearing in which the PMAB is required to replicate the decision making process of the SMP, and thus is required to reach its own decisions on the medical questions referred to it. Regulation H2(3) provides:

> "The decision of the board of medical referees shall, if it disagrees with any part of the report of the selected medical practitioner, be expressed in the form of a report of its decision on any of the questions referred to the selected medical practitioner on which it disagrees with the latter's decision, and the decision of the board of medical referees shall, subject to the provisions of Regulation H3, be final"

3.69. The management of the PMAB is contracted out by the Home Office to a private company, currently Aon Health Solutions. The contractor appoints the panel members of the PMAB and manages the appeal processes. When decisions of the PMAB are challenged in the High Court by way of judicial review (either by the officer or by the Force), the PMAB invariably takes a neutral stance.

3.70. A number of features of the role of the PMAB can be identified from the rules and the cases.

a) First, the role of the PMAB is to act as an expert medical panel to decide the questions that the SMP is required to address under the Regulations. As such the courts will pay deference to the expertise of the PMAB. This approach was noted by Mostyn J in *R (Sidwell) v Police Medical Board* [2015] EWHC 122 (Admin) said at §3:

> "The highly specialised role and function of the board is illustrated by the fact that the specialist member acts not only as a decision maker but as an expert witness as well. This seems to blur traditional lines of demarcation from a lawyer's perspective but no-one has suggested that this is improper. Thus in this case the specialist member performed a clinical examination on the claimant on the day of the hearing, 21 June 2013. His evidence deriving from

that examination was part of the material on which the board, which included him, based its decision.

It is trite law that this court will pay considerable respect to the decision of an expert and informed tribunal, and will only interfere where the grounds of challenge are clearly made out: see *Law Society v Salsbury* [2008] EWCA Civ 1285 [2009] 1 WLR 1286 per Jackson LJ at para 30."

b) Secondly, one of the members is required to be a specialist in the area of the officer's injuries and to perform an examination and reach conclusions about the medical condition of the officer (or former officer). In *R (The Commissioner of Police of the Metropolis) v Police Medical Appeal Board* [2020] EWHC 345 (Admin)[22] Deputy Judge Marquand did not accept that the conclusions reached by the expert were part of the report to which the finality provisions applied (see §54). That conclusion appears to be contrary to the express words of the Regulations which provides that the "report" shall be final and to the decision of the Court of Appeal in *Metropolitan Police Authority v Laws & Anor* [2010] EWCA Civ 1099[23]. The report is a consensus document of the Board. It would, of course, be possible for the majority of doctors to "out-vote" the specialist and to come to a different conclusion on diagnosis to the expert (although the author is not aware of this ever happening having read hundreds of PMAB reports). Absent dissent from the other members, the finality of the report applies to the essential findings of the report and not merely the concluding sections. That conclusion also flows from the change of wording from the original form of the 1987 Regulations under which finality only applied to the certificate provided by the Medical Referee. The Regulations changed to provide that finality applies to the report and not just any conclusions set out in certificate.

[22] This authority needs to be treated with considerable caution as it appears to take an idiosyncratic approach to a number of areas of the law relating to police pensions including a rather peculiar analysis of the reasoning of previous cases on psychiatric injuries which in inconsistent with the particular facts of those cases. It is unfortunate that the case was not considered by the Court of Appeal as there would have been a high chance that the decision was overturned. However, the conclusion of the case was to refer the matter back to the PMAB for reconsideration and thus the officer in that case, Mr Brown, will have a further opportunity to demonstrate his entitlement to an injury pension.

[23] See paragraph 3.66 above.

c) Thirdly, the rules make no specific provision for legal representation of parties before the PMAB but do not prohibit either. At one time, there was some resistance in Home Office Guidance to permitting appellants to be legally represented before the PMAB. That has now fallen away and both parties are routinely represented by lawyers before the PMAB. If, as seems highly likely, the PMAB process is one to which article 6 applies[24], it would be a breach of article 6 to refuse to permit either the officer or the PPA to be legally represented.

d) Fourthly, the PMAB, akin to other statutory tribunals such as the Employment Tribunal and Leasehold Valuation Tribunal, is generally a "no costs" environment, and thus the officer will not usually be required to pay the costs of setting up the hearing even if his appeal is unsuccessful.

e) Fifthly, the Force is required to pay a fee (which is understood to be in the region of £8,000) to the company operating the PMAB process for every hearing that is set up. Paragraph 8(2) of Schedule H provides for the PPA to pay expenses if the PPA seeks a late cancellation of the hearing. It provides:

> "Where a hearing has been cancelled, adjourned or postponed at the request of, or due to the actions or omissions of the police pension authority, less than 22 days (including weekends and public holidays) before the date appointed for the hearing the board of medical referees shall require the police pension authority to pay to the appellant any expenses actually and reasonably incurred by him in respect of attending or arranging to attend the cancelled, adjourned or postponed hearing as the case may be"

There is a like provision for the officer, save that it is a power, not a duty, to make a payment order. Paragraph 4 provides:

> "If the board of medical referees, after taking account of any representations from either party, decides that the cancellation, adjournment or postponement

[24] As to which see paragraph 45 above.

> as the case may be was not due to any fault on the part of the appellant and the appellant should not pay towards the cost of the cancellation, adjournment or postponement as the case may be, it shall state that this is the case and the [police pension authority] shall not require the payment of any such costs"

There is however provision which entitles (but not obliges) the PMAB to make the officer pay these costs if it considers that the appeal is "*frivolous or vexatious*": see paragraph 8(5) of Schedule H to the 1987 Regulations.

The consequences of a finding of permanent disablement or permanent unfitness.

3.71. The right of a Chief Constable, in his or her capacity as the PPA to require a disabled police officer to resign his office of constable is set out in Regulation A20 of the 1987 Regulations as follows:

> "Every regular policeman may be required to retire on the date on which police pension authority, having considered all the relevant circumstances, advice and information available to them, determine that he ought to retire on the ground that he is permanently disabled for the performance of his duty:
>
> Provided that a retirement under this Regulation shall be void if, after the said date, on an appeal against the medical opinion on which the police pension authority acted in determining that he ought to retire, the board of medical referees decides that the appellant is not permanently disabled"

3.72. There is a like power in Regulation 21 of the 2006 Regulations and in Regulation 82 of the 2015 Regulations, albeit that right is worded on the grounds that a finding has been made that the officer is permanently medically unfit (although in practice this means the same as permanent disablement under the 1987 and 2006 Regulations).

3.73. However, the Chief Constable is not obliged to require an officer who has been found to be permanently disabled or permanently medically unfit to retire. Where such an officer is able to perform some police duties but is unable to perform others due to disablement, at least three situations can arise:

a) the officer is required by the Chief Constable to retire by reason of his permanent disability (or permanent unfitness);

b) the Chief Constable decides the officer should be retained as a member of the Force in a role that is consistent with his disabilities; and

c) the Chief Constable initially makes the officer should be retained in a role that is consistent with his disabilities but (maybe some years on) the Chief Constable subsequently decides to require that officer should retire by reason of his permanent disability (or permanent unfitness).

3.74. At any time, there are a significant number of police officers who have been determined to be permanently disabled or permanently medically unit but nonetheless successfully continue to undertake valuable service as police officers and have been able to continue their careers.

3.75. The Guidance PNB 03/19 on this issue explains the decision making process recommended to be followed and provides at §40:

> "Before a permanently disabled officer may be returned to duties in a force, it will be necessary to consider the need for a risk assessment in respect of any posts he or she will be expected to hold. The key considerations are that the officer's further deployment should not:
>
> - aggravate the officer's existing disablement;
> - expose the officer to a higher risk of injury than he or she would have had if not disabled;
> - expose the public or other officers to an increased risk of injury;
> - expose the officer to a risk of being criticised or disciplined for not acting in a way which would normally be expected of an officer, but which would be inappropriate in view of the officer's disablement."

3.76. The Guidance goes on to provide details about the decision making process but states:

"41. In cases where the officer has only a few years still to serve before he or she can retire in the normal way, it will usually be sufficient for the chief constable to indicate what post the force has in mind for the officer and why. On the other hand an officer in the earlier stages of his or her career can reasonably expect to be given the prospect of continuing in the police service in a way which will enable him or her to develop capabilities and which will involve some variety of police work over the coming years. Medical retirement is likely to be appropriate where this is not the case.

42. The objective is to retain an officer in the force wherever practicable. …."

3.77. This is non-statutory guidance, but it was produced by the Police Negotiating Board before distribution by the Home Office. The legal status of non-statutory guidance was explained in *R (Ali) v London Borough of Newham* [2012] EWHC 2970 (Admin). In that case the Judge said that the Council had a legal duty to have regard to national non-statutory guidance because it "*was produced at a high level and involved those with considerable experience and expertise in the applicable area*". Although[25] the legal effect of Home Office Guidance may not have been adjudicated upon, it appears likely that a Chief Constable has a legal duty to have regard to this guidance and only to depart from it where a good reason can be established.

3.78. Further, if a Force has a policy which says that the Guidance should be followed, it will act unlawfully if the Chief Constable departs from the Guidance without a good reason to do so.

3.79. Once it has been concluded that an officer has a disability which is likely to be permanent, the Chief Constable can exercise the statutory discretion to require the officer to retire at any time and for any rational reason. Once an officer has been determined by an SMP to be permanently disabled, the officer acquires the status of being a person who is permanently disabled or permanently medically unfit for the remainder of his career. Thus, even if the officer is not immediately required to retire but is redeployed to a role that is consistent with his disabilities, the officer remains "at risk" of being required to retire at any time thereafter. There does not appear to

[25] As far as the author is aware.

be any mechanism under any of the Regulations for a retained officer who believes that he is no longer disabled or medically unfit to require the Chief Constable to refer his case back to the PPA for a new decision to be made. However there is some safeguard for an officer in this position as a result of the concluding words of Regulation A20[26] which provides:

> "Provided that a retirement under this Regulation shall be void if, after the said date, on an appeal against the medical opinion on which the police pension authority acted in determining that he ought to retire, the board of medical referees decides that the appellant is not permanently disabled"

3.80. This provision could be used to give the officer the right to object to a retirement on the grounds that, even if he was determined to be permanently disabled or permanently medically unfit by the SMP at an earlier date, by time the decision is made to require him to retire, he is no longer permanently disabled. An example of a long delay between the SMP determination and the retirement decision arose in *R (Evans) v Cheshire Constabulary* [2018] EWHC 952 (Admin). In that case there was an SMP's decision in 2007 that the officer was permanently disabled but he was not required to retire until 2016. Mistakenly, the Chief Constable referred the officer to an SMP for a second assessment in 2016, which also concluded that he was permanently disabled. However, it was accepted by the Judge that the operative SMP decision for the purposes of the police pensions scheme was the 2007 decision and not the 2016 decision. The latter decision had no legal effect as, at all times after 2007, the officer had been determined to be permanently disabled.

3.81. There is an interesting and unresolved question as to whether the power to require a permanently disabled or permanently medically unfit police officer to retire can only lawfully be used by a Chief Constable when the grounds relied upon by the Chief Constable are related to the officer's disabilities or whether it is a general power which could be used for any rational reason. It is clear that it is lawful to take the decision to require an officer to retire if there is no available post for an officer with that particular disability. But it may be different if the Force wishes to reduce costs

[26] There are like provisions in the 2006 and 2015 Regulations.

and thus seeks to make disabled officers retire because it has no general power to make other officers redundant and thus cannot make savings in any other way. Whilst such a could be challenged on the grounds of disability discrimination, it may also be unlawful on the grounds that the purpose of the power was to enable Chief Constables to require disabled officers to retire because of their disabilities and that it would be a non-*Padfield* compliant use of the power to require officers to retire for other reasons[27].

3.82. If an officer is required by the Chief Constable to retire, the officer has no choice. He ceases to be a police officer on the day when his notice runs out after being required by the Chief Constable to retire. However, provided the officer is a member of the police pension scheme, he then gets the right to an ill health pension which is payable immediately. However, in making the decision whether to require the officer to retire, the Chief Constable must comply with her equality duties under the Equality Act 2010. Thus, the Chief Constable needs to make sure that in either requiring or not requiring the officer to retire and requiring the officer to undertake a different role, the Chief Constable is not discriminating against the officer.

Can a police officer who is a member of 1987 Scheme and has been determined to be permanently disabled take his own decision to retire and claim an injury pension?

3.83. Although a finding of permanent disability or medical unfitness will not invariably lead to an officer being required to retire (as explained below), once the decision is taken, the position appears to be (although this has never been tested in litigation) that any officer who is a member of the 1987 Scheme has the option of resigning and claiming an ill-health pension. In contrast, an officer whose rights are governed by the 2006 or 2015 Regulations does not have the right to an ill-health pension unless he is required to retire by the Chief Constable.

[27] Following *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, a discretionary power can only lawfully be used by an administrative decision maker for the purpose for which the power was given and not for an unrelated purpose. For a recent example of the working out of this principle, see *R (Palestine Solidarity & Anor) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16.

3.84. This situation may arise where an officer finds himself retained and required to work in a job within the police service but which, whilst consistent with his disabilities, is not to his liking. It may be a mundane, office based job which is a long way divorced from the job he signed up and envisaged for himself when he became a police officer.

3.85. Hence, there can be a financial interest for the Force in requiring a police officer to resign on the grounds of permanent disablement. However, the overall cost to the police service of the enhanced pension may well be greater than the difference in salary levels. Further, financial savings can be made if a disabled police officer is unable to attend work (and is thus on a reduced or nil salary) as compared to the cost of paying pension costs.

3.86. The Guide to the Police Pensions Scheme 1987[28] says as follows at page 19:

> **"6.2 Ill-health pension**
>
> If you are found by the selected medical practitioner to be permanently disabled for the ordinary duties of a member of the police force, and there are no suitable alternative duties that you could undertake within the police force (taking account of both your disability and capabilities), the police authority will decide whether to retire you on those grounds.
>
> If the police authority decide to retire you, you will be entitled to an immediate ill-health pension and lump sum:
>
> - if you have at least two years' pensionable service and your retirement is on the grounds of permanent disablement, or
>
> - after any length of service if your retirement is on the grounds of permanent disablement resulting from an injury on duty.
>
> An ill-health pension is calculated in a similar way to an ordinary pension and is then normally enhanced to compensate for the lost opportunity of serving until normal retirement. The enhancements applied are shown in the table below"

[28] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/658050/PPS_Members__Guide.pdf

3.87. The Guide thus explains that a police officer is entitled to a B3 award if the ill-health retirement decision is made by the PPA. However, this Guide does not specifically address the question as to whether a police officer who has been determined to be permanently disabled and takes his or her own decision to retire (whether alternative duties are available or not) is also entitled to a B3 award, although the Annex to Section 1 appears to suggest that an entitlement to an award is (possibly only) dependent on a medical assessment of permanent disablement.

3.88. This question is not wholly clear from Regulation B3 of the 1987 Regulations which provides:

> "(1) This Regulation shall apply to a regular policeman who retires or has retired on the ground that he is or was permanently disabled.
>
> Provided that this regulation shall not apply to a regular policeman by whom pension contributions were not payable under regulation G2(1) during the period immediately preceding his retirement [or to a regular policeman who under regulations G7 and G8 is ineligible for a pension award payable on the ground of permanent disablement.
>
> (2) A regular policeman to whom this Regulation applies shall be entitled to an ill-health award as hereinafter provided.
>
> (3) In the case of a policeman who is or was at the time of his retirement—
>
> (a) entitled to reckon at least 2 years' pensionable service, or
>
> (b) disabled as the result of an injury received in the execution of duty,
>
> the award under paragraph (2) shall be an ill-health pension calculated in accordance with Part III of Schedule B, subject however to Parts VII and VIII of that Schedule.
>
> (4) In the case of any other policeman the award under paragraph (2) shall be an ill-health gratuity calculated in accordance with Part IV of Schedule B"

3.89. It seems clear that an officer who takes his own decision to retire from the Force "retires" within the meaning of the 1987 Regulations. This arises from the Glossary in Schedule A to the 1987 Regulations which provides:

> ""retirement" and cognate expressions shall be construed in accordance with Regulations A17 to A21"

3.90. Regulation A17 of the 1987 Regulations provides:

> "(1) A reference in these Regulations to retirement includes a reference—
>
> (a) to the services of a member of a police force being dispensed with under regulations for the time being in force under section 50 of the Police Act 1996 or section 26 of the Police (Scotland) Act 1967 or section 23 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 section 48 of the 2012 Act (other than regulations relating to the maintenance of discipline);
>
> (aa) to the contract under which a specified NCA officer is employed by the NCA being terminated;
>
> (ab) . . .
>
> (b) to an auxiliary policeman ceasing to be called up for active service; and
>
> (c) to the termination of a tour of overseas service otherwise than by dismissal or transfer,
>
> but does not include a reference to leaving a force—
>
> (d) on transferring from one force to another;
>
> (e) on joining the Police Service of Northern Ireland . . .; or
>
> (f) on becoming a specified NCA officer;
>
> (g) . . .
>
> and a reference to a continuous period of service is a reference to a period of service uninterrupted by any such retirement.

(2) . . .

(3) If a regular policeman is dismissed but is entitled to an ordinary pension by virtue of Regulation B1(6), these Regulations shall apply in his case as if he had retired as mentioned in Regulation B1(6)(b).

(4) . . ."

3.91. Regulation A18 refers to compulsory retirement on account of age. It provides that a "*regular policeman shall be required to retire …"* at specified ages. This wording suggests that the action of "retiring" is an action taken by the officer, but that the officer can be required to take that action in specified circumstances. The same formulation is used in Regulation A19, namely that an officer is "*required to retire*" on efficiency grounds and is also used in Regulation A20 which is concerned with the compulsory retirement on the grounds of disablement.

3.92. Regulation A21 is concerned with the "effective date of retirement". It provides:

"A21 Effective date of retirement

(1) For the purposes of these Regulations—

(a) a member of a police force shall be taken to retire or cease to serve immediately following his last day of service;

(b) a member of a police force required to retire under Regulation A18, A19 or A20 shall be deemed to retire on the date on which he is so required to retire and his last day of service shall be the immediately preceding day;

(c) a continuous period of active service as an auxiliary policeman or a tour of overseas service shall be taken to end immediately following the last day of service of the person concerned.

(2) The references in paragraph (1) to a person's last day of service are references to his last such day during the relevant period of service or, as the case may be, tour of overseas service"

3.93. It follows that the "date of retirement" under Regulation A21(1)(a) refers to a retirement of an officer which has not arisen under Regulations A18, A19 or A20. These are the only provisions under which the PPA can require an officer to retire. It follows that a "retirement" under Regulation A21(1)(a) includes a resignation by the officer. That also fits with the language of Regulation 14 of the Police Regulations 2003 which provides for the Secretary of State to make directions about the notice to be given by police officers who retire.

3.94. Some Forces have argued that Regulation B3 only applies if the Force makes the decision to require the officer to retire because the officer can only retire "*on the ground that he is or was permanently disabled*" if a decision is made by the Force to require him to retire. Whilst this is a possible interpretation, there appear to be a series of problems with this interpretation.

3.95. That approach appears to be inconsistent with the only case on the issue, namely *R (Sharp) v Chief Constable of West Yorkshire & Anor* [2016] EWHC 469 (Admin). In that case, PC Sharp resigned on 4 November 2011 and made an application for an ill-health award under Regulation B3 of the 1987 Regulations in February 2013, based on his psychiatric illness during his period of service. The issue in the case was whether the former police officer was permanently disabled. The Judge said as follows at §32 and §33:

> "32. In the light of reg A(12) I agree …. that in order to determine whether an officer is entitled to an ill health award it is necessary to ask three questions:
>
> 1. Does the police officer (or former police officer) suffer from an infirmity of mind or body?
> 2. Does that infirmity cause the police officer to be unable to perform his duties as a police officer?
> 3. Is that inability to perform the duties as a police officer likely to be permanent?
>
> 33. The police officer will be entitled to an award if, and only if, the answer to each of these questions is in the affirmative"

3.96. This formulation suggests that an enforced retirement is not a condition which has to be satisfied by a former police officer who seeks an award under Regulation B3. That approach is also consistent with the provisional view expressed by Charles J in *R (Ashton) v Police Medical Appeal Board & Anor* [2008] EWHC 1833 (Admin) at §21 where he said

> "I pause to comment that in my view, on a first reading the wording of Regulation B3 is capable of a wider meaning to include a retirement by the Claimant on the basis of her permanent disablement"

3.97. In that case no detailed submissions were made about this and hence the view expressed by Charles J is only provisional. Equally, in *Sharp* no submissions were made on behalf of the Chief Constable that Mr Sharp had no entitlement to a B3 pension because he had not been required to retire as a result of the decision made by the Chief Constable under Regulation A20.

3.98. The contrary argument is that the words "*on the ground that"* in Regulation B3 refer back to Regulations A18 to A20, all of which relate to grounds that a Chief Constable can rely upon to require an officer to retire. However, if the intention of the drafters of Regulation B3 was that it should only apply to an officer who is required to retire, the Regulation could easily have said so (and would not have provided that an ill-health pension was payable to an officer who retired at his own election and then developed an illness which would have led to him not being able to perform police duties). The answer to this point appears to be that the key word is "retire" (which suggests that this includes a decision by the officer) as opposed to "required to retire" (which suggests a decision imposed on the officer).

3.99. The position is not made clear by the use of the words "*is or was permanently disabled*" in Regulation B3(1). That appears to be a reference to either the former officer's present state (i.e. the former police officer is permanently disabled at the date when the application is made for the ill-health pension) or is looking back to an

undefined former reference date at which point the former officer "*was permanently disabled".*

3.100. However, if a person was determined by an SMP to be permanently disabled at a point in the past, the usual assumption would be that the individual continues to be permanently disabled. However, the use of the words *"is or was …"* suggests that a former officer can qualify under this Regulation even if he or she was not permanently disabled at the earlier reference date. Thus an officer who was determined to be permanently disabled in the past who recovers his health remains entitled to an ill-health pension unless the Force offer to re-engage the officer: see Regulation K1(2).

3.101. In contrast to the potential ambiguities under the 1987 Scheme, the position under the 2006 Scheme is clear. Regulation 29(1) of the 2006 Regulations which sets out the qualifying criteria for entitlement to an ill-health pension provides:

> "This regulation applies to a regular police officer who retires or has retired under regulation 21 (compulsory retirement on the ground of disablement"

It follows that a police officer who is a member of the 2006 Scheme and who retires without being required to do so, is not entitled to an ill health pension even if the officer subsequently becomes disabled. That appears to be wording which indicates a change of policy, which is another argument to support the case that the member of the 1987 Scheme has this right.

3.102. If an officer can be awarded an ill-health pension under 1987 scheme for an illness or injury that arises either before or after he has resigned consequent upon an SMP assessment which is carried out after his service as a police officer has ended, it appears illogical to suggest that an officer cannot be awarded where the assessment is carried out during his period of service.

3.103. The same approach to voluntary retirements in the 2006 Scheme is taken by the 2015 Scheme: see Regulation 102 of the 2015 Regulations. Thus a police officer who

is a member of the 2015 Scheme and who retires without being required to do so is not entitled to an ill health pension.

From which date is the ill-health pension payable?

3.104. The officer's pension is payable from the date when officer retired or such later date when the officer became disabled if that was at a later date: see Regulation A12(4) of the 1987 Regulations and the cases of *R (Sharp) v West Yorkshire Police & Anor* [2016] EWHC 469 (Admin) and *R v Tully*[29].

[29] Unreported but the transcript shows it was a decision of HHJ Morris of 30 November 2006 at Cardiff Crown Court. Anyone who needs a copy of this judgment is invited to contact David Lock QC.