



Neutral Citation Number: [2020] EWHC 287 (Admin)

Case No: CO/2464/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2020

Before :

MR JUSTICE JOHNSON

Between :

**THE QUEEN
ON THE APPLICATION OF
ANTHONY WEED**

Claimant

- and -

**COMMISSIONER OF POLICE OF THE
METROPOLIS**

Defendant

Colin Banham (instructed by Slater & Gordon) for the Claimant
Robert Cohen (instructed by Directorate of Legal Services, Metropolitan Police Service) for the
Defendant

Hearing date: 5 February 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MR JUSTICE JOHNSON

Mr Justice Johnson :

1. This case concerns the discretion to award a police officer sick pay beyond the minimum required under the statutory framework (“discretionary sick pay”). The Claimant was a police officer in the Metropolitan Police Service (“MPS”). In February 2013 he was the officer in the case (“OIC”) in an indecent assault prosecution. His conduct came under scrutiny. This triggered a sequence of events which resulted in him suffering psychiatric injury. He took sick leave. He remained on full pay for six months. His pay then reduced to half pay for six months, with no pay thereafter. He did not return to work and he was medically retired in 2016. He has received an injury on duty award and is in receipt of an ill-health pension. He sought discretionary sick pay for the period 2013-2016. Ultimately he was granted discretionary sick pay for a short period in 2014 and for a period between 2015 and 2016 whilst his entitlement to an ill-health pension was under consideration. Otherwise his claim for discretionary sick pay was refused. He challenges that refusal. He says that the refusal to grant him discretionary sick pay in full is irrational and a breach of a legitimate expectation. He relies on a finding made by an independent appeals body, made for the purposes of determining his pension entitlement, that he has suffered a permanent disability as a result of an injury incurred in the execution of duty.

The facts

2. The Claimant worked in the MPS Child Abuse Investigation Team from 2006. He was subject to regular psychological testing. In 2009 he was the OIC for the prosecution of a man who was charged with indecent assault. He showed one of the complainants in the case statements that had been made by other witnesses. This resulted in the jury being discharged. The re-trial took place in November 2009. The defendant was convicted and sentenced to 10 years imprisonment. Following the trial other complainants came forward and the defendant was charged with further offences. The trial commenced in February 2013. Criticisms were made on behalf of the defendant as to the Claimant’s approach to disclosure. The Judge recorded that it became clear that the Claimant’s involvement with the three complainants “may have gone beyond what would normally be expected of a police officer with the duties assigned to him.” The Judge made directions for the Claimant’s mobile telephone calls and texts to be investigated and for the Claimant to make a statement as to his involvement with the complainants.
3. On 15 February 2013 the Claimant’s mobile phones and Filofax were seized. He was removed from his role as OIC. At that point the Claimant suffered what was described to the Judge as “a mental breakdown”. The jury were discharged and the trial was re-fixed to be heard in August 2013.
4. On 9 May 2013, when the Claimant had been on sick leave for 86 days, he was informed that he would move on to half pay if he was still absent at the six month point, but that he had the option to make representations as to why he should remain on full pay. The Claimant did not make any representations. On 14 June 2013 Assistant Commissioner (“AC”) Allison decided that there were no grounds for the Claimant to remain on full pay and that he would therefore move to half pay from the six month point. The Claimant was given a right to appeal against this decision. He did not pursue an appeal.

5. The Claimant remained on sick leave when the criminal trial was heard. It went ahead without evidence from him. The jury were unable to reach verdicts on 4 counts and a re-trial was ordered, to be heard on 2 October. The Judge then re-assessed the position of the Claimant. He considered that there was evidence that the Claimant was deliberately trying to frustrate the process of giving evidence. After considering the expert evidence of two psychiatrists he concluded that, if anything, the Claimant was suffering from work related stress and that although he was signed off from operational duties that did not preclude him from providing answers to questions put by the parties to the criminal proceedings. He made directions accordingly.
6. The Claimant was subsequently informed that he would move to no pay with effect from the one year point, ie 14 February 2014. He made representations that he should remain on half pay. On 6 February 2014 the Claimant was informed that AC Allison had decided that he should remain on half pay until 24 March, but that he would move to no pay thereafter if he was still absent from work. The rationale was that this period of time would allow for the outstanding trial to conclude and for the Claimant to prepare for a return to work. The Claimant did not return to work. He appealed against the decision not to award discretionary sick pay after 24 March. On 20 June 2014 AC Rowley informed the Claimant that he had decided not to grant discretionary sick pay. The Claimant did not therefore receive any sick pay from 24 March 2014.
7. On 17 December 2014 the Claimant made further representations as to why he should receive pay, notwithstanding his long period of sick leave. AC Gallan notified the Claimant on 27 April 2015 that she would not exercise discretion to allow him to be paid because she did not consider that there had been any change in circumstances to merit such an exercise of discretion.
8. In the meantime, in February 2015, the Claimant applied to retire from the MPS on the grounds that he was permanently disabled from performing the ordinary duties of a police officer. On 11 June 2015 his case was referred to the Selected Medical Practitioner (“SMP”) under the Police Pensions Regulations 1987. On 18 April 2016 the SMP certified, for the purposes of those Regulations, that:
 - (1) the Claimant was disabled from performing the ordinary duties of a member of the police force;
 - (2) The disability was in respect of the conditions (a) PTSD and (b) depression;
 - (3) Both of these conditions, and the resulting disablement, were likely to be permanent.
9. As a result, the Claimant retired from the MPS on 22 July 2016.
10. On 2 August 2016 AC Hewitt decided that the Claimant should receive full pay in respect of the period between 11 June 2015 until 22 July 2016 (ie the period between the referral of the case to the SMP and the Claimant’s retirement). This accorded with the Defendant’s Standard Operating Procedure (“the SOP”), and with guidance of the Police Negotiating Board (“the PNB guidance”), that full pay should be granted during this period – see paragraphs 27-28 below (at paragraph 7 of the guidance, and paragraph 7.1 of the SOP).

11. The Claimant's solicitors wrote a pre-action letter asking that the Claimant be granted full discretionary sick pay in respect of the period from 14 August 2013 (when he had moved to half pay). It was said that the Claimant's disablement was the result of an injury received in the execution of his duty and that this merited the exercise of discretion in his favour in accordance with the PNB guidance.
12. The Defendant responded by a letter of 9 January 2017. That letter said that even if AC Hewitt had been entitled to review the earlier decisions (which was not accepted) it was not open to him to award discretionary sick pay on the ground that had been advanced unless or until the SMP determined that the Claimant's disablement was the result of an injury received in the execution of duty (see paragraph 52 below). The Claimant argues that this gives rise to a legitimate expectation that the Defendant would exercise discretion to grant the Claimant sick pay if it was established that the Claimant's permanent disablement was the result of an injury received in the execution of duty (see paragraphs 51-57 below).
13. On 15 February 2017 the SMP decided that the Claimant's conditions were not the result of an injury received in the execution of duty. The Appellant appealed against that decision. The appeal was determined by the Police Medical Appeal Board ("PMAB") on 5 September 2017, in accordance with the Police Pensions Regulations 1987 and the Police (Injury Benefit) Regulations 2006. The PMAB did not agree with the diagnosis of PTSD. It said:

"...the Board does not feel that the PTSD diagnosis is substantiated, and although there were, in the Board's view, some depressive features of his illness, it is clear that the underlying psychological illness as presented to the Board was anxiety with elements of phobic anxiety and some depressive features. It is therefore a mixed anxiety and depression disorder but with the attributes of anxiety to the fore and depression much more a minor component. ...

In this case the Board is of the view that the Appellant does have anxiety with some depressive features and specific phobic anxiety and the Board is also of the view that this will be determined as an injury under the Regulations..."

14. The PMAB considered that the injury was likely to be permanent, and that it was sustained in the execution of duty. It said:

"...The upsetting events that he sustained were experienced while he was undertaking his duties in a Court whilst waiting to appear as the Officer who had managed the Police case for the prosecution. The Board is of the view that being in Court to manage this case, and undertaking this role, was part of his normal duties. If one looks at the PMAB guidance which lists the ordinary duties of a member of the Police Force, one of the ordinary duties is dealing with procedures, including prosecution proceedings, managing case papers and giving evidence in Court. Therefore in his case it is quite clear that he was actually executing one of the core duties of a member of a

Police Force, and it was whilst executing this duty that he sustained the index injury.”

15. On 11 May 2018 the Claimant’s solicitors wrote to the Defendant and referred to the decision of the PMAB. They said:

“We are therefore writing to request that the MPS consider exercising its discretion to extend [the Claimant’s] pay for the period 14 August 2013 to 10 June 2015 in the light of the finding of the PMAB that [the Claimant’s] disablement is the result of an injury received in the execution of his duty.”

16. In the absence of a substantive response, the Claimant’s solicitors sent a pre-action letter dated 28 November 2018. On 1 February 2019 the Claimant made detailed representations as to why he should receive discretionary sick pay in full for the period claimed. On 18 March 2019 AC Ball decided not to reinstate the Claimant’s pay for the period 14 August 2013 to 10 June 2015. She said:

“The MPS guidelines give ‘indicative examples’ of when favourable discretion would or would not be exercised. In considering these, while each case must be considered individually, I note that “an officer suffering medically diagnosed post-traumatic stress disorder as a result of the performance of police duty” would normally attract favourable discretion, whereas “stress related illness (including psychiatric illness) resulting from working conditions generally” would not.

I note the decision of the PMAB that the correct diagnoses is not of PTSD but of “anxiety with depressive features and phobic anxiety”. Therefore I do not believe that the PTSD provision applies. I also do feel that [the Claimant’s] circumstances fit the stress related illness provision. The original events at court are not more than an officer, who must expect to be held to account, could reasonably be expected to deal with, and – as my colleague AC Rowley found – [the Claimant’s] own inappropriate behaviour triggered a chain of events which then led to the disclosure of his records.

Although not a factor in my decision, I wish to note that Mr Weed was afforded very extensive support by the MPS to return to work, at which point his pay would have been reinstated. He decided repeatedly not to engage in efforts to support his return.”

17. This is the decision that is challenged in these proceedings.

Statutory and policy framework

The Police Act 1996

18. The Police Act 1996 consolidates earlier legislation in relation to the governance of the police. Section 50 of the Act gives the Home Secretary power to make regulations that make provision with respect to the leave, pay and allowances of members of police forces:

“50 Regulations for police forces

- (1) Subject to the provisions of this section, the Secretary of State may make regulations as to the... conditions of service of police forces.
- (2) Without prejudice to the generality of subsection (1), regulations under this section may make provision with respect to-
- ...
- (j) the... leave, pay and allowances of members of police forces...
- ...
- (4) In relation to any matter as to which provision may be made by regulations under this section, the regulations may-
- (a) authorise or require provision to be made by, or confer discretionary powers on...chief officers of police...
- ...”

19. Section 36 of the Act requires the Home Secretary “to exercise his [power to make regulations under section 50] in such manner and to such extent as appears to him to be best calculated to promote the efficiency and effectiveness of the police.”

The Police Regulations 2003 and the Home Secretary’s determinations

20. The Police Regulations 2003 were made under section 50 of the 1996 Act.
21. Regulation 33(5), together with a determination made thereunder, regulates sick leave, broadly requiring that an officer may only take sick leave when certified as unfit for duty by a medical practitioner.
22. Part 4 of the Regulations makes provision in respect of pay. Regulation 28 states:

“28 Sick pay

The Secretary of State shall determine the entitlement of members of police forces to pay during periods of sick leave taken in accordance with a determination under regulation 33(5), and in making such a determination the Secretary of State may confer on the chief officer discretion to allow a

member of a police force to receive more pay than that specified in the determination.”

23. The Home Secretary has made a determination in accordance with regulation 28. That states:

“ANNEX K

**DETERMINATION
FOR REGULATION
28
SICK PAY**

1) Subject to paragraph (2), a member of a police force who is absent on sick leave, in accordance with Regulation 33(5), shall be entitled to full pay for six months in any one year period. Thereafter, the member becomes entitled to half pay for six months in any one year period.

...

3) The chief officer of police may, in a particular case determine that for a specified period

- a) A member who is entitled to half pay while on sick leave is to receive full pay, or
- b) A member who is not entitled to any pay while on sick leave is to receive either full pay or half pay, and may from time to time determine to extend the period.

...”

24. The discretion that is afforded to the chief officer under this determination is, in practice, exercised in the MPS by an Assistant Commissioner.

PNB Guidance in respect of discretionary sick pay

25. The PNB existed (until 1 September 2014) by virtue of section 61 Police Act 1996. It was a body that had responsibility for considering (amongst other matters) questions relating to leave and pay of police officers. It made recommendations to the Home Secretary which, by virtue of section 62(1), the Home Secretary was required to take into account when making regulations under section 50.

26. The PNB has promulgated guidance in respect of the exercise by chief officers of their discretion to grant discretionary sick pay to officers who have been on sick leave for more than six months. That guidance does not have any explicit statutory authority. There is no explicit statutory obligation on the part of chief officers to have regard to it. However, the guidance represented an agreement that was reached by the PNB which included a person representing the Defendant’s interests (see section 61(1)(c)). The Defendant accepts, for the purposes of these proceedings, that it would have been unlawful to ignore the guidance. Put another way, the Defendant accepts that the MPS was obliged to have regard to the guidance.

27. The guidance is contained in PNB Circular No 5/01. It states:

“Guidance to chief officers on the use of discretion to resume/maintain paid sick leave

1. The Secretary of State's determination of sick pay under regulation 28 of the Police regulations 2003 provides that a member of a police force who is absent on sick leave shall be entitled to full pay for six months in any one year period. Thereafter, the member becomes entitled to half pay for six months in any one year period.

2. The chief officer of police may in a particular case determine that for a specific period:

- A member who is entitled to half pay while on sick leave is to receive full pay;
- Or that a member who is not entitled to any pay while on sick leave is to receive either full pay or half pay.

...

5. The decision to exercise the relevant discretion is one for the chief officer who must consider each case on its merits. A force cannot have a fixed policy that discretion always will or will not be exercised in a particular kind of case. It is however possible for forces to lay down guidelines to promote fairness and consistency in the decision making process, so long as the possibility of exceptions is not ruled out.

6. The PNB recommends that forces have a written policy on the exercise of discretion. Such a policy should:

- Set out the procedure by which decisions will be reached
- Include an appropriate opportunity for an affected officer to make representations prior to the decision being made
- Provide for a periodic review of decisions
- Set out guidelines in relation to the exercise of discretion, while emphasising that each case should be considered on its merits
- Have due regard to relevant legislation, including the Disability Discrimination Act

7. Whilst each case must be considered individually, the PNB considers it would generally be appropriate for chief officers to exercise the discretion favourably where:

- The chief officer is satisfied that the officer's incapacity is directly attributable to an injury or illness that was sustained or contracted in the execution of his/her duty

...

- The case is being considered in accordance with the PNB Joint Guidance on Improving the Management of Ill Health

and the police authority has referred the issue of whether the officer is permanently disabled to a selected medical practitioner

...

9. Chief officers are reminded that these guidelines do not remove the obligation to consider each case on its merits. A chief officer may decide to exercise discretion favourably in circumstances not covered by the guidelines set out above or may decide not to exercise discretion favourably in a case which is covered by those guidelines. In particular a chief officer may decide not to exercise the discretion where:

- There is evidence of default or neglect on the officer's part;
or
 - The officer's actions may be delaying the process of recovery; or
 - The officer is unreasonably failing to co-operate with a rehabilitation programme, or with an adjustment to facilitate a return to duty within a reasonable timeframe, or to comply with requests to attend medical examinations or to supply medical information; or
 - The officer is actively engaged in a business interest during the period of absence
- ..."

MPS policy on discretionary sick pay

28. The Defendant has promulgated policy in relation to her approach to discretionary sick pay. That is contained in the SOP, which is entitled "Guidance notes in relation to Attendance Management." It states:

"1. Introduction

1.1 The Police Regulations 2003 set out that all officers will automatically go to half pay after 183 days of sickness absence and off pay after 366 days of sickness absence unless an Assistant Commissioner (AC) has exercised discretion...

...

1.3 Every officer, by virtue of the nature of their office, faces unique risks in the execution of his or her duty to prevent crime, preserve order and protect life and property and the...AC... may in a particular case decide to exercise discretion to retain an officer on full or half pay.

1.4 Whilst each case must, by law, be considered individually, it is expected that discretion will be exercised favourably where:

– the injury or illness is sustained or contracted in the course of the performance of the duties of the office of Constable...

1.5 It should also be noted that:

- the question of whether an injury or illness was sustained in the execution of duty for the purposes of the Police Pensions Regulations 1987 is not the relevant test and has a specific and broad meaning within those Regulations extending beyond those cases where it will normally be appropriate to exercise discretion.

...

7. **Ill-health Retirement**

7.1 ...in accordance with [the PNB guidance] discretion may be exercised at the stage when the... issue of whether the officer is permanently disabled [has been referred] to a Selected Medical Practitioner (SMP).

...

13. **Indicative examples of when favourable discretion would or would not be exercised when considering an extension to full pay for police officers**

13.1 Whilst each case must by law be considered individually, it is not possible to give a precise definition of all categories of cases; the following examples may help you to clarify a particular case.

...

13.4 Illness

13.4.1 The following are examples, which **would** normally attract favourable discretion:

...

- an officer suffering from a serious viral infection contracted from a victim during rescue or resuscitation;
- an officer suffering illness as a result of contact with a contaminated hypodermic needle during a search of a person or premises;
- an officer contracting a contagious disease from a prisoner, and
- an officer suffering medically diagnosed post-traumatic stress disorder as a result of the performance of police duty

13.4.2 The following are examples, which **would not** normally attract favourable discretion:

- chronic illness unrelated to any particular source or cause arising from the specific duties relating to the office of constable;
- illness incapacitating an officer from the ordinary duties of a police constable but which would not be incapacitating for other occupations;

- stress related illness (including psychiatric illness) resulting from working conditions generally;
- an officer failing to co-operate with a rehabilitation programme or comply with requests to attend medical examinations or supply medical information; and
- the officer is actively engaged in a business interest during the period of absence.”

Police ill-health pension and injury benefits

29. The Police Pensions Act 1976, the Police Pensions Regulations 1987 and the Police (Injury Benefit) Regulations 2006 provide a framework for police pensions, including provision for officers who retire through ill-health or injury.
30. By regulation 11 Police (Injury Benefit) Regulations 2006 (previously regulation B4 of the 1987 Regulations) a police officer who ceases to be a member of a police force and is permanently disabled as a result of an injury received without his own default in the execution of his duty is entitled to an injury award. The questions of whether an officer is permanently disabled, or whether disablement is the result of an injury received in the execution of duty, are determined by the SMP with a right of appeal to the PMAB (see regulation 30 of the 2011 Regulations, read with regulations H1 and H2 of the 1987 Regulations).
31. There is a well-developed body of case law on the question of whether, for the purposes of the 1987 and 2006 Regulations (and previous legislation to similar effect), an injury has been received in the execution of duty, particularly in cases of psychiatric injury and/or stress related illness. A consistent theme is that a “benevolent interpretation” is required – see *Garvin v Police Authority for City of London* [1944] KB 358 *per* Viscount Caldecote LC at 361. The principles that may be derived from the authorities were summarised as follows by Lambert J in *Chief Constable of Avon and Somerset Constabulary v Police Medical Appeal Board* [2019] EWHC 557 (Admin) at [16]:

“a. The test is whether the person’s injury is directly and causally connected with his service as a police officer. The causation test is not to be applied in an overly legalistic way as it is a relatively straightforward concept and one which falls to be applied in practice by medical rather than legal experts. The reference to a direct causal link does not therefore mean that fine distinctions are to be drawn between direct and indirect causes of the injury but there must be a substantial causal connection between the injury and the person's service as a police officer.

b. The causal connection must be with the person’s service as a police officer, not simply with his being a police officer. In this context, duty is not to be given a narrow meaning. It relates not just to operational police duties but to all aspects of the officer's work and to the officer's work circumstances. A sufficient causal connection may be established with events experienced by the officer at work, whether inside or outside the police

station and including such matters as things said or done to him by colleagues at work. It is not necessary to establish that work events or work circumstances are the sole cause of the injury provided that there is a substantial causal connection.

c. The “one common element” in each case in which the injury was held to have been sustained in execution of duty as the existence of an event or events, conditions or circumstances which impacted directly on the physical or mental condition of the claimant while he was carrying out his duties which caused or substantially contributed to physical or mental disablement...”

32. In the present case, of course, the PMAB has determined that the Claimant has sustained an injury in the execution of his duty. Despite a faint suggestion that the PMAB could lawfully have reached a different conclusion, its finding has not been challenged by the Defendant.

Does the PMAB finding mandate a grant of discretionary sick pay?

33. Mr Banham, for the Claimant, developed a sustained and sophisticated overarching argument to the effect that the PMAB finding mandated a grant of discretionary sick pay. It is put this way in the grounds of challenge:

“No reasonable person making the Decision... would have refused to extend/reinstate the Claimant’s pay, in that there was... a decision from the PMAB establishing that the Claimant met one of the criteria where it [would] be appropriate to exercise the discretion favourably.”

34. Strands of the overarching argument find voice in each of the grounds of challenge. It is convenient to address it before turning to the individual grounds.
35. Mr Banham relied on paragraph 7 of the PNB guidance as advocating a favourable exercise of discretion where an officer has sustained an injury in the execution of duty. He points out that nothing in the Police Regulations 2003 or the determinations thereunder refer to an injury sustained in the execution of duty. It is a concept that comes from regulation B4 Police Pensions Regulations 1987 (now regulation 11 of the Police (Injury Benefit) Regulations 2006, but I shall refer to the 1987 Regulations because they were in force at the time of the PNB guidance and the SOP). Nothing in the PNB guidance suggests that the words are intended to have a different meaning to that which they bear in those Regulations (as explained in the authorities). Moreover, the PNB guidance resulted from a PNB agreement that was reached on 9 May 2002. That agreement also extended to the promulgation of guidance in relation to the management of ill-health retirement. Accordingly, at the time of drafting the PNB guidance the PNB had the provisions relating to ill-health retirement well in mind. The PNB must therefore have been using the phrase “injury... sustained... in the execution of... duty” as a term of art with the same meaning as that which applies under the 1987 Regulations. The PNB guidance is important and has “primacy” over the SOP. The PNB was created to provide a form of protection for police officers given that they are prohibited from belonging to trade unions or engaging in industrial

action – see *Staff Side of the Police Negotiating Board v Secretary of State for the Home Department* [2008] EWHC 1173 (Admin) [2013] 1 WLR 444 *per* Keene LJ at [2] and [13]-[15]. The PNB guidance, and the SOP, must be interpreted in that light, requiring a “benevolent” interpretation that is favourable to officers. The indicative examples given in the SOP show that the SOP seeks to mirror the approach taken in the authorities on the 1987 Regulations. In particular, the SOP recognises that medically diagnosed PTSD sustained as a result of the performance of duty would normally attract favourable discretion, whereas a stress related illness resulting from working conditions generally would not do so. Here, there is an unchallenged finding that the Claimant did sustain a medically diagnosed psychiatric injury in the execution of his duty. Accordingly, he was entitled to a favourable exercise of discretion.

36. I recognise the force of individual component parts of this submission. However, for the reasons that follow, I do not consider that the MPS was required to formulate policy to the effect that discretionary sick pay would necessarily be granted to those who are entitled to an injury pension under the 1987 Regulations due to suffering an injury in the execution of duty. Nor does the MPS policy have that effect.
37. If the Home Secretary had intended to draw the same boundaries for discretionary sick pay as those that apply to injury awards under the 1987 Regulations then regulation 28 (and/or the determination thereunder) would have been drafted very differently. Neither the regulation nor the determination requires a favourable exercise of discretion where an injury has been sustained on duty. The determination requires that a discretionary assessment is made in each case by the chief officer. The PNB Guidance emphasises that (1) it is for the chief officer to exercise her discretion, (2) that discretion must be exercised on the facts of a particular case, and (3) there should be no fixed policy that discretion will or will not be exercised in a particular kind of case (see paragraphs 2, 5, 7 and 9 of the guidance, quoted at paragraph 27 above). The reference to favourable exercise of discretion in cases of injury sustained in the execution of duty is itself immediately preceded by recognition that each case must be considered individually. It is also qualified as it being what the PNB “considers” to be “generally” appropriate.
38. The PNB guidance recommends that individual forces create their own policy guidelines in relation to the exercise of discretion. That is what the MPS has done by promulgating the SOP. There is no discrete challenge to the SOP. Regard was clearly had by the MPS to the PNB guidance when formulating the SOP – see paragraph 7.1 (see paragraph 28 above). The content of the SOP makes it clear beyond argument that it was not intended to mirror the test applied under the 1987 Regulations – see paragraph 1.5: “the question of whether an injury... was sustained in the execution of duty for the purposes of the [1987 Regulations] is not the relevant test”. The SOP makes it clear that the boundaries for a favourable exercise of discretion are more tightly drawn than the test under the 1987 Regulations – see paragraph 1.5: “[the test under the 1987 Regulations] has a specific and broad meaning extending beyond those cases where it will normally be appropriate to exercise discretion.”
39. The indicative examples that are given in the SOP are inconsistent with a policy intention to mirror the approach taken under the 1987 Regulations. For example, active engagement in a business interest ordinarily precludes the favourable exercise of discretion, whereas this is irrelevant to the test under the 1987 Regulations. The SOP cannot therefore be taken as requiring the same approach as that prescribed 1987

Regulations, such that discretionary sick pay should be granted in any case where the officer has sustained an injury in the execution of duty, giving that phrase a benevolent interpretation.

40. Nor was there any requirement for AC Ball herself directly to apply or follow the PNB guidance. The PNB guidance was taken into account when the SOP was formulated. It was the SOP, not the PNB guidance, which regulated AC Ball's decision making. She was required, in exercising her discretion, to follow the SOP, or at least not to depart from it without good reason. That SOP, for the reasons I have given, did not require a favourable exercise of discretion just because the PMAB had found that the Claimant had sustained an injury in the execution of his duty.

Ground 1: Irrationality

41. The platform for the Claimant's irrationality challenge is the PMAB's finding that he had sustained an injury in the execution of duty. He argues that in the light of this finding no reasonable person could have refused to reinstate the Claimant's pay. Insofar as the argument is based on the contention that the PNB guidance has the effect of requiring a grant of discretionary sick pay where an officer has suffered an injury in the execution of duty, I reject it for the reasons given in paragraphs 36-40 above.
42. It is said that AC Ball failed to have regard to the true purpose that underpins regulation 28. I do not, however, consider that it was necessary (or even particularly appropriate) for AC Ball to undertake her own analysis of the legislative intent that underpinned regulation 28 of the 2003 Regulations. She was applying a detailed SOP which itself had been drafted in the light of guidance from the PNB. In the absence of any challenge to the SOP she was entitled to use that as a framework for her decision making.
43. It is then said that AC Ball failed properly to consider the circumstances by which the Claimant was injured. I do not agree. She explicitly referred to the PMAB's findings and considered the circumstances in which the Claimant had suffered injury against the illustrative examples given in the SOP.
44. The Claimant says that his breakdown was contributed to or caused by duty-related incidents, that there were specific events that affected his psychiatric wellbeing, and that AC Ball could not rationally conclude that it had been caused by "work conditions generally".
45. It was for AC Ball, not the Court, to make a decision by reference to the policy. It is not sufficient to show that a different decision maker may have exercised their discretion in a different way. AC Ball's decision can only be impugned on public law grounds. In my judgment it was open to her to conclude that the Claimant's case did not "fit" within any of the indicative examples where discretionary sick pay would ordinarily be granted, but that it did "fit" within the indicative example of a stress related illness resulting from working conditions.
46. The Claimant argues that his case should have been accepted as falling within (or close to) the category of "medically diagnosed [PTSD] as a result of the performance of police duty". Mr Banham says that all the weight of this indicative example should

be placed on “medically diagnosed” rather than “PTSD” and that so long as there was a medically diagnosed psychiatric injury occasioned by police duty then the label that attaches to the injury should not matter.

47. I agree with Mr Banham that the SOP was merely providing indicative examples that were not intended to be read in a narrow or legalistic manner. Rather, they were an aid to the exercise of a broad discretionary assessment. However, AC Ball was entitled to attach significance to the reference to PTSD. Paragraph 1.3 of the SOP recognised that police officers face “unique risks in the execution of [their] duty to prevent crime.” This seems to me naturally to contemplate the types of particularly traumatic event that may precipitate PTSD. This may be contrasted with more general working conditions that might trigger a stress related illness (falling short of PTSD) and which are not a unique feature of police officers’ duties to prevent crime. AC Ball was entitled to interpret the SOP as broadly indicating a grant of discretionary sick pay in the former but not the latter type of case.
48. The Claimant then argues that in the absence of a specific test in the SOP to determine whether discretionary sick pay should be granted, it was irrational not to follow the established line of authority relating to the 1987 Regulations. I disagree. Of course the SOP did not prescribe a test in the sense of determining what the outcome should be in every particular case. That would be inconsistent with the requirement for an individualised discretionary assessment. It did, however, provide a sufficient basis to enable a decision to be made. Moreover, it would, in my judgment, have been quite wrong for AC Ball to make a decision on discretionary sick pay simply on the basis of the test that applies to the grant of an injury pension. The SOP made it explicitly clear that that was not the test to be applied here.
49. Accordingly, I reject the Claimant’s contention that AC Ball’s decision was flawed on the ground that it was irrational.

Ground 2: Unfairness

50. The unfairness challenge is put, variously as:
 - (1) Breach of a legitimate expectation;
 - (2) Procedural unfairness;
 - (3) Taking account of irrelevant considerations;
 - (4) Giving insufficient reasons.

(1) Breach of a legitimate expectation

51. The Claimant argues that he had a legitimate expectation that his pay would be reinstated upon a finding that he had suffered an injury on duty. The decision of AC Ball unjustifiably (and unfairly) departed from that expectation.
52. In order to establish a legitimate expectation based on a representation as to how a public body will act it is necessary to establish that the representation is clear and unambiguous – see *R v Commissioners of Inland Revenue ex parte Unilever PLC* [1996] STC 681. The representation on which the Claimant relies to establish a

legitimate expectation that his pay would be reinstated is the following extract from the letter of 9 January 2017 (see paragraph 12 above):

“Assuming that it was open to AC Hewitt to, in effect, review the earlier decision of AC Allison, AC Rowley and/or AC Gallon (which, for the avoidance of doubt, is not accepted), unless and until there had been a determination by the SMP that the Claimant’s permanent disablement was the result of an injury received in the execution of duty, it was simply not open to him to exercise the discretion based upon the fifth “example” of illnesses which would normally attract favourable discretion ie the Claimant’s absence from duty since the 13th February 2013 was due to his “*suffering medically diagnosed post-traumatic stress disorder as a result of the performance of police duty*” [emphasis as in the letter].

53. This representation was subject to a condition being met. The condition was that the SMP determine that the Claimant’s permanent disablement was the result of an injury received in the execution of duty. In substance, this condition was met: although the SMP did not make the specified determination, it was made by the PMAB on appeal from the SMP.
54. Read strictly, the representation was not explicitly to the effect that a decision on sick pay would be made once the condition was satisfied. Rather, it was that a decision could not be made unless or until the condition was satisfied. Moreover, it was predicated on an assumption (which was expressly not at that stage accepted) that an earlier decision could be reviewed.
55. I am prepared to accept that in all the circumstances the representation could reasonably be taken as a promise that once the condition was met, and once it was accepted that it was open to the MPS to make a fresh decision, then a fresh decision would be made. However, nothing in the representation amounts to a promise as to what the decision would be. A statement that it is not open to a decision-maker to exercise a discretion until a condition is met does not amount to a promise that once the condition is met the discretion will be exercised in a particular manner. At best, it is a promise that a decision will be made, rather than a promise as to what the decision will be. Moreover, the context in which the representation was made is such that it could not reasonably be interpreted as a promise that sick pay would be reinstated. That is because the SOP shows that a favourable decision by the PMAB is not, in itself, a sufficient reason to exercise the discretion to grant sick pay.
56. Further, the representation was made upon the basis that there was a medical diagnosis of PTSD. That was the case at the time the representation was made because that was the diagnosis of PTSD made by the SMP. However, that diagnosis was overturned by the PMAB. A foundational platform for the representation fell away at that point.
57. Accordingly, the Claimant has not shown that the Defendant made a sufficiently clear and unambiguous promise that he would receive sick pay if the SMP/PMAB decided that he had sustained an injury in the execution of duty. The claim for breach of a legitimate expectation therefore fails.

(2) Procedural unfairness

58. The Claimant says that the decision making process was unfair because he was not told the test that the Defendant would apply to the decision. This ground of challenge cannot be sustained. The Claimant was in possession of the SOP. That is clear from the content of the representations he made in advance of the decision, and he does not suggest otherwise. The SOP sets out how the decision is to be made. It explains that the Assistant Commissioner will consider each case individually and decide, in the exercise of her discretion, whether to accede to a request for discretionary sick pay. It explains that it is not possible to give a precise definition of all categories of case where a favourable decision will be made, but it gives extensive illustrative examples of cases which are likely to fall on one side or the other. Nothing in the Claimant's representations suggests that he was unaware of the policy that AC Ball would apply when making her decision, or that he required further information. In her decision AC Ball sought to apply the SOP.

(3) Taking account of irrelevant considerations

59. The Claimant contends that AC Ball took into account an erroneous previous finding by AC Rowley that the Claimant's own inappropriate behaviour triggered a chain of events which led to the disclosure of his records.
60. Mr Banham points out that the Claimant has never been notified of an allegation that he has failed to meet the standards of professional behaviour expected of police officers (cf regulation 15 Police (Conduct) Regulations 2012), far less has he been found to have committed any disciplinary offence. Certain assertions in the Defendant's Grounds of Defence about the Claimant's conduct were, it was said, unsupported by the evidence. The Claimant's telephone was seized and was subject to analysis. There is no evidence that the analysis indicated any wrongdoing. The observations about the Claimant made by the Judge in his ruling (see paragraphs 2 and 5 above) were made in the context of Crown Court proceedings in which the Claimant had not given oral evidence. Moreover, they were based on medical evidence that differed from the subsequent findings of the PMAB. I accept all of these submissions.
61. However, the Claimant accepts that, in the course of his duties as the OIC he showed a complainant the statements of other witnesses. He accepts that this was inappropriate (and, realistically, withdraws a contention to the opposite effect in his Grounds), albeit he says it was due to an "error" rather than anything more egregious. It was this conduct which, as a matter of fact, led to a jury in a major criminal trial being discharged, and resulted in the sequence of events leading to the seizure of the Claimant's telephone and his illness. Accordingly, I reject the assertion that it was erroneous for AC Ball to find that "[the Claimant's] own inappropriate behaviour triggered a chain of events which led to the disclosure of his records." This was an accurate statement of the position. It was also a matter that AC Ball was entitled to take into account in the broad exercise of her discretion. It meant that there was a sense in which the Claimant bore some responsibility for the events which resulted in his illness. This contrasts with the paradigm indicative cases set out in the SOP where an illness might justify a decision to grant discretionary sick pay.

62. It is said that AC Ball took into account the irrelevant fact that the Claimant had been provided with extensive support. This argument is without merit. AC Ball's decision expressly records that this was "not a factor in [her] decision" and there is no basis for refusing to accept her assurance at face value.

(4) Giving insufficient reasons

63. The Claimant says that the decision did not enable him to know why the decision was reached not to grant discretionary sick pay. I disagree. AC Ball explained that she did not apply the test set out in the 1987 Regulations, that she applied the SOP, that she considered the indicative examples, that she considered that the case was a closer fit to a stress related illness resulting from working conditions generally than it was to medically diagnosed PTSD as a result of the performance of duty, that the events which led to the illness were no more than an officer could reasonably be expected to deal with, and that it was his own inappropriate conduct which triggered the chain of events. This was a sufficiently reasoned decision to enable the Claimant to know what factors had been taken into account and why the decision maker had decided not to grant discretionary sick pay.

Outcome

64. AC Ball's decision to refuse discretionary sick pay was not irrational or unfair.
65. The Claimant's claim for judicial review is therefore dismissed.