In the matter of Paul Burns
And in the matter of the Firemen's Pension Scheme Order 1992

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ADVICE

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1. Mr.David Lock QC has most kindly given an initial advice setting out, as it were, the opposing forces and on feeling driven, but clearly uneasily to adopt one has also generously left the door open to the argument to be made that he can rest easy, he was right all along... Mr Burns is also fortunate in that Counsel's Instructing Solicitors could not have been more helpful in their continuing dialogue with Mr Burns.

2. Mr Burns has asked me to give a view on Mr. Lock's Advice that he has the correct pension.

3. I have hesitated before venturing to do so for when I was 'at the top of my trade' it was a long time ago and I am well aware of Mr. Lock's eminence. Indeed, in the ordinary way one would not presume to contradict a Silk of such experience but, I do here because it is by his own words that one can demonstrate that what he takes to be 'plain meaning' cannot possibly be correct.

4. I would suggest that Mr. Lock, in seeking commendable brevity and clarity, may have been a little too hasty in his initial Advice. I also wonder to what extent both his, and his instructing Solicitor's views, may, inadvertently, not have been allowed to be a little influenced, where there should be none, by their past and most successful work on a similar but different, Police Pension Scheme.

5. On the face of it and in Mr. Burns's discussions with Instructing solicitors, there are, essentially, 4 issues:

(i) What role, if any, does Rule B1 in general, and paragraph (c) in particular, have in the correct payment of Rule B3/B4 pension awards?

(ii) With extensive past persuasive experience in Police Legislation where, if at all, does any 40/60th rule have a role to play in this Firemen's Legislation - the multiplier in pensionable years ?

(iii) Interpretation of precisely what is the correct average pensionable pay [APP], on which to calculate a material Rule B3 pension – the multiplicand ?

(iv) The relationship between Rule B3, Paragraphs 4., with 5., to arrive at what amount is payable ?

6. My conclusions are:
(i) The pension law of Rule B1 plainly speaks for itself in particular in paragraph (c) which

prohibits the payment of a Rule B1 pension to a Firefighter who becomes … *"entitled to an ill-health award under rule B3."*.

The failure by the Fire Authority to correctly apply the law of Rule B1(c) to a Firefighter who it had awarded a Rule B3/B4/B5 pension(s) acted as a catalyst for a series of compounding errors in law, which in turn, led to further breaches in the law in respect of Rules B3/B4/B5.

(ii) Unlike prior fire pension schemes there is no 40/60ths rule to be applied in the SI 129, save and except to a retiree who had been in service on 10th July 1956.

The sole reference in SI 129 to 40/60ths is to be found on page 82.
This is a PART dealing with 'Special Cases' beginning at Schedule 11 (page 80), PART IV, Rule J6 *"Modifications for person's serving on 10 July 1956"*. At Paragraph 17 (page 82), PART 11, Short Service or ill-health pension.

Mr.Burns was not yet in service on that date.

(iii) (a) In calculations Rule B3, under Paragraphs 1-4., the multiplicand is the APP on the date of retirement.

(b) In calculation under Rule B3.5. Mr.Lock correctly sets out the law as "the amount that he would have been entitled to if he had continued to work until his normal retirement age". He was incorrect in applying the Rule B3, 1-4 multiplicand rule [supra at (i) (a)] to Paragraph 5.

(iv) Rule B3.5., takes precedence in providing the amount to be promulgated, unless Rule B3.4., is more.

7. SI 129 is intended to be very precise, but is a poorly drafted piece of legislation, appearing to give 'plain meaning' until, elsewhere, that meaning is changed by subjugation. Mr. Lock, in admirably seeking brevity and to put complicated legislation 'into plain English', misdirected himself in law.
With great respect, he so concentrated his focus on what, on the face of it, was all that he thought decided the issue – set out in his paragraphs 16. and 17. – that he denied himself - in 18. - all possibility of realising that, as a matter of law, what he has taken to be 'the plain meaning of the statutory scheme' - that Mr Burns pension be (calculated at his APP at the date of retirement) - was wrong.
Mr. Lock, more than once, correctly set out the law to be applied , but clearly felt bound to give priority to what he thought the plain meaning to be.
In fact, nowhere in the SI do the words *'calculated at his APP at the date of retirement'* appear.
The meaning of the SI, the Scheme, is otherwise.

8. (i) I hope that what occurs to me here will assist Mr. Lock to revise his initial Advice. Correctly interpreted, I would think there are many more like Mr.Burns, with claims which may well run, as does his, into substantial amounts. The scheme ran from 1992 until 2004.

I cannot think his pension provider was alone in ‘getting it wrong’.

(ii) It is also a question of a great social injustice; a de facto breach of good faith; and reasonable expectations – to hire men to risk life and limb for you but when hurt in a fire to pay them off as though leaving the service as though by choice, relying on their ignorance of the law to deny them their entitlement to compensation for their loss to keep us safe. That is, surely, much more than merely ‘iniquitous’, in any language and in any Society, if not sunk in barbarity.

(iii) Without, I hope being impertinent, I would particularly hope that it is Mr. Lock and his Instructing Solicitors who will be pursuing this. It is a matter requiring his high calibre and their expert support in which, in seeking to correct an expensive mistake, it does no harm to plead, or go into Court, with strong successes in similar cases.

9. In consideration I think a number, some, or all of the following, are worth bearing in mind.

(i) The SI gives evolved effect to the 1947 Fire Services Act with the intention of taking compensation out of the Courts. But without any intention to restrict awards to less than a court would award, indeed, to get the Unions ‘on side’, it leaned the other way. The aim was to give not ungenerous consistency across all local fire services and to cut endless legal costs.

(ii) The SI is a substantive piece of legislation, complete in itself and only applicable to Firemen. Whilst interesting parallels and distinctions may be drawn between it and other public service pension schemes, none can be taken to apply to, alter, or in any way interpret the way in which the 1992 SI 129 makes pension provision. Each stands alone.

(iii) To ensure an even handed approach and common practice and understanding across the Country a Home Office Commentary accompanied the SI, setting out, at exhaustive length and detail, precisely the way in which the State wished the provisions of this, its Contract with the Firemen, to be interpreted and the way its provisions were to be applied.

(iv) The Home Office Commentary was intended to be a simple ‘practice bible’ (it is a little large at 394 pages to be a *vade mecum*) but for universal access and use, to ensure the retiree Firefighters themselves and all lay administrators (and lawyers or ‘pension professionals’) understood what the words and phrases, used in this SI, were to be taken to mean and the way they were to be applied.

The Foreword states:
“For the most part the text uses the "second person" to keep the style informal but this does not mean it is addressed only to Firefighters. It is intended mainly to help the local authority superannuation officers who have to administer the Scheme”;
Quite plainly it was intended to be in public, unrestricted, use.

(v). But the Home Office Commentary is not the law – it is merely interpretive and for guidance. *“the purpose is to help those who use the Scheme to understand its provisions, bearing in mind that such guidance cannot replace or override those provisions”.*

(vi). At K1-1, Paragraph 5., the Home Office Commentary tells the reader "*The broad purposes of your ill-health pension are to compensate you for the interruption of your career, and (once you reach the age when you could have retired with a pension) to take the place of a retirement pension"*.

(vii). There are three points in the Commentary which gives the Home Office understanding that a Rule B3 pension amount shall be formulaic, or to the effect of, "*or what you could have earned".*

10. (i)The problems SI129 presents are those of a Home Office draftsman's production of a very detailed and technical piece of revisionary legislation. Human nature being what it is, during any intense team effort the work can become so well known, here to the draftsmen, that they became blind to any faults it may have had.

(ii). Unfortunately, faults were compounded by the SI going through the 'Affirmative Resolution Procedure' rather than go through any scrutiny in Committee or debate in The House. So, it was simply 'laid on the table' in the HoC library for any Member to read and, on no objections being lodged, it passed into law on 7th February, 1992.

11. I note that neither Mr Lock nor his Instructing Solicitors have had the benefit of the guidance given by the Home Office Commentary.
It defines a Rule B3 pension to also be, "*or what you would have earned by your compulsory retirement age"*.
That is the common law position and it is what Mr. Lock took the law to be.
That is until he stumbled across what he felt was of such a 'plain meaning of the statutory scheme', that, though in conflict with common law, nevertheless he concluded it avoided the common law approach to compensation.

12. The law does not countenance such conflict. Precedent is always right unless what is being proposed can be distinguished, so as to be able to be shown, not to conflict with precedent.

13. (i) *A priore*, Mr Lock, no stranger to public policy, may agree, on reflection, that his Advice may run aground before one gets into the detail of it. He writes, with justified indignation at the end of 18., "Further it would appear iniquitous for a former fire-fighter who became disabled as a result of circumstances that had nothing to do with his job should be paid a pension which was greater than a fire-fighter who completed his full 35 years service".

(ii) The corollary is surely yet more iniquitous? On compulsory retirement on being injured while firefighting, to pay a Firefighter an Ordinary Rule B1 pension, to the exclusion of any compensation provided by Rule B3 for the loss of career.

(iii) Mr. Lock is clearly right. Any right minded person would be indignant on hearing a pension is being paid where there is neither loss nor liability, yet would not it be more

heinous, if it were the case, for Firemen, injured in our service, to be routinely being denied compensation for lost careers. Whilst it would also have been an abuse to deny retirees knowledge of, and access to, the Home Office Commentary, would it not be a greater abuse, relying on their ignorance, to pay them the wrong pension ?

(iv) Both such unjustified or avoided payments would offend public policy and could only be legally imposed on the clearest direction of fully debated legislation. For a Pension Provider to conveniently seek to save money by such means would, go beyond being iniquitous, it would render the authority liable, and not only in the amounts of the sums wrongly denied.

(v) Many, and I have in mind a jury (which, I seem to recollect, is by choice available in an exemplary damages case), could well take the view that for any pension provider, on whose honesty, duty of care, and good faith the retiring Fireman relies for a calculation and payment of a correct pension to:

(a) Avoid, to both staff and retirees, sight of the Home Office Commentary intended for their use;

And,

(b). Having compelled a Fireman to retire on grounds of attributable ill health, to then pretend that an Ordinary Rule B1 pension is what the law requires to be paid as a correct Rule B3 pension;

And then,

(c). To deceitfully pay only the lesser pension falling due to any Fireman who, by choice, cuts short his career to go and be a policeman or on any other whim;

And to then,

(d). Deny the 'error' well knowing a pensioner, a vulnerable person, may neither have the money, the health, nor the will to 'take on Town Hall';

Surely in such a case the law provides and requires that the malfeasant provider ought to be punished by way of exemplary damages?

I think Rookes v Barnard (1964) AC 1134. Per Devlin LJ., remains the authority. In Mr. Burns's case, the conduct seems to meet the criteria of being 'arbitrary and oppressive abuse of power in the hands of a servant of the State.'.

(vi) Thus, premised here only on common law, to pay an Ordinary Rule B1 pension in place of an ill health/injury Rule B3/B4 pension would be unarguably wrong in law. As a way to save public money it would be contrary to public policy and the law.

If that is correct and it seems so, it follows that to claim that the SI provided for anything in conflict with that premise is to misunderstand the legislation, or, in the alternative, that the Firemen's Pension Scheme Order specifically repeals and replaces common law, to provide that an Ordinary Rule B1 pension can be paid in place of an ill-health Rule B3 pension.

That the SI does that, is Mr Lock's Advice.

14. But it is Mr. Burns's case that he is wrongly being paid an Ordinary Rule B1 pension he would have been entitled to, had his premature retirement had nothing to do with his

job, but was being taken early by choice. The common law on damages would agree with Mr.Lock's view. With respect, I have no doubt a Court would agree with Mr. Burns. Public policy or natural justice apart, it is the law.

15. (i) But I only venture to suggest that Mr. Lock has simply misdirected himself in law because, in his own words, he demonstrates that to be so. He makes plain his place of departure from the law in the text of his Advice;

(ii) One can see the problem he faced. Never an easy task to put such diffuse legislation into 'plain English', Mr. Lock seeks to do so at paragraph 18., of his Advice, where he expresses, in a single embracive sub clause, what he takes to be 'the plain meaning of the statutory scheme' as '(calculated at his APP at the date of his actual retirement)';

(iii) That is certainly unambiguous, and yet, with respect, nowhere do those words appear in SI 129 - the scheme;

(iv) Faced with several *similar* phrases, in various places he has for brevity 'cleaned them up', so conflated them into what seemed to be that brief, but immediately intelligible, whole;

(v) But, with respect, in so doing he loses the clear distinctions to be drawn and adhered to. In each case the distinction made apparent by the words actually used, and in which context;

(vii) In absence of conflation, so taken phrase by phrase, distinctions emerge that require *similar* words to have entirely *different* meanings within specific contexts.

16. In best practice, Mr. Lock makes apparent the way he has arrived at his conclusions and so makes the point:

(i) Initially, Mr Lock premised his thinking on what he has always taken the law to be, but on finding that 'his thinking' is not apparently what he takes the SI to mean, he abandons 'his thinking' to premise his Advice on what he refers to as the 'plain meaning of the statutory scheme';

(ii) His omnibus interpretation of 'plain meaning' is expressed in the words 'calculated at his APP at his actual date of retirement' – at 18., line 4 of his Advice.

(iii) 'His thinking' is expressed at 18., line 1, where he defines entitlement as… "Rule B3(5) thus places an upper limit on the amount of an ill-health pension paid under Rule B3 by providing that the sum paid cannot exceed the amount that an individual would have been paid if he had continued to work until aged 55 and then been entitled to a pension under B1"…, which is a common law entitlement.

(iii). (ii) conflicts with (iii) supra – One cannot have one, and the same pension entitlement,

calculated on what ‘he would have been paid if he had continued to work’, and also, ‘calculated at his APP at his actual date of retirement’.
They are wholly different criteria and are mutually exclusive.

(iv) Of necessity, in denying the common law on damages in English Law, he sets the SI against common law in adamantine conflict.
He does not seek to resolve this conflict.

(v) Yet it has to be resolved, because the presumption at law is that there can never be any conflict. It is a purpose of the law. Prior legislation and legal precedent is the law unless something in apparent conflict can be so distinguished so as to admit it without conflict.

Lord Wensleydale’s Golden Rule *[Pearson v Grey (1857) 6 HLC 61 at p.106]* remains current…
“*In construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistence with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further”.*

And if that was insufficient:

Lord Field said in *Cox v Hakes* (1890) 15 App. Cas. 502 at p. 542:

Now the admitted rule of construction, from which I am not at liberty to depart, lay down that I cannot infer an intention contrary to the literal meaning of the words of a statute, unless the context, or the consequences which would ensue from a literal interpretation, justify the inference that the Legislature has not expressed something which it intended to express, or unless such interpretation (in the language of Parke B. in Becke v Smith *(1836) 2 M&W 192 leads to any manifest "absurdity or repugnance" …*

Furthermore, the Literal Golden Rule:

Lord Esher critcising the literal rule in *The Queen v The Judge of the City of London Court [1892] 1 Q.B. 273*:

Now, I say that no such rule of construction was ever laid down before. If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this - if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation. If the learned judge meant to say that, when the meaning of general words is (if you look at them by themselves) clear, that determines their construction at once, even though from the context - from other parts of the same Act - you can see that they were intended to have a different meaning; if he

meant to say. that you cannot look at the context - at another part of the Act - to see what is the real meaning, then again I say he has laid down a new rule of interpretation, which, unless we are obliged to follow it in the particular case, I would not follow...

Finally, the Golden Rule of Context:

Lord Hoffmann stated in *Charter Reinsurance v Fagan [1997] AC 313, at p.391*:

I think that in some cases the notion of words having a natural meaning is not a very helpful one. Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural.

And thus the presumption at law, *'expressio unis est exclusion alterius'* (mention of one excludes others), remains unaltered.

17. Since one cannot ignore any text within any legislation, 'plain meaning' can only be given meaning consistent with all other parts of the SI; all words passed into law are presumed in law to have meaning.

18. Given that, as matters stand, an apparent conflict exists between the precedent of common law and Mr. Lock's 'plain meaning', the question is… "Can one, on looking only within SI129, find words to distinguish Mr. Lock's 'plain meaning' from the precedent of common law ? ".

19. Mr. Lock deals with Mr Burns's substantive Rule B3 'ill-health pension' claim at 16,17, & 18., in his Advice. Mr Burns's Rule B4 qualifying injury award, save on quantum, is not in issue.

20. At 16., and 17., Mr. Lock reproduces Rule B3.5 (1) and (2), respectively. He also sets out a 30 year service Rule B1 entitlement. His consideration and analysis is at 18.

21. (i). At 18., Mr. Lock goes straight to the heart of the matter in seeking to deal with the Rule B3.5 ill-health pension. As a senior and very experienced Silk, Mr. Lock begins by simply setting out the law, as any fully competent lawyer would.

(ii). He correctly identifies that it is not 'time', which is limited to 55, that is at large [I would have added, 'or 60, if before 55, the set senior rank of Asst.Div.Officer was reached'-Rule A13], but 'amount' – the quantum.

(iii). Mr Lock then quantifies the quantum at large by specifying that the material amount is…"the amount an individual would have been paid if he continued to work until 55 and then been entitled to a pension under B1".
Thus, far so good, but then without comment, though clearly in direct contradiction with what he has just correctly written, he adds "(calculated at his APP at the date of his actual retirement)" These are his words; they are a direct quote from the SI but a conflation of *similar but not identical*, phrases, within separate contexts.

(iv). Clearly troubled by this inconsistency he seeks to put it on all fours, or avoid the conflict, with what he had just stated as his understanding of the law on damages.

(v). In seeking to find a way through he follows… "(calculated at his APP at the date of his actual retirement)", by writing… "However the limit is not the amount of the ordinary pension that the firefighter would have been entitled to receive under a B1 when he actually retired but the amount that he would have been entitled to if he had continued to work until his normal retirement age (which was then 55)".., to repeat, but with slightly greater particularity, what he had just written.

(vi). Unable to reconcile "APP with actual date of retirement" with what he "would have been paid if he had continued to work until aged 55", he gives up the Sisyphean task and makes no further attempt to reconcile the mutual exclusion.
He chooses to abandon what he had taken the law to be in the belief that the SI made a specific 'plain meaning' exception to common law.

22.(i). Was he right? What is the law? Is it Mr.Lock's correctly stated universal understanding under English law on quantification of damages, or does the SI by its language avoid the common law ?

23. If one accepts the words "calculated at his APP at the date of his actual retirement" at face value, an ill- health pension is based on what the APP (average pensionable pay) is at the date of a physical retirement, irrespective of whether the career is being terminated early by choice, or enforced by ill-health pension. In either case what is paid is an Ordinary Rule B1 pension.

24. On the other hand if an ill-health pension is based on, "the amount he would have been entitled to if he had continued to work until his normal retirement age", that denies 'APP as at the date of his actual retirement', but accords with the provision set out at Rule B3.5 (a) by way of a notional, "notional retirement pension", defined as what a person would have received "if the person had continued to serve until he reached normal pension age, when he would have become entitled to an Ordinary or Short Service pension ("the notional retirement pension").

25. Clearly if the 'plain meaning', '(calculated at his APP at the date of his actual retirement)' were to be the correct interpretation of the scheme it would entirely vitiate, Paragraph 5. It would have no use, nor serve no legal purpose. Yet that cannot be the legislative intention because it would be to defeat the presumption at law that all legislation has meaning.

26. This drives one to the unavoidable conclusion that since the application of '(calculated at his APP at the actual date of his retirement)' would vitiate Paragraph 5, it follows, of necessity, that it is incorrect to conflate and take the meaning of the word "is" to be the same as words "with reference to". Where different language is used in legislation it is given its ordinary meaning.

27. It follows that whatever meaning was legislatively intended to be given to the 'meaning of the statutory scheme', it was not that an Ordinary Rule B1 pension be paid in place of, or be substituted for, a Rule B3 ill-health pension.

28. If so, one is required to go back to the SI and see what words are actually used in what context and see if that admits any interpretation not in conflict with any other provision in the SI, or common law.
I set out in PART 111, omitting Paragraphs only 2 and 3 as immaterial.

PART III Rule B3
ILL-HEALTH PENSION

1.-(I) Paragraphs 2 to 5 have effect subject to Parts VII and VIII of this Schedule, and paragraphs 3 and 4 have effect subject to paragraph 5.
(2) In paragraphs 2 to 4, A is the person's average pensionable pay.

4.- Where the person has more than I0 years' pensionable service, the amount of the ill-health pension is the greater of:

$$20xA/60$$

and-

$$7xA/60 + AxD/60 + 2xAxE/60$$

where-

D is the period in years of his pensionable service up to 20 years, and
E is the period in years by which his pensionable service exceeds 20 years.

5.-(1) Where-

(a) if the person had continued to serve until he could be required to retire on account of age, he would have become entitled to an ordinary or short service pension ("the notional retirement pension"), and
(b) the amount calculated in accordance with paragraph 3 or 4 exceeds the amount of the notional retirement pension,

the amount of the ill-health pension is that of the notional retirement pension.

(2) The notional retirement pension is to be calculated by reference to the person's actual average pensionable pay.

29. Construing it requires a word-by-word consideration leaving none without an unassigned meaning. This would appear to yield:

30. (i). As to a Rule B1 and a Rule B3 pension. *A priori*, the SI specifically denies a Rule B1 pension to a Rule B3 ill-health pension recipient.
A Rule B1 ‘Ordinary Pension’ is payable to a regular firefighter who retires but who, B1(c), “does not become entitled to an ill-health award under Rule B3”.

(ii). Nowhere within Rule B3, Paragraph 5., is a Rule B1 specified. The text refers to “the notional retirement pension”.
(iii). The Paragraph 5., specified ‘notional retirement pension’ *is not* a straight Rule B1 Ordinary pension.

31. (i). PT III 1. (Supra), at (2) makes the specific and limited provision. In paragraphs 2 to 4, ‘A’ is “the person's average pensionable pay”. There is no mention of APP in Paragraph 5.

(ii). Under the *‘expressio’* presumption the exclusion of Paragraph 5., is absolute... “A is the person’s average pensionable pay” on being specified for application in 1-4 which denies the addition of Paragraph 5., to the class.

(iii). At Paragraph 5. (2). The provision is “a person’s notional retirement pension is to be calculated by reference to the person’s actual average pay”.

(iv). Since the notional retirement pension APP *is not* ‘the person’s average pensionable pay’ as specified in 1-4, then what other meaning can properly be ascribed to the words used which are(my emphases) *‘by reference to’;* and, *‘actual’* ?

(v). English law requires words to be given their ordinary meaning; ‘by reference to’ means, amongst other things ‘by drawing attention to’ or to ‘use something as source‘ (transitive verb) – OECD
and,
‘actual’ existing in fact; real; authentic – OECD.

(vi). In the context of Paragraph 5. (2), a “person’s notional retirement pension is to be calculated by reference to the person’s actual average pensionable pay” means using as a source for calculating a notional APP for the notional pension the actual pay scales of all ranks at the time of retirement.

It avoids speculation of, on what pay may become, whilst allowing for a proper a reflection of promotions lost by early termination of career on grounds of attributable ill-health.

32. This avoids the conflict. It allows effect to be given to Mr. Lock’s correct recital of law, that the pension needs to be, in ‘the amount that an individual would have been paid to work until aged 55’, which should be a Rule B1 pension based on years of full service, uninterrupted by ill-health and giving credit for a more senior rank that the premature retiree ‘could’ (Home Office Commentary Pages B3-2;B3-3.) have achieved if ‘paid to work until aged 55 or 60’.

Thus the APP on which the notional retirement Rule B1 pension is calculated is the APP of the rank someone ‘could’ notionally have achieved, but for injury curtailing career, and was taken, to provide the apposite notional APP for the notional rank, from scales of pay actually being paid at time of actual retirement.

33. If this is taken to be the correct interpretation of the SI provision there is no conflict between a “B1 calculated on actual APP”, and “A is the APP” in Paragraphs 1-4, and a

notional retirement pension (a Rule B1 pension) calculated ‘by reference to”, an “actual” APP in Paragraph 5; to fix the prevailing scale of rates of pay then prevailing.

34. Furthermore, the Rule B3 nomenclature (name system) is significant. It will be noticed that in Paragraphs 2, 3, and 4 under Rule B3, what each formula is calculating is an ‘ill-health pension’. But in Paragraph 5, which takes precedence over 3, and 4, it is called a ‘notional retirement pension’. Since this notional pension takes precedence, it is paid.

Nothing is actually a pension until it becomes promulgated as the ill-health pension. The nomenclature defines selection of the amount.

35. At Rule B3 paragraph 1(1) it is specified “that paragraphs 3 and 4 have effect subject to paragraph 5”. Given ordinary meaning where A is ‘subject to’ B, B takes precedence over A in being given effect, or put first in line, or order.
Therefore Paragraph 5 has precedence in application. This means that a Paragraph 5 pension is always paid as the ill-health pension unless there is provision for that precedence to be lost. There is such provision.

36. The ‘notional pension’ is the ill-health pension paid, unless “the amount calculated in accordance with paragraph 3 or 4 exceeds the amount of the notional retirement pension’’ in which case the Rule 3 or Rule 4 ‘ill-health pension’ becomes [takes the place of, supplants] ‘the notional pension’.

37. (i). How to calculate a ‘notional retirement pension’ is specified at PART VI, Rule B5, 2(2). Save that D is replaced by an E - both specifying the same ‘up to 20 years’ , and E is replaced by F - ‘years ...exceeds 20 years’. The formulae are identical except the Paragraph 4, Rule B3 ill-health formula is enhanced by an additional 7/60 at its commencement.

(ii). However, unlike a Paragraph 4 calculation which will always exceed 40/60ths there is a limitation imposed on a ‘notional retirement pension’ in that it is specified at (3) (that):
“A person's notional service is the period in years that he would have been entitled to reckon as pensionable service if he had continued to serve until he could-

(a) retire with a maximum ordinary pension (disregarding rule B l (2)), or
(b) be required to retire on account of age,

whichever is the earlier.

(iii). An Ordinary Rule B1 pension is limited to 40/60ths of APP.
Therefore in a ‘notional retirement pension’ the formula is, in effect the notional APP x 40/60ths maximum. It is apparent why when one considers that what is offered is the full pension the retiree would have earnt on a full service pension calculated on the rank he ‘could’ have achieved.
Put another way pecuniary loss is extinguished. He is paid all he may have earnt and the full service pension. His injury, per se, is compensated under Rule B4 provision.

38. In effect the Paragraph 4., calculation will always exceed the Paragraph 5., calculation *except* where the APP taken for the rank a retiree 'could' have attained is substantially above the APP upon which Paragraph 4., is calculated.

39. In practice Paragraph 5., will rarely be paid, being a safety net to avoid short-changing just a few who, but for injury, would have scaled the heights of promotion. Usually Paragraph 4., will be the greater and be paid.

40. Were any other interpretation given to the provision it would permanently deny one or other calculation (in this instance 4., or 5.) ever being paid and so render the words in the legislation meaningless.

41. This leads to the question of whether or not there is any 40/60ths limit to be applied in Rule B3 ill-health provision ?

42. At Rule B3 – 3. (2) in the Home Office Commentary[Pages B3-2;B3-3] in answer to the question "How much is the pension?' specifies… 'Never more than 40/60ths of APP, *or what you could have earned by your compulsory retirement age" .*

43. It is as well that the Home Office Commentary cannot make law because it is in error, and patently so in stating (supra) "Never more than 40/60ths". Perhaps here would be a convenient place to correct any misunderstandings.

44. One can only look to the SI 129 for whatever authority, or provision, there may be. No other legislation, whether before or after the promulgation of the SI, is of effect, save and except amending or enabling legislation. There is none. My comments at 6.

45. In considering 40/60ths Mr. D. Hamilton, the Technical Director at the Pensions Advisory Service has published the opinion, "Your pension will only grow beyond 40/60ths if the scheme rules say so. Certainly legislation will not prohibit this, but it does not require it to happen".

46. Clearly the public perception, and so what Unions may negotiate, changes with time. One can see it at work where the 1973 Fire Service Regulations SI 'capped' an ill-health pension at 40/60ths, but 20 years on and SI129 does not cap an ill-health pension, indeed, the formulae makes provision for more than 40/60ths.
But by 2006 The FSR-SI Explanatory note at page 71, paragraph (g) reads "...pension will accrue at 1/60th per year. A firefighter member will be able to accrue more than 40 years pensionable service". That is not in connection with a Rule B3 ill-health pension but an Ordinary B1 pension.

47. The sole reference in SI 129 to 40/60ths is to be found on page 82.
This is a PART dealing with 'Special Cases' beginning at Schedule 11 (page 80), PART IV, Rule J6 "Modifications for person's serving on 10 July 1956". At Paragraph 17 (page 82),

PART 11, Short Service or ill-health pension.
There appears at 2. “The amount of the pension is not to be less than 1/60th nor more than 40/60ths of the person’s pensionable pay ”.

48. However, the provision is specifically applicable only to anyone whose service commenced on, or before 10 July 1956 and Mr Burns began his career in the Fire Service in 1963.

49. Save and except at supra, in the special case, there is no restriction of any pension to 40/60ths save by the de facto operation of the formula for an Ordinary Rule B1 pension, which specifies 30 x APP/60 + 2 x APP x 5/60 (years maximum above 20). In effect 30 + 10/60 = 40/60ths.

50. Far from restricting a pension to 40/60ths, the SI 129, Rule B3 formula set out at Paragraph 4, is designed specifically to increase pension above 40/60 of APP. Indeed, there is already a 40/60ths Rule B1 pension buried within the formula, which enhancement given by the formula can take to well beyond 40/60ths. In effect, the Firemen’s Union negotiated a good deal for its membership. The formula is:

> 7xA/60 + AxD/60 +2xAxE/60
> where-
> D is the period in years of his pensionable service up to 20 years, and
> E is the period in years by which his pensionable service exceeds 20 years.
> And where ‘A is the person’s APP’

51. One can immediately see that any firefighter retiring on a Rule B3 pension with more than 30 years service will receive 7 + 20 + 2 x10 /60ths or 47/60 of APP. This could be exceeded.
The common law argument behind the granting of extra pension provision under Rule B3 is that due to the exigencies of simply being a firefighter all firefighters are required to retire young ,on account of age at 55 (unless in high enough administrative rank, Asst Div Officer and above-Rule A13, to 60). That is young in terms of less demanding occupations and so a fit full term retired firefighter may well have another full time job for 10 or more years after leaving the Fire Service, in which to supplement his full service de facto 40/60ths pension. Such supplementary income tends to be denied the disabled, so it is appropriate that an enhancement above an Ordinary full service Rule B1 pension be paid.

52. Although a ‘Notional Retirement Pension’ is not specified as an Ordinary Rule B1 pension it is premised on the assumption that an Ordinary Rule B1 pension would have been paid on full service, in which case there would have been no pecuniary loss, just injury which is a Rule B4 matter. In my view a Notional Retirement Pension is limited to 40/60ths.

53. In sum one arrives at a point where a Rule B3 pension is required to be calculated in accordance with the formula (in this case at Paragraph 4) which is calculated on a set APP,

but leaves time at large; and at Paragraph 5, which is set in time but allows the APP to be at large.
The raison d'etre is that it would be quite wrong, in damages, to consider two 40 year old men, both being retired on ill-health from the same rank which for one would have been as far as he would have gone, and for the other be a way station on the way to being a Chief Officer, to be taken to have suffered the same future loss.
Hence the basic provision of Paragraph 4 but only payable subject to being greater than the Paragraph 5 amount.

54. One can be sure that that is the correct view from the specific provision of the scheme.

55. The SI general direction (under duplication) at Rule L 4. 3. Provides that where there are two contending pension amounts the 'larger' is always paid

56. (i). In Mr. Burns's case it remains to do the calculations.

(ii). I understand he has evidence in that he 'could' have reached ACO. In that case his Paragraph 4 requires to be calculated on his APP as at date of retirement of c£31,500 and his Paragraph 5 notional APP on the ACO APP as at 1997, which was c£56,500.

(iii). His Paragraph 4 pension would be:

7 x 31.500 + 31,500 x 20 + 2 x 31,500 x 13.5/60 = c£28,350

(iv). His Paragraph 5 notional pension on the notional formula is of 56,500 x 20 + 2 x 56,500 x 13.5/60, which, whilst totaling c£44,000, only does so on 47/60ths which is above the Ordinary pension maximum, so his payable notional retirement pension 56,500 x 40/60 = £37,500 odd

(iv). Paragraph 5. takes precedence unless Paragraph 4. is greater, it is not, so his pension entitlement was £37,50044 pa.

57. I hope this is rather more transparent than I understand an earlier opinion may have been. But if anything is unclear please do not hesitate to contact me.
Incidentally, the link kindly provided by Mr. Lock would not work for me. I am not sure his Advice was written on the full version. I have found that even in archived material modifications and omissions, as in formulae, seem to creep in. I believe that it was a 'consolidated version' entered into the archive in 2008. It may be that that the original 1992 version of SI 129 date stamped as sold by HMSO for £9.10 on 9th March 1992 is preferable. I think that copy can be found on Mr. Burns's web site 'The Morning Bugler'.

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