ADVICE.

I am asked to Advise on an Appeal in Mr. N's case on a point of law from the Deputy Ombudsman Determination on 10th. September 2019.

Conclusion.

1. Crucial to the Determination was construction of Statutory Instrument 129 of 1992, and the meaning to be given to the words 'is' and 'by relation to'. The Deputy Ombudsman misdirected herself by conflating 'Is' and 'by reference to', to mean the same thing in order to replace the statutory ill health retirement provision by the ordinary time served pension, wrongfully denying compensation for financial loss. The TDPO has otherwise misdirected herself on law and its application.

2. I advise that there are grounds for Appeal on points of law and an Appeal should succeed.

3. Should the Appeal succeed then the Court may be asked to apply the rate of interest on pension underpaid as in any case of the State withholding payments due, as in HMRC cases.

4. Due to the egregious nature of the conduct of those in a fiduciary relationship to pensioners the Court be invited to mark such oppressive and arbitrary conduct by way of exemplary and/or aggravated damages.

Consideration.

5. The substantive grounds are, as I set out in an earlier Opinion, essentially recited by TDPO in her Determination.

6. In her Determination the DTPO prays in aid of her rejection, Example 7 of the Commentary. Example 7 has bearing in this case, but not, with respect, in the way she has sought to bring it to bear.

7. Mr. N's case is of a fireman deprived of his career on enforced early retirement on the grounds of ill health at a time when, but for ill health (Crown liability admitted), he 'could' have had greater earnings to earn and promotions to win.

8. Example 7 is of a man required to retire on ill health 97 days before being required to retire due to age. He suffered no loss but received all that 1992 SI 129 provided in the same way as Mr. N.

9. Example 7 makes clear that provisions and enhancements provided by 1992 SI 129 unrelated to any financial loss, are not paid in compensation for financial loss – a basis for the Adjudicators Determination, passing without comment in TDPO Determination. Example 7 denies the proposition advanced by the Adjudicator that loss is otherwise accounted for, apart from a B1/B3 sum pension.

10. Example 7 also denies the DTPO's assertion at her paragraph 36 to the effect that if the SI intended compensation to be paid as a Court awards damages for future loss then the SI would have said so. Example 7 apart the SI specifically does make provision for compensation for future loss specified in B3 provision. But, in any event, as a matter of jurisprudence, the law construction of documents and convention, common law provision for loss can only be denied by Statute on express wording to that specific effect. It may not be inferred as TDPO has inferred in order to find against Mr. N. The TDPO has not suggested any 'absurdity' or 'inconsistency' in the Statute. She misdirected herself in deciding that if the Statute did not express the intention of common law it was to be taken as a denial.

11. In Rookes v Barnard 1964 (AC). In his Judgment Lord Evershed repeated and adopted "Now it is 'the universal rule' as Lord Wensleydale observed in Grey v Pearson, that in construing statutes, as in all other written instruments the grammatical and ordinary sense of the words is to be adhered to unless they lead to an absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further".

12. The foundation of the TDOP's decision is her inferring a denial of compensation because the SI does not say in words that she can understand, that compensation be paid. That position is not, by law, open to her to take. As a matter of application of the law, written wording is construed strictly against the interest of those who seek to rely upon the wording. In this matter TDPO's reliance on an inference of wording where there is none, to deny Mr. N. compensation for financial loss, was wrong in law.

13. In saying (Paragraph 36 of her Determination) "I can see nothing in the legislation as drafted that is unclear on its face" DTPO is, with respect, blinding herself to what is perfectly clear on the face of the SI, in effect she is denying the very purpose of the statute, to replace the court's jurisdiction in all its functions, including damages or provision for financial loss.

14. The TDPO's error lies in the apparent conviction, groundless in law, that it is the intention of the SI to award the sum of an ordinary 'time served', B1 pension in all cases of ill-health pensions. (At Para 35) " In Mr. N's circumstances Part 3 5 (2) restricts his ill health pension to the level of a B1 Ordinary Pension" but (later) "is paid as a B3".

15. By this simple, but unlawful, expedient DTPO renders null, void, and without meaning the whole of the ill-health, B3, pension provision provided for at paragraphs 3, 4 & 5. The maths of the formulae in 3 and 4 ensures such a sum will always far outweigh any ordinary time served B1 pension. It follows that if, as DTPO maintains, B3 5 (2), restricts any B3 5 pension to an ordinary B1 then B3 paragraph 5 provision is denied any legal effect.

16. Given that the only other provision is B3 2 provision for a retiree on ill health of less than 5 years service whose pension is a B1 sum, the TDPOs understanding of the law, means that whatever B3 provision is applied (Paragraphs 2, 3, 4 or 5) the result is the same – a basic time served B1 pension, denying all or any compensation provided by the SI for loss of career and earnings of firefighter incapacitated in service to the Public. TDPO's Determination provides to each invalided, early retiree, of whom Mr. N is one, a B1, time served pension, as though leaving of their own volition, having decided on a different career, so suffering no loss. TDPO has misdirected herself following an unlawful lay TPO precedent cited in Adjudication.

17. It being that on Royal Assent all that is enacted into Law has meaning, to avoid payment of a pension properly provided by Statute, TDPO is acting ultra vires, unlawfully and perversely in denying meaning to law by misdirecting herself that a B1 pension is payable as a B3, thus denying the whole of B3 provision of meaning and legal effect, rendering B3 provision redundant to the B1 provision in 1992 SI 129.

18. The law is well acquainted with 'the man on the top of the Clapham Omnibus', in effect it is to say 'res ipsa loquitor' the facts speak for themselves That is also this case.

19. Given that before legislation any firemen so injured as to be invalided out had his case routinely put through the Courts to quantify damages under the several heads covered by the SI (barring being the author of his own misfortune), and for future financial loss, the TDPO has failed to inform herself in law, or fact, and has misdirected herself to a wrongful determination on an assumption that the Union ab initio, when negotiating with HMG in replacement of common law rights, agreed to give up compensation for future financial loss a quantum, in many cases, the greater part of common law damages.

20. The Unions did not initiate the move out of Court. HMG did in order to reduce the escalating cost of legal settlement, the parties agreeing the SI provision with common intention of enhanced, not diminished provision on injury on realised risk in public service.

21. The TDPO Determination is, to use Lord Wensleydale's word, 'absurd'. It presuppose the Union in negotiation for the best deal it could get for its members has in effect said to HMG "We agree, to relinquish common law rights to cut costs, and, while we are about it, we'll save the taxpayer more by abandoning the damages that Courts currently award our members". The DTPO's case, no less than the current TPO's predecessor's (a layman) and no less than the Adjudicator's in Mr. N's case, all are logically argumentum ad absurdam.

22. In 21 DTPO correctly sets out the law in B3 that A 'is' the APP in calculating provision pursuant to paragraphs 2 – 4.

23. In 22 DTPO correctly interprets 'the notional retirement pension' as the pension that could have been earnt (but for ill health) until required to retire on account of age. She also uses the same words as the SI in specifying "the 'notional retirement pension' is to be calculated by reference to the actual average pensionable pay".

24. DTPO points out APP is, pay as at last day served, but what escapes her is the notional pension is not an actual pension. It is theoretical, estimated, hypothetical or abstract concept , used to define meaning. Only after meaning is ascribed does the Statute then finalise the question by providing that the ill-health pension paid is the notional retirement pension.

25. The words of the SI are, at B3 5 (1) (a) "If the person had continued to serve until he could have been required to retire on account of age, he would have become entitled to an ordinary or short service ("the notional retirement pension")" – if 3 or 4 exceeds it – "the amount of the Ill-health pension is that of the notional retirement pension". The provision is sequential and, of necessity, to decide whether or not 3 or 4 exceeds the notional pension requires that the notional pension be calculated. If, as TDPO determines the Notional pension is always B1 and provision under paragraphs 3 and 4 is also a B1 there is no meaning to B3.

26. This B3, ill health provision, applies to young men (and women). Paragraph 3 to 5

apply to down to 10 years service. 30 to 35 years career cut short. Careers tend to see promotions over such times. Damages are very much based on reasonable expectation.

27. The SI does not provide that in assessing a notional pension that its calculation be restricted the number of years that could be served. TPDO misdirects herself. Such a restriction on common law application where a statute is silent would be struck down. It is for Parliament to make the rules not Ombudsmen and Women to suit the mores or economies of the day. If change is required it is for parliament to make it or under delegated powers.

28. The DTPO at 28 gives as her opinion 'The Commentary cannot insert meaning into the order". With the greatest of respect, that is its precise purpose, not to make law, but to tell those who use it what, beyond peradventure, it is to be taken to mean.

29. The Home Office drafted, authored and promulgated the SI in tandem with the Commentary. Given that legal language is not necessarily transparent and because its use would be by laymen and laywomen to the benefit of other lay people, with pension funds managed by lay people, a plain language Commentary was 'a necessary', so was contemporaneously issued by the Home Office.

30. In a reductio ad absurdum TDPO interprets "or what you could have earned by compulsory retirement" to mean something other than "what you could have earned by compulsory retirement"

31. If 'the ordinary sense of the words is adhered to' [per Lords Wensleydale et al] there is no tension between the SI and the Commentary. As a side note, had the Commentary not said precisely what the Statute provided, those contemporaneously involved would have amended it before publication.

32. There is no tension between the statute and the Commentary because the statute uses different language in B3, provision, under paragraphs 2, 3 and 4 to distinguish their provision from the provision under paragraph 5.

33. B3 (2) specifies, " In paragraphs 2 to 4, A is the person's average pensionable pay". By using the word 'is' the statute fixes the position, in distinction B3 5 (2) provides "The notional retirement pension is to be calculated 'by reference to' the actual average pensionable pay".

34. In order to arrive at the conclusion she desires, TDPO misconstrues and ignores the distinction made, and denies the meaning of language by conflating "is" to mean "by reference to", to irrationally misdirect herself that "the notional retirement pension is to be calculated on the APP."

35. Had that been the legislative intention then all B3 provision is rendered redundant – 2.3.4 & 5 would all be calculated on A is the APP. That being so then all are rendered down to being in the sum of a B1. It wholly denies B3 its purpose.

36. Since that cannot be so in law – all legislative words have meaning - so it is necessary to look for a meaning that escaped TDPO.

37. When one thing is to be calculated by relation to something, it means the one thing is not in the same position as the something, but it is in some way tied to it. So where a calculation is

based on pay, and the pay in question is the APP to which a calculation is to be made in relation to that actual APP, the calculated APP is not the same as the actual APP, to which it is related. It is not a question of opinion but definitive use of the meaning of language.

38. By using different words in the same clause in legislation two separate things are created.

39. It follows that the questions that arise are simply:
1. When would the ill health retiree have had to retire on account of age?
2. What rank or pay "could" the retiree has anticipated to come to enjoy?
With those question answered, involving annual reports and a Senior Officer, then the notional pension calculation can be done on the putative APP of the fireman retiree qua the current APP of the fireman he 'could' have become, had his career prospered into full maturity. The tie is that actual and putative APP are on the same pay scale prevailing at the time of enforced early retirement.

40. In each instance of Determination against Mr. N's interest, conspicuous by its absence is any scintilla of logical analysis to support the adverse result. It renders the process a game of blind man's buff and is unfair, adversely biased, and ultimately relies on either the poverty of the pensioner to avoid the injustice, or their death. It is an arbitrary and oppressive abuse of power.

41. At 30, TDPO prays in aid guesswork, uncertainty and confusion in calculation, which would be correct on her misdirection to herself on how the statute provides resolution. As provided there is no guesswork on pay - None at all. The APP on which a notional retirement pension can be calculated is restricted by the words "by relation to" to the then current pay scale. The only question at large is at what point on that scale 'could' the ill-health retiree have aspired to be at if, on full service, they were retiring on account of age.

42. At 31. With respect TDPO misses the point. In using the words "what you could have earned" the question is not when in years, which is set at 40 years maximum, but to what level in pay.

43. The point is that whilst firemen have to retire at 55. A Station Officer or above may go on longer and if they entered the service in their late 'teens' their service may run above 40 years. The only relevance to the point is that a notional pension is also subject to the same 40 year rule.

44. At 32.Far from supporting TDPO, Example 7 undermines her decision in that it makes plain that all the other benefits that accrue to a fireman being forced to retire, on grounds of ill health, still accrue though he has suffered no financial loss. It denies TDPO the earlier basis of Determination that compensation for loss of career and earnings had been 'mopped up', as it were, within other benefits.

45. At 36. With respect, the TDPO simply glossed over the fundamental point that is patent in the SI - 'By reference to' are words that do not mean 'is'. The violence done to meaning, to force the SI to deny its express provision, is all at the hands of those whose position in law, but denied by fact, is fiduciary to Mr N.

46. As a matter of grammar and syntax, the mere fact of using distinctive words in one clause in application to APP denies all possibility that the APP each refers to is the same APP.

The DTPO misdirects herself in error in determining otherwise for she avoids Lord Wensleydale's dicta adopted in Rookes V Barnard, supra, that "ordinary sense of the words is to be adhered to".

47. 'Ordinary sense' is that of the man on the Clapham Omnibus. Pointing to a tree he may say to his daughter "look, that is a fine oak tree". He might then say "By reference to the oak tree, go right 4 trees and that is a maple tree". The point that escaped TDPO is that all are trees in the same wood at the same time, just as all material APPs are in the same scale at the same time, but no more is one the other, than a maple is an oak.

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