In the Court of Appeal **Case CH-2020-000043**
England and Wales
Civil Division

On appeal from an order made by the Honourable Mrs. Justice Falk on 2nd. April 2020, ref: CH-2020-000043, determining an appeal from the decision of the Deputy Ombudsman on 10th September 2019 (ref: PO) – 19150) and on further appeal from a subsequent order made by the Honourable Mr Justice Fancourt on 3rd July 2020.

BETWEEN

[redacted]

Appellant

and

LANCASHIRE COMBINED FIRE AUTHORITY

Respondent

Appeal.

Pursuant to CPR 52 The Appellant seeks leave to appeal out of time, and to have it settled in law that the law of provision as set out in 1992 Statutory Instrument 129 Part lll, B3, ill-Health Pension, on being construed according to normal English, is that 'by reference to' does not mean, 'is' (the terms being mutually exclusive), to the legal effect:

- That the purpose of the legislation was, and is, to compensate for financial loss.
- That the law was, and is, that a B3 notional pension be calculated as the pension which would have fallen due on being required to retire on account of age and is wrongly calculated on the years served until a firefighter is forced to retire prematurely due to ill health ('qualifying injury').
- That the law was, and is, that a B3 notional pension be calculated on the average pensionable pay (APP) at time of enforced retirement but of the rank or scale point the firefighter could have reached, but for injury, and is otherwise wrongly calculated on the actual APP being paid at the time of enforced early retirement.

That upon a correct construction of the law the Appellant's ill-health pension be calculated, ab initio, as though, at time of enforced retirement, he was being retired with the rank which, but for injury, he could have attained on full service (evidenced) of Divisional Officer ll.

Declaring the Respondent's practice, of denying compensation for financial loss under the scheme for financial loss, was, and is, unlawful and that Mrs. Justice Falk and Mr. Justice Fancourt were wrong to sanction a fraudulent practice.

No other party appearing, the Appellant asks for the matter to be dealt with on paper without physical hearing. On no occasion has any argument been advanced by anyone seeking to give any ratio decidendi for the Respondents practice (though, self evidently, the discrimination saves the pension fund money).

And the Appellant Appeals on some, or all, of the following grounds:

A. The Appellant appeals on grounds pursuant to CPR 52. 7. (second appeals):

1. That Mrs. Justice Falk and Mr Justice Fancourt so misdirected themselves at first instance as to sanction fraudulent practice as lawful, an illegal and discriminatory practice repugnant to law.

2. In so doing both gave judgments denying the rules of law by rendering statutory provision for compensation of financial loss to be of no effect.

3. In so doing each judgment breached important principles of law, in particular a presumption at law that in absence of specific wording clearly expressing parliamentary intention to that specific effect, statute is not to be construed to deny common law rights.

4. The judgments were given in denial of the 'Golden Rule' [per Lord Wensleydale in Gray v Pearson (1857) 6HL Cas1, et al] that in construction of a statute all words have meaning and the meaning to be given each is its normal ordinary meaning.

5. Wrongly both judges gave judgments sanctioning the defendant's fraudulent practice of construing the wording of statutory provision 'by reference to', to mean 'is', in denial of normal meaning; being to locate an unknown point by reference to a known point. Given ordinary meaning, 'by reference to', and 'is', are mutually exclusive terms.

6. Both judgments uphold an unlawful status quo. Mrs. Justice Falk, by misdirecting herself, but without any ratio decidendi, that 'by reference to' must mean 'is' to avoid a 'nonsense', and Mr Justice Fancourt, by misdirecting himself, again in absence of any ratio decidendi, that the Appellant's point of law was 'unarguable' and unable to make 'any practical sense' – though reductio ad absurda on any construction based on any English to be found in the Shorter Oxford English Dictionary.

7. Each Judgment was wrong in law in upholding the respondent's practice of paying the Appellant an Ordinary (retiring able bodied by choice) B1 pension in avoidance of the provision made by 1992 SI 129 to compensate firemen for their financial loss, on loss of career through injury, for which the defendants are 100% liable by law.

Therefore:

(a). The Appellant appeals on the basis that Mrs. Justice Falk and Mr. Justice Fancourt were wrong.

(b). That on any proper construction of the words of provision in the statute and on giving them their proper meaning and legal effect the Court of Appeal will find the Respondent's practice of denying compensation for financial loss to be unlawful, egregious, and in most serious breach of important legal principals.

(c). The Appellant further submits that the Respondent's practice is an arbitrary and oppressive misconstruction of statute law to wrongfully deny compensation for financial loss for which the defendants are 100% liable, and that such practice is fraudulent and so repugnant to law that the Court of Appeal will be compelled to reverse judgments sanctioning such practice and allow the Appeal.

B. Further pursuant to CPR 52.7, the Appellant brings to the Appellate Jurisdiction's attention an ostensible irregularity of which he knows or surmises, no more than hereinafter set out:

1, Mrs. Justice Falk, in denying leave to appeal, having also found on the substantive point of law that 'by reference to' must mean 'is', to avoid a 'nonsense', the Appellant filed an Appeal with the Court of Appeal canvassing the great many breaches in law her finding raised.

2. Mrs. Justice Falk was concerned with pensions provided to firefighters by 1992 SI 129, Schedule 2, Part lll, ill-Health Pension B3. The question being the construction of the words 'is' and 'by reference to' used to define what sum in pay is to be used in calculating pension.

3. A material pension is essentially comprised of two multiplicands, the pensionable years served multiplied by average pensionable pay [APP].

4. The Respondent's practice is to calculate all B3 ill-health pensions as Ordinary B1 pensions falling due to an able bodied person taking early retirement by choice. Though paying a B1, the Respondents pay it as though paying a B3 pension.

5. A B1 pension makes no provision for financial loss. If the Appellant is right in law the sole purpose of the B3 pension is to compensate for his financial loss. His pain injury suffering and loss of amenity being compensated for by a B4 pension.

6. 1992 SI 192, Part lll, ill-Health B3 provision begins with paragraph 1 (2) specifying that "In paragraphs 2 to 4, A *is* the person's average pensionable pay" [APP]. But the specification at 5. (2) is "A notional pension is to be calculated *by reference to* the person's *actual* APP (my emphases).

7. Had the Home Office intended the specification at 5 (2) to be the same specification given at 1 (2), then 5 (2) would have been void of meaning and redundant to paragraph 1 (2) which could have read "In paragraphs 2 to 5 A is the person's average pensionable pay".

8. The wording at 5. (2) used in distinction from 'is' was no oversight. Elsewhere in the SI, at Part VI, the APP multiplicand to be used in calculating a B5 'deferred notional pension' is "A is the person's average pensionable pay' – as in B3, 2 - 4 calculations. How to calculate a notional pension is specific to the context of provision in the statute and varies on intent.

9. To make quite sure that lay people would understand the precise meaning of the drafting language used, the Home Office published a Commentary to the SI translating the legal effect of using mutually exclusive 'is' and 'by reference to' mean, in more colloquial terms, "What could have been earned" – "What you could have earnt" (Commentary). This in place of a pension on 'what has been earnt' due to anyone choosing to leave early so being the author of their own consequential financial loss, if any, on leaving early.

10. The distinction in specification has a profound practical legal effect. By specifying that the APP on which to calculate a notional pension is to be arrived at specifically 'by reference to' the 'actual APP', by English usage and simple logic, two APPs are to be in

mind. They can't be the same one. It follows that the actual APP, with its known identity, is the fixed point of reference within rates of pay in a scale from which the APP of the rank or pay point lies, which, but for injury, the Appellant could have attained. It is akin to the Common Law process in quantification of damages in personal injury cases – which this is.

11. The distinction and its legal effect aligns the statutory provision with common law practice of damages being awarded to compensate for financial loss for which an employer is liable. There is no wording in the Statute denying the common law right to compensation.

12. Were Mrs. Justice Falk, (and subsequently Mr Justice Fancourt), to be correct, it would follow:

(a). The ill-health pension now being paid is what the Appellant was and is properly due, though coincidentally, it is the same 'time served' B1 pension which would have been due to him had he chosen to end his career as a firefighter early and leave, able bodied, to pursue another career.

(b). If correct, the whole of the 1992 SI 192 B3 ill health pension provision is redundant, surplus, and to no legal or practical effect.

(c). It also follows that the law is sanctioning discrimination in that whereas any employer, liable for financial loss on injury cutting short an employee's career, pays compensation, not so if employed by the Respondent.

(d). If a B1 Ordinary Pension is properly the Appellant's ill-health pension and his B4 Injury Pension is for his pain suffering and loss of physical amenity, then, as construed by the Respondents, the wording of the statutory B3 provision is fully satisfied by a B1 Ordinary Pension provision, which denies the presumption at law that all statutory wording have meaning and legal effect.

13. Following the filing of an Appeal to the Court of Appeal Mrs. Justice Falk initiated further action requiring the Appellant's appearance at a Hearing she ordered to be held on 3rd July 2020. In her Order she asked parties to agree facts and she also precisely defined the words requiring construction.

14. The Appellant anticipated that, when fully seized of the matter, Mrs. Justice Falk would so construe and distinguish the wording of 5 (2) from 1 (2) as to give full legal effect to 5 (1) to order that a notional pension be calculated on years until required to retire on account of age and on the APP of the rank he could, but for injury, have attained (taken from the then current pay scales.

15. The Appellant put his Appeal to the Court of Appeal into abeyance.

16. Though unable to agree, the Respondent provided full pay scales and the Appellant 3rd party evidence from Senior Officers of the opinion that had the Appellant served his full career to 60 he would have would have been promoted, for which a pension calculation was given.

17. On 2nd July, the Appellant called Mrs. Justice Falk's Clerk only to be told the papers had been taken from her and a Mr. Justice Fancourt would conduct the hearing.

18. The Appellant was assured by Mr. Brilliant, Clerk to Mr. Justice Fancourt, that the judge was 'au fait' with the case and that it would all be fine.

19. For reasons not made clear the Judge's computer did not record the first 21 minutes or so of the "Open Court Hearing". Without reason given, and much to the Appellant's concern, his wife was excluded from being with him, and he was told that he may not record what was said.

20. Not that the Appellant knew no recording was taking place, it was immediately plain to him that the judge had no grasp of the case but clearly intended to rely on the Appellant to set it out. When the Appellant suggested the Judge may read a document the Appellant had only read a small part before the Judge laid it aside with the comment "Well, this clause 5 takes some reading" The rest of the hearing is on the transcript, the judge simply saying "Yes" as the Appellant sought to make his case but in no way engaging with any point made by the Appellant.

21. The Judge did not parse or construe the words of the point of law at issue.

22. After the Appellant had mentioned Mr Bruce the judge misdirected himself on what Mr Bruce had written saying that "Mr. Copplestone Bruce is taking a rather broader approach to the merits of the pension scheme, and what I am concerned with is a much narrower question of the interpretation of the statutory instrument." Vide, the Grounds of Appeal on the point he was to consider:

" 3. She (the Deputy Ombudsman) misdirected herself on the law of construction of documents and the 'Universal rule' Rookes v Barnard 1964 (AC) and drew an inference in law as to the meaning of statute not open to her, as a matter of law, to draw.

8. Though required by the law of construction of documents and otherwise under the 'universal rule', to give words their ordinary meaning, and adhere to it, she misdirected herself in drawing no distinction between the words 'is' and 'by reference to' used in the statute making B3 provision, but, by conflating them, misdirected herself on a whim that in law they be taken to mean the same thing, thereby denying the purpose and intention of the statutory B3 provision".

23. The Appellant having spoken of it, the judge quoted wording from the Commentary but misdirected himself on its meaning, taking "until compulsorily retired" to mean when retired early on ill-health when, in context of being retired on ill-health, "what could have been earned until compulsory retirement", can only mean until retired on account of age - a future event beyond the time of the injury.

24. In the transcript the judge summarises some of what the Appellant had spoken of during the unrecorded 21[sic-27] minutes of the hearing but then ignores it and does not engage with the Appellant before telling the Appellant "All right. I propose to give a short judgment, giving my reasons for the decision on your application". There is no ratio decidendi in his Judgment. *(set out in full below)*.

"Mr G[redacted], I am sorry that, that goes against you but as I explained, it is a pure question of law, interpretation of the language of the scheme and in my judgment the point is simply

unarguable. There is no material within the wording of the scheme to support the argument, nor in my view would it make any practical sense. So that is the reason why I have dismissed your application. I am sorry that I have had to do that but that is the position as a matter of law".

25. Mr. Justice Fancourt never explained, referred to, or considered any wording that may constitute any 'pure question of law', nor did he define the point he finds 'unarguable' nor any wording which he found 'would not make practical sense' though a calculation showing the practical differences was part of the submission to Mrs. Justice Falk (for the 3rd July Hearing).

26. It seems irregular to the lay Appellant, a Senior Fire Officer, for a case to be taken from one judge who, thinking better of it after having dismissed it, orders a hearing for which she seeks further written input so, presumably when she was fully seized of it and when she may have come to understand the stark beauty and compelling spare simplicity of the draftsmen's language, so may have intended to correct a gross and long standing injustice – If not why revisit law she has decided? – to then have the case is taken from her to be casually dismissed by a judge who conducts the first 21 minutes of an open Hearing without recording it and where, apparently, neither the transcript nor the Judgment may be disclosed.

27. The Appellant is left with a concern of public importance that in the light of the recent McCloud and Sargeant cases (2018) EWCA Civ. 2844, might not there have been an irregularity, an interference in another case of, in this case, egregious, discrimination between a privately employed citizen whose financial loss is compensated at common law but under statute as construed by this respondent, compensation for financial loss is denied. The lay Fire Chief sees no reason to compensate his firefighters for financial loss. Note letter in Bundle.

C. The appellant repeats and adopts his original Appeal against Mrs. Justice Falk's initial Judgment.

D. On the assumption that Mr. Justice Fancourt, adopted Mrs. Justice Falk's first judgment, the Appellant adopts and repeats his grounds of Appeal lodged against Mrs. Justice Falk's judgment as grounds of appeal against Mr. Justice Fancourt's judgment.

E. Further the Appellant Appeals on the grounds of the matters as set out B supra. Mr Justice Fancourt being wrong in law on important points of legal principle such as to compel the Court of Appeal to find in the Appellant's favour to avoid sanction of conduct defrauding the Appellant of his rightful pension entitlement.

F. The Appellant invites the Court to review the fitness for purpose of a system for dispute resolution so heavily weighted against the pensioner and so in favour of the Respondents, though they owe fiduciary duty to put the pensioners interests before their own, that justice is not done (many have died) with delay being introduced by the respondents at every juncture – in this case some 5 years have elapsed from first complaint.

G The Appellant invites the Court to consider the conduct of the Respondents and, if so minded, direct that exemplary or aggravated damages be awarded to deter and punish the arbitrarily and oppressive conduct of the Respondent Authority. In this case the Respondent's avoidance of Counsel's Opinion to 'blind' themselves to legal obligation, their suppression of the Home Office Commentary, and misquoting it deliberately to

mislead, all carried on with impunity in a system so denied judicial oversight that denial of justice has become institutionalised to the point that defrauding its pensioners has long been the norm visited on Firefighters ‘injured in keeping the public safe’.

H. The Appellant seeks an account with unpaid pension retained by the Crown to be paid to the Appellant with Statutory Interest and such aggravated or exemplary damages as the Court should see fit to award.

And Costs.

Francis G[redacted].

J. M. Copplestone-Bruce
Inner Temple
25-09-20.