

Attached without prejudice to a without prejudice letter proffered for agreement a common sets of facts between the parties on modification of the Respondents proffered Agreed Facts.

**In the High Court of Justice
Business and Property Courts of England and Wales Chancery Appeals (ChD)**

**On appeal from a decision of the Deputy Pensions Ombudsman
on 10 September 2019 (ref: PO-19150)**

Appeal ref: CH-2020-000043

Between



Appellant

And

LANCASHIRE COMBINED FIRE AUTHORITY

Respondent

FACTS.

Pursuant to the Order of the Court made the 6^h May 2020, The Respondent and Appellant have agreed as follows:

1. Mr G [REDACTED] s date of birth is 17.12.1943. He turned 55 on 17.12.1998 and 60 on 17.12.2003.
2. He joined the Fire Service on 22.3.65 and retired on 22.7.98 (aged 54) following a road traffic accident when on duty on 5.2.1997, his car being hit from behind when stationary on a roadway while he was driving from an incident to the Fire Station. He suffered neck, head and back injuries, all adjudged by the Respondents to be 'qualifying injuries'.
3. This was a compulsory retirement under Rule A15 of the Scheme which reads as follows:-

- (1) Subject to paragraph (2), a regular firefighter may be required by the fire authority to retire on the date on which the authority determine that he ought to retire on the ground that he is permanently disabled.*
 - (2) A retirement under this rule is void if, on an appeal against the medical opinion on which the fire authority acted in determining that he ought to retire, the medical referee decides that the appellant is not permanently disabled.*
4. Officers at Assistant Divisional Officer rank and above could continue to work until the age of 60. Below that rank, the compulsory retirement age was 55. This was set out in Rule A13 which reads as follows:-
 - (1) This rule applies to every whole-time member of a brigade appointed on terms under which he is or may be required to engage in fire-fighting.*
 - (2) Subject to paragraph (3), a person to whom this rule applies shall retire—*
 - (a) if he holds the rank of assistant divisional officer or a higher rank, on attaining the age of 60, or*
 - (b) if he holds the rank of station officer or a lower rank, on attaining the age of 55.*
 - (3) In special cases the fire authority may extend the service of a person to whom this rule applies for a further period if they are satisfied that such extension would be in the interests of efficiency.*
5. Part 1 of Schedule 2 of the Scheme has the effect of limiting the maximum number of years' service that can count towards a pension at 40 years: so pension is payable to a maximum sum of 40/60ths of the appropriate rate of pay.
6. Mr G [REDACTED], was promoted to the rank of Assistant Divisional Officer with effect from 1/4/1988 and acted as a Divisional Officer III from 18/12/1989 – 30/04/1990 within B Division HQ Burnley, in his Divisional Staff Officer role he was required to stand in on occasion for his immediate superior DO III.
7. The three attached sheets entitled; "Uniformed Pay Scales 7.11.1997," "Uniformed Pay Scales 7.11.1998," and "Whole-time Pay Scales from 1999 – 2014," show the ranks in the Fire Service at that time and the relevant pensionable pay scales. The LCFA scales are taken from the Nationally negotiated 'The National Joint Committee Pay Scales'.
8. Progression "within" any of the ranks shown, based on length of service in that rank and within the Service as a whole would be automatic. For example progressing from 1st through to 3rd year at Assistant Divisional Officer level would be automatic each

year, and the 15 years' service increase was based simply on time in Service. However, progression up through the ranks was not automatic and was dependant on a position becoming available and a successful application. The annual increases in pay were applied automatically.

9. At the time of his retirement on 22.7.98, Mr G [REDACTED] was an Assistant Divisional Officer 3rd year, 15 years' service. With reference to the 1997 pensionable pay scales which were then applicable (the annual increase did not take effect until the 7^h of November each year) his pay was £27,420. This was however subject to an inclusive 20% 'Flexible Duty System'(FDS), pensionable allowance, so the total was £32,904.
10. It is agreed that Mr G [REDACTED], with 10 years exemplary experience as an ADO would reasonably have expected promotion in his final 5 years in a Fire Brigade Establishment then affording many more higher appointments than today, and in which tenure in the senior ranks tended to be short, having only reached command level by way of a fire-fighting career.
11. Had Mr G [REDACTED] continued to work until the age 60, the pay scales for 2003 would have been used in the calculation. Assuming he was at the same rank, his pay would either have been i) £41,941.20 (including the FDS allowance and Long Service (LS) Increment) if he was not responsible for a group of stations, or: ii) £43,053.60 (including the flexi duty allowance and Long Service Increment) if he was responsible for a group of stations.
12. It is not possible to say whether Mr. G [REDACTED] would have been an Assistant Divisional Officer responsible for a group of stations or not. However, under the establishment maintained by the Brigade at the time, Mr. G [REDACTED] as an Assistant Divisional Officer was responsible for a group of stations before he was injured. It also not possible to say whether or not he would have achieved a promotion to a higher rank before he reached 60.

COMMENT

(a). The Respondents in taking an uncommitted position avoid uncertainty by taking the Appellant as an established ADO, from which to extrapolate, with hindsight, that his APP but would have been either £41,941.20 or £43,053.60 but for injury.

(b). The Appellant would agree either APP but should Mrs Justice Falk agree his construction on the point of law and accept that he could have made DO II then his ill health pension would be calculated on an APP £36,547.72,

(c). If required the Appellant can supply references endorsing his full career expectation that he could reasonably have reached, at least, Divisional Officer II, before being required to retire at 60; on rate 25L at £30,456 pa which (with 20% FDS Allowance and LS Increment included) would have made his Average Pensionable Pay, up to £36,547.72. APP.

(d). When the Appellant applied for an ADO vacancy in West Yorkshire Fire Service his Lancashire Chief Fire Officer wrote in support of his application, "He runs his Station in an efficient manner and appears to get the best from his junior officers and men under his command.". In an earlier reference his Divisional Officer ended his letter by saying " If he is successful our loss will definitely be your gain".

(e) The Appellant was in good standing with his senior officers in Divisional HQ at the time of his accident and confident of promotion later in the year. Having acquired his Personal Record File by means of an Information Commissioner's Order. He will supply it complete to the Court if wished,

(f). The Respondents have not calculated any notional pension to age 60 on APPs of £41,841.20 or £43,053.60 , or otherwise than currently paid as set at **A below**.

(e) Appellant's current pension was calculated by Julie Wisdom (the Respondents' contracted Deputy Pension Scheme manager) sets out in her letters to the Appellant of 23rd February 2015, and 26 May 2015 in which the paragraph 5 provision is taken to impose a restriction

'The restriction is such that we cannot calculate a higher pension than would have become payable had you retired normally on account of age i.e. at age 55 and become entitled to an ordinary pension. Therefore as you had 35 years 285 days service at retirement your pension was calculated as an ordinary pension under regulation B1'

(e). To assist the Court the Appellant has calculated for direct comparison at **B below** his B3 DO II, Paragraph 5 'notional pension' at 40/60ths of £36,547.72 , payable as his ill health pension, and related gratuity and Injury Pension. In so far as the Appellant is aware there are no other calculations to be made.

(f). The Appellant was not aware that the Home Office had issued a practice guidance 'Commentary' to the SI 192. At all times he assumed his pension provider would ensure they knew the law and would apply it. Had he known of the existence of and the guidance given by the Home Office Commentary he would have questioned the basis upon which his pension was calculated.

13. The 1992 Scheme is index linked in accordance with pensions increases legislation, which is likely to have provided an increase in pension similar to any increase in salary that would have accrued had Mr G [REDACTED] remained in work until the age of 60.

Comment.

The pension paid being 2/3rds of salary fixed at 55.

14. The current "G [REDACTED] pension calculation" is dated 24.9.98 and is shown at **A below** the Appellants B3 Notional paragraph 5 pension of 40/60ths of a DO II's APP, as at the Appellant's date of retirement, is set out at **B below**.
15. The parties have agreed, subject to the Courts approval, that should the Appeal fail then the existing calculation **A below** continue and the Appellant be at liberty to appeal to a higher Court. That if the Appellant succeeds the pension is to be corrected to the 2020 calculation **B below**.
16. The parties have agreed that in the event of monies being found due to the Appellant, in consideration of the application of statutory 8% compound interest on such sums, The Appellant will not pursue any other claim for civil or criminal damages from the Respondents.

Ill Health Pension. A is being paid. B would be correction to DO II

Retires in accordance with Rule B3

40/60th of Average Pensionable Pay **A.** £32,465.27 = £21,643.51 *being paid*

B. £36,547.72 = £24,365.15 *Notional DO II*

Injury Pension

60% of APP	A. of £32,465.27 = £19,479.16	B of. £36,547.72 = £21,928.63
Less ¾ Of Ill Health Pension	£16,232.63	£16,446.47
Less Incapacity Benefit £48.80 pw.	<u>£ 2,545.73</u>	<u>£ 2,545.73</u>
Payable	£ 700.00	£ 2,236.43

Gratuity 12.5% of £32,465.27 = £4,058.16 or of £36,547.72 = £4,568.47

Pensions payable wef 23.07.1998

Ill Health Pension.	A £21,643.51	B £ 24,365.15
Less Commutation.	A £ 5,401.88	B £ 5,410.88
Plus Injury Pension.	A £ 700.00	B £ 2,236.43
Total annual pension	A £16,933.43	B £21,190.70

17. It is agreed that the sole question is as set out by Mrs Justice Falk precisely in Paragraph 5 of her Order of 6th May 2020.

These are the facts as agreed between the parties for submission by the Respondent to the Court by Friday 22nd May 2020.

Signed. G [REDACTED]. LIP Appellant.

Signed. Howell pp LCFA.