

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN

on the application of

1. JOHN FRANCIS
2. STAFF SIDE POLICE NEGOTIATING BOARD

Claimant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

And

OFFICIAL SIDE POLICE NEGOTIATING BOARD
POLICE NEGOTIATING BOARD

Interested Parties

CLAIMANT'S SKELETON ARGUMENT

Time estimate 2 days

Essential reading: Claimant's grounds, 1st and 2nd statements of John Francis, Defendant's detailed grounds, statement of Stephen Kershaw. Claimants Bundle A pp 13-38 (PAT decision), 41-3, 47-61, 84-7, 125-7, 163-7, 167J-L, 194 (para 2.21), 195 (para 2.26), 198-9 (para 8.4), 238-9 (paras 2.7-2.15), 243-8; Claimant's Bundle B: 1-39, 176-81, 298-229; SK1: 1-14, 18-25, 34-41, 71-7, 85-7, 90-2, 97-102, 120-3,

1) Issues:

- a) Has the Defendant acted unlawfully in failing to follow a recommendation of Police Appeal Tribunal that pay for 2007 should be increased by 2.5% from 1st September 2007. In particular:
 - i) Has she acted in breach of the Claimants' legitimate expectation or otherwise in excess of her powers under Regulation 46 of the Police

Regulations in failing to give proper weight to the decision of the PAT or departing from it for insufficient reason?

- ii) Has she failed to give adequate reasons for her decision?
 - b) Did she pre-determine the issues for decision by her?
- 2) The Claimant's do not pursue the point taken at paragraphs 66-72 of the grounds [CB26-7] and 76-8 grounds of resistance about an obligation to re-consult about staging. It is accepted that this would not produce any practical relief beyond what can be granted on the rest of the application.

Summary

- 3) The Claimants challenge the decision of the Secretary of State to stage a pay award of the Police Arbitration Tribunal (PAT). The PAT award was to increase the pay of police officers by 2.5% from 1 September 2007. The Defendant has varied the implementation date to 1st December 2007. This produces the result that the increase for the year is only 1.9% and not 2.5%.
- 4) Police officers are in an exceptional position because they cannot strike or take other industrial action. This is a serious restriction on their freedom of association as they cannot bargain collectively in any meaningful sense. The machinery for setting and negotiating police pay has been devised so that it produces a fair and transparent result to compensate officers for this. This was the foundation for the proposals in the Edmund Davies reports in 1978. It was confirmed by the Sir Patrick Sheehy in different industrial conditions in 1993 and was accepted as a principle by the official side in negotiations this year [SK294].
- 5) This approach has been applied consistently each year since before 1978. In each year, pay has been:
- a) Uprated according to an index agreed between the sides of the PNB or determined at a PAT.
 - b) Uprated with effect from 1st September each year.
 - c) This was intended to "command the confidence of the police service and the public by being transparent simple and objective" [Sheehy para 8.4 CB 198].

- 6) This year the Defendant has, for the first time, departed fundamentally from the basic structure of the scheme. She has disregarded both the indexing approach and the conventional date for uprating and she has departed from a recommendation of the PAT. The Claimants do not say that the Defendant cannot in any circumstances do this but she can do so only for the most weighty reasons and must give cogent and clear reasons for what she has done. Anything else fails to provide officers with the fair and transparent means for determining their pay to which they are entitled.
- 7) The Defendant's reasons fail to explain why she has decided as she has. The Defendant asserts that the decision is "in the interests of affordability and government policy on public sector pay" but as explained in the Claimant's grounds [CB22-3] neither of these points can withstand scrutiny. The award is affordable and there is nothing in any stated pay policy to require staging of this award. The Defendant has not properly addressed this. Her grounds simply assert that she was entitled to base the decision on pay policy without explaining why this is. This does not disclose a reason of sufficient weight to depart from the PAT recommendation.
- 8) The absence of reasoning or transparency suggests that there was in fact no attempt by the Defendant to address the factors specific to this group of workers. The Defendant pre-determined the issues and held fast to her Department's intention to deliver an in-year award below 2%. This is consistent with her failure to give any detailed explanation, or consideration to the PAT award and her failure to recognise the exceptional industrial relations position of the police.
- 9) The remainder of this skeleton deals with:
 - a) Narrative. This does not deal with the whole history, which is addressed in the statements of John Francis. It concentrates on the history of the negotiating machinery and why the Claimants say there is a legitimate expectation that PNB awards will be followed and on those parts of the 2007 process showing the Defendant's approach to government pay policy and the delivery of an in year award below 2%.

b) The statutory provisions

c) Submissions

Narrative

The machinery for negotiating police pay

10) The early history of this from 1919 to 1980 is set out in John Francis' statement at paras 13 to 15 and does not appear to be in dispute. Even before 1980 there was a well established practice that pay awards took effect from 1st September each year and that the Home Secretary would follow awards of the Police Council.

11) In 1977–78 a Committee of Inquiry was set up, chaired by Lord Edmund-Davies, to report on police pay. As noted at JF15, this was brought about because of a specific crisis in the course of the 1976 pay round. This is an important background feature because it emphasises that the Edmund Davies settlement was intended primarily to address grievances arising from the annual pay settlement.

12) The Edmund-Davies inquiry recognised, the unique and important role played by police officers in a parliamentary democracy and took as its starting point that police pay and conditions must be "set at a level to recruit and retain men and women of the right quality and in sufficient numbers to carry out [police officers'] duties". The committee noted the restriction on membership of a trade union and inability to take strike action as "perhaps the most important statutory restriction" and one that sprang from "the conviction that they are necessary to ensure the matchless role of the police" [CB86 at para 16].

13) The Second Report dealt with police pay. Chapter 6 considered and rejected a submission that the police should be allowed a right to strike but recorded at para 84:

"84. In common with all those who submitted evidence for our consideration, this committee is satisfied that the absence of the right to strike is a serious deprivation for any worker. It is essential that the police should not suffer in pay because they are deprived of the right to strike, and that it should be put beyond doubt that they are being paid fairly.

"Such an important limitation on the freedom of action of members of the police force renders it even more essential (i) that the machinery for determining police pay and other conditions of service commands the confidence of all sections of the service; (ii) that the absence of any right to strike be borne in mind by both sides when negotiating and should lead to an award that does full justice to the claims of the police; (iii) that there should be speedy arbitration at the request of either party".

14) In Chapter 11, the Report made recommendations for new rates of pay for federated ranks [167F-I]. Chapter 12 described a mechanism for keeping pay up to date. The starting point was that there was "general agreement that police pay should be related to some general index" [para 257 page 167J]. This resulted in recommendation 43, explained in para 261 that: "the salary levels which we recommend for the federated ranks and superintendents as at 1 September 1978 should therefore be updated on 1st September 1979 in accordance with changes in the index of average earnings (new series) in the previous 12 months and similarly in subsequent years". Paragraph 263 left to the PNB whether to use September to September changes or some other 12 month period "in the interests of reaching a settlement on or not long after **the due date**" (added emphasis). Paragraph 266 made clear that the system should not be inflexible and it should be open to either side to "propose variations to the updating process in the light of changes either in the police service or in pay movements in the economy as a whole".

15) For ACPO ranks the uprating formula was different and took account of average earnings and pay elsewhere in the community (recommendation 44 and para 264 – CB/167K).

16) The first report had dealt with the machinery for negotiating terms and conditions and had recommended the establishment of a police negotiating board with an independent chair and secretariat. In Chapter 10 [CB pp125-6] the Committee considered the powers of the Secretary of State to withhold consent

to an agreement of the PNB and whether an award should be binding. At paragraphs 114-

"...we were assured by the Home Departments that the Secretaries of State would never withhold approval of a Police Council agreement save for reasons of grave national importance. Regarding the power to make regulations in the absence of agreement the Home Department said that, should there be any future failure to agree on a pay award or any breakdown of the negotiating machinery the government would need the power to make Regulations on pay matters for the police, whose efficiency was essential for the maintenance of law and order. Finally they claimed that Parliament was already sovereign in matters of Police Regulations, because all Regulations had to be laid before it.

"115. We agree with the view that, as Police Regulations have to be laid before Parliament, the Secretaries of State are already accountable to that body and that accordingly, no further control is necessary. We recommend accordingly (Recommendation 27).

"116. In relation to the power to withhold approval exercised by the Secretaries of state over Police Council agreements, this question bears directly upon the view taken of the position of the police in society, a topic discussed in the Joint Introduction to our reports. If, as we think, they are unique in their role as a disciplined service responsible for the maintenance of law and order, negotiating procedures applicable to the generality of other pay groups are not necessarily appropriate. Our view is that, because of the unique role of the police and the ultimate responsibility of the Secretaries of state for the maintenance of the Queen's peace, the Secretaries of State should retain their present powers in relation to Police Council agreement and the making of Police Regulations. Being satisfied that these powers have not been and would not be exercised lightly, we recommend accordingly.

"117. We would however, like to place on record our view that any award by the Police Arbitration Tribunal should be set aside only for reasons of the utmost national importance".

17) There are two strands to this reasoning:

- a) Firstly the fact that Regulations had to be laid before Parliament was a sufficient control on those powers and therefore they did not need to be subject to further legal controls. At the time the detail of police pay, and other terms and conditions, was set out in the body of the Police Regulations and these were subject to negative resolution [Police Act 1964 s. 33 – SK/136-7 and now Police Act 1996 s. 50(8) – SK/143]. This is no longer the case. Since 2000 the Police Regulations have set out a framework for the determination of terms and conditions and the detail (such as rates of pay

and the effective date of any increase) is set out in Determinations made by the Secretary of State. These determinations do not have to be laid before Parliament and so are not subject to the same level of scrutiny. This structure is now contained in Regulation 46 of the Police Regulations 2003.

b) The power of the Secretary of State to depart from recommendations was not intended to confer any general power of veto or to enable the Secretary of State to reach a separate decision on the merits but was in the context of the need to maintain the Queen's Peace. The example given was that Regulations might need to be made to ensure the police were paid if the PNB could not reach agreement.

18) The recommendations were then enacted in the Police Negotiating Board Act 1980. In the course of the debate Mr Eldon Griffiths [CB172] described the effect of the recommendations as being that Lord Edmund Davies had devised "an inflation proofed formula to which both sides of the House are now committed. There is a provision for overriding for national necessity but police pay is not now to be bandied about in line with particular Governments Incomes policies". The Home Secretary, Leon Brittan, welcomed this speech and did not disassociate himself from this remark (CB/173 col 742).

19) The 1980 Act followed the approach recommended by the Edmund Davies report. It did not make PNB agreements binding but instead provided that they had the status of recommendations¹. The functions and status of the PNB were continued in the Police Act 1996, which was a Consolidating Act.

20) In 1984 there was a change to the pay-uprating formula in that it was linked to the underlying index of average earnings [see CB/211].

21) The Defendant claims [detailed grounds para 6-8 and 14-24 and Stephen Kershaw paras 12-21] that recommendations of the PNB have not been followed on a number of occasions and that the Government made clear its new position that it not longer intended to adhere to the commitment that recommendations

¹ The 1980 Act provides that a PAT award is deemed to be an agreement of the PNB. Except where appears otherwise references in this skeleton to PNB agreements are intended to be references to agreements and awards following a reference to the PAT.

would be followed except where there was a reason of national importance. The legal effect of this is examined below and the documents are discussed in the second statement of John Francis. In summary:

22) The 1988 negotiations related to senior grades only and did not impact on any expectation about pay determination for federated ranks. Pay for chief officer grades was determined under a different formula.

23) In 1990 the Home Secretary did depart from a recommendation of the PNB with regard to rent allowances. However, this did not relate to the annual pay award which was treated as having a different status and was more highly protected. At the same time that the Secretary of State was saying that he could not support the PAT award for rent allowances he was affirming a commitment to the Edmund Davies approach to pay. A news release dated 24 October 1989 [SK1/4] said:

“The Home Secretary added that the government’s attitude to police pay was unchanged. Since 1979 police pay had been increased annually in line with the Edmund Davies formula. The government remained committed to the broad principles on pay laid down in the Edmund Davies report and had no plans to change the arrangements for negotiating police pay”.

24) In a letter to the Chair of the PNB, Professor Hunter, dated 23rd Oct 1989 [SK1/5-6] the Secretary of State explained his position in connection with the rent allowance claim and the approach he was minded to take. The Claimant’s case is that this was not a statement that the Home Secretary was thereafter free to depart from a decision of the PNB for other reasons in all circumstances. It was only “in the present circumstances” that the Defendant felt able to take into account factors “other than” the mere fact that an agreement was supported by the PAT. However, even if this is intended to signal a general departure from the Edmund Davies any recommendation would still “carry great weight”. See also a letter to Dennis Healey MP dated 21 Feb 1990 at SK11-2 indicating that awards should be accepted “wherever practicable”.

25) In due course the Secretary of State did promulgate draft Regulations that departed from a recommendation of the PAT as to housing allowances. There was an annulment debate [SK1/241-82] in the course of which the continuing

commitment to Edmund Davies in relation to pay was affirmed. The Home Secretary said:

"I entirely agree with my hon. Friend the member for Ryedale (Mr Greenaway). The government have made their commitment to the Edmund Davies report, but there is criticism about capital spending plans in police forces. We must heed that argument and do our best to meet the representations made to us. The more we refuse to grasp this nettle, when housing allowances have run completely out of control, the less chance we have of meeting the serious objections that have been made to use on an entirely different front".

a) Mr Greenaway had said [SK279]:

"Morale has been adversely affected by the decision on housing allowance. It would be wrong to suggest otherwise. We must be careful to stress the clear Government commitment to honour Edmund-Davies on pay. The Government's support for the police speaks for itself"

26) The Claimants also refer to letters at SK1/23-5 where the Home Secretary described a speech to the Police Federation in 1990 in which he had expressed himself to be committed to the Edmund Davies formula and felt bound to honour the figure that produced despite the fact that it was "unwelcome in the present climate".

27) These comments cannot be seen as relating only to a formula for calculating increases in pay. The Edmund Davies approach was not only to approve an index but also the process by which it should be carried into effect and through which any changes would be introduced. Any change to the formula was to be negotiated and the new formula would then form the basis for any further pay settlement. This makes sense of the statement in October 1989 that (added emphasis):

"The government remained committed to the broad principles on pay laid down in the Edmund Davies report and had no plans to change **the arrangements** for negotiating police pay".

28) The all earnings index continued to be used until 1994 when the Sheehy Report recommended a different index. However, the fundamental structure, and the reasons for it remained the same. Thus the report continued to emphasise the need that the absence of the right to strike be "recognised in pay arrangements.

This is regardless of the prevailing state of industrial relations or the conditions of the labour market. That is one reason for recommending (Chapter 8) that a formula should be applied against the uprating of police pay subject only to periodic levels checks against the market and abatement in respect of changes to a limited range of centrally determined conditions of service" (see para 2.21 and 2.16). At para 8.4 the report further explained this:

"Chapter 2 paragraph 2.21. makes clear our view that since the police service has no right to strike, free collective bargaining would not be an equitable approach to the future settlement of police pay. Primarily for this reason but also so as to avoid peaks and troughs in the level of police pay, we favour a formula approach. Our objective has been to identify an approach which will:

- (a) Maintain pay at a sufficient level to recruit, retain and motivate officers of a good calibre on a consistent basis over time (by keeping police pay broadly in line with the market);
- (b) Command the confidence of the police service and the public by being transparent, simple and objective"

29) In paragraph 8.15 the Report recommended that in future the formula for uprating police pay should be based on the survey of private sector pay settlements already conducted by the Office of Manpower Economics (OME) in connection with civil service pay".

30) The Sheehy formula was to link police pay to the median of non-manual pay movements in the private sector on the 7th June each year. This enabled the staff side to table its claim based on the index at the July meeting of the PNB which was the last meeting before 1st September when the pay increase would take effect [see the PAT award for 2006 at CB211].

31) For 2006 the Sheehy formula would have produced an increase of 3%. Despite this the official side offered only 2.2%, and for the first time proposed to depart from an index based approach [PAT para 27]. The PAT upheld the Staff Side's claim to an increase, from 1 September 2006, of 3% based on the OME non-manual index. In reaching its decision the PAT was critical of the official side approach. It said at para 44 [CB222]:

"The indexation arrangements have been in place for 27 years. In our view it is not appropriate in the context of the police service to set aside such a long

standing mechanisms in the present year in the absence of full negotiations over possible alternatives and instead to offer a one off pay settlement at a lower level so late in the day”.

The Booth Report and 2007 negotiations

32) On 6 November 2006, the Home Secretary announced a two-part review of the way that police pay is uprated and of the police negotiating machinery, to be carried out by Sir Clive Booth. The first part of the review, which reported on 21 February 2007 [CB225-54], considered the options for uprating in 2007 (“the first Booth report”).

33) Sir Clive recognised that the options for a radical change in the negotiation machinery for 2007 were limited [para 4.24]. He recommended that for 2007 the parties adopt a new public sector facing index [para 4.27]. He also recommended that the sum produced by the index should not necessarily be applied across the board but should be used to produce a “pot of money that can be applied differentially according to the needs of the service, including modernisation”. The Booth index produced a figure of 2.35% although following further correspondence with Sir Clive this was revised to 2.325%.

34) The progress of the negotiations is discussed in the first statement of John Francis. His second statement deals with the correspondence disclosed by the Defendant since the grant of permission. That narrative is not repeated here. The Claimants note the following:

- a) On 10th April 2007 Dr Reid exercised his powers of direction to the PNB requiring them to reach agreement around the terms of Sir Clive’s report [CB1/176-8]. That letter set out government pay policy in terms that were broadly consistent with the formulation described by Sir Clive Booth in his report [2.7-12 at CB1/238-9].
- b) So stated, the policy does not appear to require that individual pay settlements be within 2% but that instead they be consistent with achieving a CPI target of 2%. However, other documents, including correspondence at the time the direction was given suggest that the policy was understood in

this sense on the official side from an early stage. Moreover, the documents stating the Home Office position indicate their fixed intention to produce an in year award for 2007 at this level. In particular

- i) 10 April 2007 Dr Reid to Steven Timms MP [SK39-40].
- ii) The Official Side's opening offer, as presented to the full PNB on 18 April 2007. This proposed 2.35% (the outcome of the Booth index) but assumed that was inconsistent with pay policy. The Official Side wished "... *to discuss with the Staff Side how the PNB can secure an outcome consistent with the achievement of the CPI inflation target of 2% and the government's wider objectives [set out in the letter to the independent chair of the PNB], whether by staging or by some other means of containing overall pay bill growth in the year to which the settlement applies*".
- iii) Mr. Timms letter to Dr Reid dated 16 May 2007 in which he said: ***If the police negotiating board process cannot achieve this outcome, you will need to impose an award at 2.35%, in line with Sir Clive's index. And required that the award be staged.***
- iv) The proviso to the official side offer made on 12 July 2007 [CB2/232] of 2.325% from first September 2007, to be applied across the board rather than as a "pot" approach. The letter noted that: "As the offer will not produce an outcome consistent with the UK government objectives including achievement of the CPI inflation target of 2% and affordable and sustainable pay awards, the Home Office, the Scottish Government and Northern Ireland Office, whilst supporting the offer of an award based on the new index, do not support the proposal that the new index, do not support the proposal that the new index should be applied in full with effect from 1 Sep 2007".

v) Staff side's response [CB2/235].

35) The parties were unable to reach agreement in the PNB despite an extension of the deadline for agreement and the matter was referred to the PAT with the following written terms of reference:

"to consider a failure to reach agreement between the two sides of the Police Negotiating Board on the uprating of the pay of police officers for 2007 and to make an award".

36) The Staff Side and Official Side both presented detailed written submissions and made oral submissions to the Tribunal. Reference is made in particular to the following passages:

Official side submission [CBB/298-329 without enclosures]

- a) Para 4.2 [page CBB/303] where the main principles are set out:
- i) The official side claimed that the offer of 2.325% is "at the limits of what can be funded without impacting adversely on service priorities and delivery". In fact, as had been made clear the authorities comprising the official side had budgeted for more than 2.7%.
 - ii) The offer accepted the principle that "the employment status of police officers means that the basis for determining any pay award should be fair and transparent but does not mean that they should have a higher award than that justified by consideration of the relevant factors".
 - iii) Pages 317-8 dealing with government policy on pay. This referred to the letter of 10th April 2007 and said:

"pay awards should be based on the achievement of the CPI inflation target of 2%..."

"The government collectively has demonstrated its commitment to its pay policy by delivering overall headline awards for pay review body groups in 2007-8 that average 1.9%".

"it is therefore important that public sector pay settlements continue to be consistent with the governments inflation target of 2 percent".
 - iv) Pp 324-5 address the formal majority offer made by the official side. Para 6.42 deals with the minority position of the Home Office that they "believe that implementation should be staged in order to be consistent with the UK government objectives including achievement of the CPU inflation target of 2% and affordable and sustainable pay awards. The government has made clear that pay awards of more than 2% in year value must be base on clear evidence of recruitment and retention difficulties. This therefore proposed staging at 1.5% for the first 7 months (as recommended by Stephen Timms) to produce and in year award of less than 2%.

Staff side: CBB/1-43

37) Section 3 – affordability and the government’s public sector pay policy. The staff side pointed out that an award in line with the Claimant’s claim (3.94% and so *a fortiori* some lesser amount) would have a negligible effect on the CPI and noted the report of the SSRB on senior salaries.

38) The Tribunal gave its award on 27 November 2007.

39) It developed a composite index combining and merging elements of those proposed by both parties [para 58]. This produced a median of 2.5%. It preferred to adopt a median figure rather than a weighed average as proposed by the staff side. Its award, as recorded at paragraph 70 was

“To increase the pay of all ranks of police officers covered by the three standing committees of the PNB by 2.5% with effect from 1 September 2007”.

40) In a letter dated 30 November 2007 [CB1/41-3] the Defendant requested consent from the Chancellor of the Exchequer to agree to “stage” the implementation of the award so that it would be effective only from 1st December 2007. This would produce a headline figure of 1.9%.

41) The Defendant announced her decision to House of Commons on 6th December 2007 [CB1/47-8]. The material part of her statement read:

“I have considered this recommendation very carefully. In doing so I have taken account of the Tribunal’s findings and reasoning, the need to ensure value for money and the best use of resources, affordability and Government policy on public sector pay.

“The Tribunal’s recommendation for a 2.5% increase is based on a new index expanding that proposed by Sir Clive Booth. Having fully considered the PAT findings I accept the recommendation of the Tribunal for an award of 2.5%. However I have given very serious consideration to the implementation of this award and concluded that in the interests of affordability and Government policy on public sector pay, the implementation of this award should be staged. This year’s police officer pay award will therefore be 2.5% with effect from 1 December 2007. Staging will mean that around £40m extra will be available in 2007/8 to invest in the provision of policing service to the public”.

42) In a letter to Members of Parliament dated 10th December 2007 [CBA/49-50] the Defendant purported to justify her decision. She again claimed that she had considered very carefully the recommendation made by the PAT but continued that she had not accepted the recommendation about the starting date.

"in coming to my decision about police officer pay I have a responsibility to take into account affordability and consistency with Government pay policy, including the maintenance of low inflation. For these reasons, I decided the implementation of the pay award should be staged...This will release some £40m, which will go towards a better police service and is the equivalent in value of over 800 more police officers than would otherwise be affordable this year. I attach priority to maintaining police officer numbers to ensure that police officers have colleagues alongside them, as well as ensuring fair pay settlements".

"..."

"Recruitment and retention of police officers is among the best in the public sector. Police forces report strong levels of applications. There are very low officer resignation rates with only 1.5% of officers voluntarily leaving the police service in the year ending 31 March 2007. the equivalent figure for the whole economy is 11.5%, or 7.8% across the public service..."

43) Since the decision under challenge there have been a number of meetings between the Defendant and representatives of the Police Federation. They have not produced any change in the substance of the decision despite some minor adjustments to matters such as dog allowances. At a meeting on 11th December 2007 the Defendant said that there was "no scope to open this year's settlement" [p. 102]. At the same meeting she described the PNB negotiating machinery as dysfunctional.

44) On 22nd January 2008 the Defendant wrote to the Police Federation in the following terms:

"My predecessor and I set out government policy to the PNB at the beginning of the 2007 negotiations, throughout the process and again as part of the Official Side's evidence to the Police Arbitration Tribunal. At all points it has been clear that whilst I would consider any PNB or PAT recommendation on its merits I would need to consider whether it was affordable and whether staging its implementation would be appropriate. The government inflation target remains unchanged, It has never meant, in 2007 or 2008, that all pay awards had to be settled at 2% or that all parts of the public sector had to have their pay awards staged. Both the level of each award and the

questions of staging need to take account of the prevailing economic circumstances and a wide range of other factors”.

Statutory scheme

- 45) This is summarised in the initial grounds at paras 25-11.
- 46) Police Officers are appointed to individual police authorities and serve under the direction and control of the Chief Constable. However, their terms and conditions are set out nationally in Police Regulations and in Determinations issued under the Regulations.
- 47) Police officers cannot be a member of a Trade Union (Police Act 1996 s. 64). They do not enjoy the same immunities from action in contemplation or furtherance of a trade dispute as apply to other employees under s. 244 TUL(C)RA 1992 and indeed most forms of industrial action are precluded by section 91 of the Police Act 1996 which creates a criminal offence of causing disaffection:
- “Any person who causes, or attempts to cause, or does any act calculated to cause, disaffection amongst the members of any police force, or induces or attempts to induce, or does any act calculated to induce, any member of a police force to withhold his services, shall be guilty of an offence...”
- 48) The current arrangements for determination of police terms and conditions are set out in the Police Act 1996 Sections 13 and 50 set out the authority for Regulations concerning terms and conditions.
- 49) S. 61 continues in existence the Police Negotiating Board (PNB) initially established by the Police Negotiating Board Act 1980. The PNB exists “for the consideration by persons representing the interests of [a range of bodies including police authorities, members of police forces and the Secretary of State] of questions relating to hours of duty, leave, pay and allowances, pensions or the issue, use and return of police clothing, personal equipment and accoutrements”.
- 50) By section 62(1), before making Regulations concerning terms and condition the Secretary of State shall take into consideration any recommendation made by the

Police Negotiating Board for the United Kingdom and shall supply the Board with a draft of the regulations”.

51) The Police Regulations 2003 are made under s. 50 of the 1996 Act. Regulation 24 allows for pay to be in accordance with determinations of the Secretary of State. This arrangement was introduced in 1998 with effect from 1996 after it proved too slow and cumbersome to implement pay decisions via changes to the Regulations (see 2nd statement of John Francis).

52) Regulation 46 confers the authority to make determinations, including determination as to police pay.

“46 Determinations

(1) Before making a determination under any provision of these Regulations relating to the matters mentioned in section 61(1) of the Act, the Secretary of State shall take into consideration any recommendation made by the Police Negotiating Board and shall supply the Board with a draft of the determination; and subsection (2) of section 62 of the Act shall apply in relation to a recommendation to be made for the purposes of this paragraph as it applies in relation to a recommendation to be made for the purposes of subsection (1) of that section”.

53) The Chairman and Deputy Chairman of the PNB are appointed by the Prime Minister and by section 61(3) of the 1996 Act the Board “shall continue to be constituted in accordance with such arrangements...as appear to the Secretary of State to be satisfactory”.

54) The current constitution of the PNB is dated July 2003 [CB1/2-12]. It comprises 22 members of the official side (including the secretaries of state, association of police authorities and association of chief police officers) and 22 members on the staff side (including the Police Federation of England and Wales and Scotland, and Northern Ireland, the Superintendents Associations, and the Chief Police Officers Staff Association).

55) There are 3 standing committees relating to Chief Officers, Superintendents and Federated Ranks (i.e. all ranks below Superintendent). These are the 3 standing committees referred to in the PAT award.

effective collective bargaining because they never have the option of withdrawing their labour.

63) Article 11 of the ECHR requires that workers should be permitted to associate and that they should be able collectively to advance and represent the interests of their members². This does not entail a right to strike because that is only one means of being heard but where there is no such right then Article 11 may require that there are other means of representation³. In *Ministry of Justice v Prison Officers Association* [2008] EWHC 239 (QB) this was referred to as a requirement that compensatory measures be put in place. Wyn Williams J was prepared to accept the force of the principle but held that failure to comply with it did not, on the facts of that case, amount to inequitable conduct disentitling the Claimant from an injunction.

64) Art 11 allows lawful restrictions on the right in the case of members of police forces but the Defendant does not appear to rely on this⁴. Rights of association have in fact been granted by enabling officers to be members of the Police Federation and those rights must be effective. In any event, freedom of association and collective bargaining or other types of representation also further other fundamental convention values such as dignity liberty and autonomy, equality and democracy⁵. A power on the part of the government unilaterally to negate a negotiated agreement is likely to involve a disproportionate interference⁶.

² *Swedish Engine Drivers Union v Sweden* (1976) ECHR 617.

³ See e.g. *Schmidt and Dahlstrom v Sweden* (1976) 1 EHRR 632 at 644 where the absence of a right to strike was not a breach of Art 11 because of the existence of other ways to exercise the right. Conversely in *Wilson & Ors v UK* [2002] IRLR 568 the ECtHR held that the absence of a duty collectively to bargain was not a breach, among other things because of the right to strike [para 45].

⁴ Compare *National Union of Belgian Police v Belgium* (1975) EHRR 578 where the government did not rely on this proviso.

⁵ As explained in *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia* [2007] SCC 27 at paras 82-5.

⁶ *Ibid* at para 96: "While it is impossible to determine in advance exactly what sorts of matters are important to the ability of union members to pursue shared goals in concert, some general guidance may be apposite. Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements".

65) It is unnecessary to explore the limits of the compensatory principle in Convention terms because it has already been recognised as a cardinal feature of the current scheme for determining police pay. It was established specifically in order to provide police officers with a fair and transparent way of determining their pay and in which they could participate in the absence of a right to take industrial action. This has been recognised throughout the history of the scheme as is clear from the Edmund Davies report at 2nd report paras 68-88 [163-7], Sheehy at paras 2.21, 2.26 [CB1/194-5], and as was accepted in the current pay negotiations by the official side.

66) It is against this background that the power of the Secretary of State to interfere was limited in discussion in the Edmund Davies report to matters of national importance. If the power is not substantively limited in some way then it fails to meet the requirement in Art 11(2) that any restriction, even in the case of the police, be lawful in the sense that it meets the requirements of certainty and is not arbitrary⁷. In this case the power is conferred, not so that the Secretary of State can interfere at will, but so that they can maintain an efficient and operative police force in the national interest.

Legitimate expectation

67) The Claimants' case on legitimate expectation is that the members of the staff side and those that they represent have an expectation entitled both to substantive and procedural protection and that:

- a) Whatever the appropriate test (see above) the Defendant has failed to demonstrate a sufficient basis for departing from the recommendation.
- b)** At the very least the Defendant is obliged to give adequate reasons for departing from the recommendation. The Defendant does not pursue a separate complaint that there was no sufficient consultation although if the further reasons are required then it follows that the Claimant must be entitled to address them.

⁷ *Council of Civil Service Unions v United Kingdom* (1987) 50 DR 228, EcomHR.

The factual basis for the expectation

68) The first question to consider to what has the public authority, whether by practice or by promise, committed itself⁸. This is a question of fact.

69) The Claimant's rely on a number of matters:

- a) The terms of the Edmund Davies report. This includes:
 - i) The promise made as to the status of PNB recommendations and that they would be departed from only for reasons of national importance. This was a statement as to future practice and survived the enactment of the Police Negotiating Board Act 1980.
 - ii) The Edmund Davies recommendations as to pay:
 - (1) That it should be uprated according to an index.
 - (2) That the uprating should be effective from 1st September every year, described as the "due date".
 - (3) That the index could be replaced by a negotiated alternative. This has the corollary that it will not be replaced unless the alternative is negotiated and that if an alternative is negotiated then it will for the new basis for any indexation until a further negotiated change.
- b) The consistent practice of successive home secretaries has been to follow without amendment annual pay settlements agreed by the PNB and PAT. This practice has survived successive government policies or objectives with regard to public sector pay or controlling inflation.
- c) Annual index-based uprating was affirmed by Sheehy, again with effect from 1st September each year. The formula adopted to implement Sheehy was expressly devised so that indexing could happen on this date each year.

⁸ In R (on the application of Bibi) v Newham London BC, R (on the application of Al-Nashed) v Newham London BC [2002] 1 WLR 237 CA para 19.

- d) The conventional understanding that 1st September is the due date is so powerful that in his letter of 10 April 2007, Dr John Reid directed the PAT to reach agreement on a pay award to take effect on 1st September 2007.
- e) Both the Edmund Davies and Sheehy reports confirmed the importance of the compensatory principle. Both required that police officers have a method of calculating pay that took account of their inability to strike and that would be fair and transparent.

70) The expectations initially created were that:

- a) A threshold expectation: The Defendant would follow any decision of the PNB except where there were grave countervailing reasons meeting a threshold criterion of national importance.
- b) A pay round expectation: That the annual pay award for federated ranks would be conducted in accordance with the indexing approach introduced by the Edmund Davies Committee or such other index as replaced it by agreement with effect from 1st September each year.

71) The Defendant claims that any expectation was defeated by 1990 at the latest relying on:

- a) Pay awards to ACPO and supervisor ranks in 1988 and 1989 and
- b) The 1990 negotiations over housing allowance.

72) The first was of limited scope and related to a different group of officers, it was not notified to the committee representing the federated ranks and could not frustrate their expectation. It is notable that this break with practice was not relied upon before Carswell J in *Re Police Association for Northern Ireland's Application* [1990] NI 258. If it had the force that the Defendant claims then it would have been because, on the Defendant's case, it would have been effective to put the Claimants on notice that the Secretary of State no longer intended to be bound by his promise to the Edmund Davies Committee and so it would have defeated the threshold expectation. Nor can this be used to defeat the pay round expectation based on practice because it relates to the wrong group and also

pre-dates the re-affirmation of the Edmund Davies position on pay in 1990 noted above. In any event, the pay round expectation does not rest simply on practice but also on the terms of the Edmund Davies and Sheehy reports on this issue.

73) As to the housing allowance in 1990:

- a) A close reading of the available documentation at the time (see above and the 2nd statement of Mr Francis) shows that it is too crude to suggest that the Secretary of State resiled from the national importance formulation for all purposes. In particular he left the arrangements for annual pay determinations unaffected and expressly affirmed them. The Defendant's submissions give no content to this.
- b) Even if the 1989/90 could and did affect the threshold expectation (see below) they did not affect the pay round expectation. That remains intact and grows in force with each succeeding year.
- c) To the extent that the Secretary of State did purport to resile from saying that awards in general would only be departed from for reasons of national importance:
 - i) It was not open to him to do so. The threshold expectation created by the promise to the Edmund Davies committee could not be defeated for all purposes in the future simply by breaking that promise on one occasion. Expectations related to a policy for the time being can be defeated by giving notice of a change of policy but this was of a different kind. It was in the nature of a bilateral agreement and so was closer to contract than a mere policy statement. In return for their assurance to the Edmund Davies Committee the Secretaries of State secured a recommendation that the awards should not be binding. Where conduct by a public body may amount to a breach of contract or estoppel then that may be so unfair to amount to an abuse of power - *Preston v IRC* [1985] AC 835⁹.
 - ii) Even if he was entitled to act in this way then the national importance justification was replaced by a formulation to the effect that recommendations would be given great weight. The Defendant does not address this. She suggests that the national importance criterion was

⁹ In *R (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 WLR 348, Lord Hoffmann disapproved of private law analogies with estoppel in this field but that does not affect the proposition here that the closer the circumstances are to a bargain in the nature of a contract then the less likely it is that the expectation can be defeated by simple notice.

removed but does not suggest anything that took its place. The Defendant appears to claim that from 1990 awards of the PNB had no more significance than any relevant consideration and that she was free to accept or reject on the merits as she saw fit. It is claimed that she did "not exercise their discretion to depart lightly" (para 70) but that is presented as a matter of grace not obligation. No reading of the contemporary documents overall suggests that PAT decisions were to be relegated in this way.

- d) The position after 1990 was that the Claimant's expectation that annual pay round settlements for federated ranks would be honoured was undiminished. It was still appropriate to maintain a national importance formulation as the standard for departure in relation to this. But even if this was not the case, PAT awards were still to be treated as presumptively binding and should be departed from only for reasons of great weight.

Was this expectation substantive or procedural only?

74) In *Re Police Association for Northern Ireland's Application* Carswell J accepted that the Claimant had a legitimate expectation that "the Secretary of State would not reject awards of the Tribunal, in circumstances where the requisite degree of national importance was not established, without taking steps to ensure that their action did not operate unfairly"

75) He held that this expectation was procedural only. On his reading of the authorities as they then stood he did not accept that fairness could require an authority substantively to be bound by an expectation it has created. This does not appear to have been argued before him and the claim was limited to a procedural expectation. On the facts of the case the only live argument on this point was as to procedural fairness and an opportunity to make representations. No argument seems to have been advanced about a right to reasons.

76) The position has since changed and it is now accepted that expectations can be given substantive protection in appropriate circumstances. This can apply as much to expectations that arise because of conduct - *R v IRC, ex p Unilever plc*

[1996] STC 681, *Nadarajah v Secretary of State for the Home Department* (2005) EWCA Civ 1363 as those that raise because of an express representation (such as in *R v IRC, ex p. MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545).

77) In *Coughlan* the Court of Appeal considered that where a claim was raised of a legitimate expectation then there were 3 possible outcomes, the decision maker might simply be required to bear in mind its previous policy or practice, secondly the expectation might attract procedural protection, such as a right to be consulted or have communicated reasons for a departure from the policy, thirdly if "the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy".

78) At paragraph 58, the Court described its functions in these respective classes of case:

"having decided which of the categories is appropriate, the court's role in the case of the second and third categories is different from that in the first. In the case of the first, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise. In the case of the second category the court's task is the conventional one of determining whether the decision was procedurally fair. In the case of the third, the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised."

79) In *Bibi v Newham LBC* [2002] 1 WLR 237 Schiemann LJ recast the function of the Court as follows:

"In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.

...

'Detrimental reliance will normally be required in order for the claimant to show that it would be unlawful to go back on a representation. This is in accord with policy, since if the individual has suffered no hardship there is no reason based on legal certainty to hold the agency to its representation. It should not, however, be necessary to show any monetary loss, or anything equivalent thereto.'

'Where an agency seeks to depart from an established policy in relation to a particular person detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such.'

80) The following factors point to the expectation in this case being a substantive one:

- a) The practice or representation is clear¹⁰.
- b) It relates to a specific class of decision (recommendations of the PNB).
- c) The practice relates to a clearly defined group of people. In *Coughlan* Lord Woolf said that an expectation would be more likely to be substantive if it related to an individual but he was there drawing a distinction between a definable set of individuals and promises made to the world at large.
- d) The consequences of honouring the representation are unlikely in themselves to engage or require political judgments. They involve the payment of sums of money as agreed. In *Coughlan* a further factor leading to the conclusion that the expectation was substantive was that the consequences for the health authority were purely financial (at 243B).
- e) The Claimants have historically acted to their detriment in reliance on the expectation. The members of the staff side of the PNB, have, on behalf of their members, acted in reliance on the expectation that the recommendations would be followed by engaging with the process in good

¹⁰ In response to the pre-action protocol letter the Defendant asserted that the representation was not clear, unambiguous and devoid of any relevant qualification. That is not so but in any event that is not now a requirement if it ever was. (*R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 and *Nadarajah – below*).

faith and by placing confidence in it. They have not sought to pursue pay claims by other means and have not sought to challenge the broad limitations on the right to strike contained in s. 91 of the Police Act 1996.

81) The above points were made in the Claimant's grounds (para 47). The Defendant does not deal with them but observes at para 71 that "the need to comply with Government pay policy was a perfectly proper reason to depart from" any substantive expectation that might exist. They rely on *R v Education Secretary ex p Begbie* [2000] 1 WLR 1115 per Laws LJ at 1130F and *Nadarajah v Secretary of State* [2005] EWCA Civ 1363 per Laws LJ at para 69 in support of a claim that the court can rarely intervene in decisions of this kind.

82) The Claimants accept the proposition that where decisions involve matters of macro economic or social policy then the Court will not normally interfere substantively to protect an expectation but that is not the case here:

- a) The Defendant's submission assumes the premise on which it is based that stating was needed to comply with government pay policy. That is exactly what was in issue in the negotiations and the Defendant has still failed to explain why this was the case – see reasons below.
- b) On analysis this is not a case that involves macro-economic or social issues at all in the sense used in those cases. Pay negotiation and settlement is a common phenomenon and does not involve the exercise of any special government powers. The Claimants seek to enforce a pay settlement that will result in each of the affected officers receiving an additional payment. This is not a political judgment in itself. The Defendant claims that the consequence of payment will have macro economic consequences. That is not a rational view to take on the evidence but in any event it does not convert the underlying pay award into such a decision.
- c) The Defendant's argument does not take account of the remedy sought by the Claimants. They do not ask to court to don the garb of policy maker by making a substitute decision. Instead they seek to hold the Defendant to a giving proper weight to PAT awards while recognising that the ultimate power of decision rests with the Secretary of State. Cases like *Al Nashed* (below)

show that the court can intervene in this way without trespassing on impermissible policy decisions.

Has the Defendant acted unlawfully in relation to the expectation and what remedy should be given?

83) These two questions are linked. Where there is a legitimate expectation then the decision-maker must understand its scope and, at the very least take it into account. If they do decide to depart from it then they must give reasons that are adequate to allow the court to evaluate whether or not the departure is justified according to the level of protection to which the expectation is entitled. This was the approach taken in *Al Nashed*

"Whereas in *Coughlan* it was common ground that the authority had given consideration to the promises it had made, in the present cases that is not so. The Authority in its decision making process has simply not acknowledged that the promises were a relevant consideration in coming to a conclusion as to whether they should be honoured and if not what, if anything, should be done to assuage the disappointed expectations. In our judgment that is an error of law.

"The Authority should when considering the position of the applicants have borne in mind that a promise was made to each of them that they would be given secure tenancies and that these promises have to this day, many years after they were made, not been fulfilled. There is no indication that the Authority has ever come to a judgment as to what weight should be given to the fact that the promises were made. There is no reason why the applicants should be disadvantaged by the fact that the promises were made as a result of the Authority's misunderstanding of the law.

"The law requires that any legitimate expectation be properly taken into account in the decision making process. It has not been in the present case and therefore the Authority has acted unlawfully.

"....

"But when the Authority looks at the matter again it must take into account the legitimate expectations. Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances such as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulate its reasons so that their propriety may be tested by the court if that is what the disappointed person requires".

- 84) The Defendant's decision-letters fail to meet this standard in any relevant respect.
- 85) At most the Defendant asserts that she has given very careful consideration to the PAT award but nowhere does she indicate any awareness of the expectation that such awards will be followed, nor does she acknowledge that reasons of exceptional weight are necessary to justify a departure (whether reasons of national importance or any other standard). In her letter of 22nd January 2008 to Jan Berry [SK122-3] she says "I would consider any PNB or PAT recommendation on the merits". This suggests that she regards herself as free to agree or disagree with a recommendation without giving it any special status as such.
- 86) The justifications put forward for the decision are apparently affordability and pay policy but the decision letters do not articulate this is a way that enables the Claimants or the court to understand either what the relevant pay policy was or why it necessitated this decision. Wherever the threshold lies to justify departure from a PAT decision it is impossible to say that the Defendant has established that this is made out.

Affordability

- 87) The Defendant has failed to explain what was meant by this or how it led to the conclusion that the award should be staged. Each of the police authorities comprising the official side has budgeted for the award as made by the PAT and they all support the award. The documentation disclosed by the Defendant supports the Claimants' position on this point. In July 2007 the official side lobbied the Defendant for authority to offer 2.5% unstaged [73-88]. The Defendant did not shift her position despite the fact that the official side said that authorities had budgeted between 2.5% and 3% for pay increases in 2007. If, by affordability, the Defendant intended to refer to the ability of police forces to afford this award for the current (2007-8) year then she erred because she failed to give any consideration to the fact that the relevant police authorities maintained that they could afford the award.

88) In her letter to MPs dated 10th December 2007 the Defendant accepted that "the full increase is locked into police officer's salaries for the future". If the Secretary of State intended to refer to these other years then she also erred because a decision to stage the award has no impact on affordability for these future years as for those years the award will be met in full in any event. It only has an impact on the 2007-8 year in respect of which provision has already been made.

Government Pay Policy

89) The Defendant has failed to explain how staging is necessary to comply with government pay policy and has failed to address the Claimant's arguments set out in the Staff Side submissions to the effect that the award would not be inconsistent with pay policy.

90) The initial reference to the PNB made by Dr John Reid MP in April 2007 explained Government Pay Policy as follows:

"The Government's clear objective – as articulated by the Chancellor – is that pay awards should be based on the achievement of the CPI inflation target of 2%. This policy applies to the police as to other public sector groups. The government's pay policy is not to impose the same award on every group, but to apply the same approach and considerations to every group. The police award should be consistent with the governments' wider economic objectives to secure economic stability and steady growth. It must be affordable and within existing spending limits, and consistent with continuing control of public finances. The pressures on Police Service finances underline the importance of restraint in this area".

91) As negotiations developed the interpretation given to this policy became more unclear. In the course of the meetings before the PNB the Official Side at some points appeared to take this to mean that government policy was that there should be no pay increases above 2%. Thus the official side offer of 2.5% was subject to the caveat that the Home Office could not agree because it was inconsistent with government pay policy. Similarly Dr Reid's letter to Mr Timms of 10th April referred to "in year" growth in line with the CPI target of 2%" [SK39] The official side submission to the PAT (see above) gave no clear definition.

92) The Claimant pointed out on a number of occasions that a 2.5% increase was not incompatible with maintenance of a 2% inflation target. It would be an

elementary error to equate the two. This was raised in the second working party meeting (CB2/190 para 15) and explained in detail in the staff side submissions para 3.1-5 (CB2/10-11). In making these points the Claimants were raising genuine issues of substance (see the statement of Rafael Gomez of the LSE). This issue was never resolved in the working party discussions and the PAT did not express a final conclusion on it.

93) The Defendant did not address any of these arguments and it is impossible to know from her reasons why she reached the conclusion that she has or what her understanding was as to the true meaning of government pay policy. The PAT did not expressly grapple with the competing contentions put forward by the parties because it did not need to do so and so the Defendant's reasons cannot be supported simply reference to the Defendant saying that she "considered very carefully" the PAT report.

94) In the letter to MPs dated 10th December 2007 the Defendant refers to other awards also being staged to below 2%. However, this cannot in itself be a sufficient reason to stage the police officer's awards. To treat it as such fails to give effect to that part of the government pay policy that all groups will not be treated the same and also fails to recognise the special and unique position of the police and the restrictions on their freedom of action, including the right to strike (see above).

95) Explanations given since the decision was announced take matters no further forward. The grounds of resistance assert that the decision was prompted by a "need to comply with government pay policy" [71] but do not explain what this was or what it required that result. The Defendant's letter to Jan Berry of 22 Jan 2008 (see para 45 above) also fails to give any transparent or understandable explanation for the decision. What other circumstances or factors were taken into account and why did they lead to this decision? Since it is the case that not all workers have to have their award staged why does this apply to the police? This letter still fails to recognise the special industrial relations context or to acknowledge the lack of a right to strike or accept that PAT recommendations have presumptive force.

Procedural expectation

96) Even if the Claimants expectation was entitled to procedural protection only then this would still entitle them to adequate reasons for the decision. This is an ingredient of procedural fairness and is typically required where a decision maker seeks to depart from an expectation – *R v Devon County Council ex p Baker* [1995] 1 All ER 73, 89. It cannot be contended that this expectation entitled the Claimants to standards of fairness falling short of a properly reasoned decision. An express objective of the indexing approach was to ensure that officers were entitled to the benefit of a fair and transparent means of determining pay (see the Sheehy report above) and this was expressly accepted as an objective in the official side submission to the PAT. The Defendant's reasons are inadequate as explained above¹¹.

Statutory context

97) A similar result to that contended for under legitimate expectation is also derived from the statutory context. The Defendant is required to take into consideration the PNB recommendation by Regulation 46. A term such as this takes its meaning from its context and in appropriate circumstances will mean that the recommendation must be followed except where there are cogent contrary reasons – *R (Munjaz) v Mersey care NHS Trust* [2006] AC 648¹². The Defendant resists this version of the argument on the following main grounds:

98) There is no analogy with *Munjaz* which affected the fundamental rights of a limited number of subjects and did not involve macro-economic issues [68]. This only serves to emphasise the depth of the Defendant's misunderstanding of the position. This case does involve fundamental rights and all previous discussion on this topic has acknowledged this. The fact that this decision affects a larger number of individuals cannot affect this if their fundamental rights are engaged. Nor are the macro-economic consequences decisive. That may affect the court's

¹¹ See De Smith Judicial review of Administrative Action 6th edn at 7-104-9 for the adequacy of reasons in various contexts. The standard here is transparency.

¹² In any event, there will normally be a duty to give adequate reasons for a departure from a matter to which the decision maker must have regard – *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318 and this produces the same result as under procedural expectation above.

assessment of what ultimately can count as cogent reasons for departure but does not affect the approach in principle.

99) Carswell J rejected the idea that there was any substantive limitation on the powers of the Secretary of State and that approach was affirmed by Parliament when it re-enacted the Police Negotiating Board Act 1980 in the Police Act 1996 – *Barras v Aberdeen Steam trawling and Fishing Co Ltd* [1930] AC 402. This does not provide an answer to this point because:

- a) The *Barras* doctrine does not apply here. It relates to circumstances where a term of art has been given a particular binding construction. The effect to be given to a recommendation of the PNB is not a matter of statutory construction in this sense but depends on the context, which may change from time to time.
- b) The contrary proposition was not apparently argued before Carswell J and he did not have his attention drawn to the compensatory principle.
- c) The 1996 Act was a consolidating Act only.
- d) Even if the *Barras* doctrine settles the meaning of the term in s. 62(2) of the Police Act 1996 it does not do so for Regulation 46 of the Police Regulations 2003 which is the power in issue in this case. The PNB Act 1980 followed the Edmund Davies report in not placing an express substantive limitation on the power of the Secretary of State because Police Regulations would be subject to parliamentary scrutiny. That is not now the case because police pay is dealt with by determinations and so the statutory context is different. In that context there is every reason why the power of the Secretary of State should be limited to be exercised in accordance with the compensatory principle.

Closed mind

100) The Claimants are content to adopt the approach in para 72 of the skeleton argument distinguishing between pre-determination and pre-disposition. The Secretary of State is a party to the PNB process and must be expected to have adopted a position in the negotiations. But this emphasises rather than diminishes the obligation to keep an open mind and to consider the PAT award as a matter in its own right. The negotiating structure contemplates that the

Secretary of State might fail at the PAT or might have to make more concessions than they wish to secure agreement. If this happens then they cannot simply revert to the position they took in the negotiations but must take the agreement as their starting point.

- 101) When these proceedings were started the Claimants did not have full documentation relating to the decision. The letters available at that time were summarised at para 65 of the grounds. Further material has now been disclosed and is discussed in the second statement of John Francis. It shows that:
- a) As early as March 2007, and before any direction was given by the Secretary of State to the PNB the government was "firmly minded" to stage any award. The direction to the PNB of 10th April 2007 was intended to achieve this result. For the first time the Home Secretary intervened in an attempt to force a decision about a new indexing arrangement.
 - b) In his letter to Stephen Timms MP of 10 April 2007 [SK39] the Home Secretary made a statement to the effect that he must show that he had not pre-determined the outcome. However, this cannot be reconciled with the second paragraph of the letter which states that the "in year pay bill growth" must be "in line with the CPI target of 2%". The PNB has freedom as to how this can be achieved but not as to this outcome it is "open to the PNB to consider other means of achieving the same end".
 - c) From this point on the Defendant recognised no possibility of any pay settlement that involved an in-year increase above 2%, even though pay policy did not necessarily entail this. By the time of the official side offer of 18 April 2006 it appears to have been assumed that an in year award lower than 2.35% was necessary to meet the CPI inflation target.
 - d) On 16 May 2006 Stephen Timms wrote to the Home Secretary [SK71-2] in the clearest terms indicating that this was a foregone conclusion. He said: "*If the police negotiating board process cannot achieve this outcome, **you will need to impose an award** at 2.35%, in line with Sir Clive's index. **The award must also be staged**, in line with the government's response to the recent Pay Review Body (PRB) recommendations: where PRB-recommended awards exceeded the relevant government proposal (e.g. those for nurses and prison officers), awards were staged to 1.5% for seven months; the*

official side's position should therefore be staging at 1.5 % until 1 April 2008)"

- e) The staging required by Mr Timms delivered and in year award of 1.854%.
 - f) This is a letter by Mr Timms and not the Home Secretary but there is no indication from the Defendant, or her predecessor disagreeing with this approach or asserting any freedom of action to agree to a higher in year award. On the contrary, at a meeting on 11th December 2007 with Jan Berry and John Francis, the Defendant referred to this as the Treasury "mandate" (p. 101 – although there is there no reference to staging. This conversation took place before disclosure of the letter). The extent to which the Secretary of States actual discretion was limited by the Treasury also appears from the memo from Stephen Kershaw of 29 Jun 2007 at CB1/254A-D. paragraph 14 refers to the need to seek treasury approval for more "wriggle room". There is no indication that such authority was sought and so the "mandate" remained for an in year award of about 1.85%.
 - g) Thereafter the Defendant did not engage on the merits with any arguments from other members of the official side directed at increasing the in-year award above 2% (see the correspondence at 73-87). She referred to government pay policy but did not explain why that required an award at this level.
- 102) This goes well beyond the expression of a preliminary approach that the Defendant is minded to adopt and indicates that options involving an in year increase above 2% are excluded. Statements to the effect that the Secretary of State will carefully consider recommendations take on a purely formal character against this correspondence. It is not in point that the Defendant agreed to some minor changes to London Weighting and dog handlers or that she agreed to a 2.5% increase (albeit staged) rather than 2.325%. The objective was to limit the increase for the year.
- 103) At the same time the Defendant has been openly dismissive of the PNB negotiating process and the approach to the PAT decision is consistent with this. She described it in a meeting with John Francis and Jan Berry as "dysfunctional" (Francis 1st statement para 59 – not challenged by Mr Kershaw) and on 2nd August 2007 she expressed "considerable doubt about the effectiveness of the current pay determination arrangements".

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