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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 11/07/2019

BEFORE:

MR JUSTICE MORGAN

- -

BETWEEN:

Case No: CH-2018-000247

(1) GARY CORSHAM
(2) GARY WASHBROOK
(3) DAVID GILLIES

Appellants

(1) POLICE AND CRIME COMMISSIONER FOR ESSEX
(2) THE CHIEF CONSTABLE OF ESSEX CONSTABULARY
(3) ESSEX AND KENT SUPPORT SERVICES

Respondents

AND BETWEEN:

Case No: CH-2018-000248

(1) KEVIN HAZELL
(2) WILLIAM PAUL KENDALL

Appellants

(1) THE CHIEF CONSTABLE OF AVON AND SOMERSET POLICE
(2) AVON AND SOMERSET POLICE AND CRIME COMMISSIONER

Respondents

Simon Cheetham QC (instructed by **Ellis Hass & Co, Solicitors**) for **the Essex Appellants (Messrs Corsham, Washbrook and Gillies)**
Naomi Ling (instructed on a Direct Professional Access basis) for **the Avon and Somerset Appellants (Messrs Hazell and Kendall)**
Jonathan Holl-Allen QC and Aaron Rathmell (instructed by **Legal Services, Essex Constabulary** and **Legal Services, Avon and Somerset Constabulary**) for the **Respondents in both appeals**

Hearing dates: 12 and 15 April 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MORGAN:

Introduction

1. This judgment concerns appeals against the decision of the Pensions Ombudsman (Mr Anthony Arter) dated 21 August 2018. That decision dealt with eight separate complaints which had been made to him. The eight complaints raised essentially the same issues. The Ombudsman dismissed all eight complaints.

2. Five of the complainants now appeal to the High Court. Three of those five were formerly police officers serving with the Essex constabulary. I will refer to them as "the Essex appellants". They are Mr Corsham, Mr Washbrook and Mr Gillies. Two of the five appellants were formerly police officers with the Avon and Somerset constabulary. I will refer to them as "the Avon and Somerset appellants". They are Mr Hazell and Mr Kendall. The appeals raise the same issues and have been heard together.

3. The problem which has been encountered by the appellants and which led to their complaints to the Pensions Ombudsman can be shortly stated as follows:

   i) The appellants were serving police officers who were entitled to retire after 30 years' service in the police force.

   ii) They were entitled on retirement to pensions which allowed them to take a substantial lump sum and then to receive annual pension payments.

   iii) The appellants retired in 2010 or 2011 when each of them was under the age of 55.

   iv) The Finance Act 2004 ("the 2004 Act") contained detailed provisions as to the taxation of pensions which came into force on 6 April 2006 ("A-Day").

   v) When the appellants retired in 2010 or 2011, the 2004 Act provided that the normal minimum pension age was 55.

   vi) It followed that the appellants were retiring under the normal minimum pension age.

   vii) Taking pension benefits under the normal minimum pension age normally produced adverse tax consequences for the pensioner.

   viii) However, the 2004 Act contained provisions which allowed the pensioner to avoid those tax consequences in certain circumstances. Those provisions potentially applied to the appellants but it was critical to their being able to take advantage of those provisions that the appellants did not take up employment of a certain kind within one month of retirement.

   ix) Each appellant did take up such employment within one month of retirement and accordingly were subject to the adverse tax consequences of taking pension benefits under the age of 55.

x) The result was that each appellant was liable to pay a substantial tax charge on their lump sums and on their annual payments until they reached the age of 55.

xi) The appellants say that the chief constable and the police authority in relation to each appellant encouraged that appellant to take up the further employment without delay.

xii) When the police officers made their decisions to take up further employment within one month of retirement they were not aware that the result of so doing would be to make themselves liable to tax in the way described.

xiii) They had not been informed of that result by their chief constables or their police authorities in advance of taking up the further employment.

xiv) If they had been informed of that result, before taking up the further employment, they would have postponed the start date of their further employment until more than one month after retirement and, in that way, they would have avoided being liable for the tax consequences referred to above.

4. In their complaints to the Pensions Ombudsman, the appellants contended that the relevant police authority and the relevant chief constable were in breach of duty to the appellants by failing to advise them about, or at least to inform them of, the tax consequences of taking up further employment in the way described above. The Pensions Ombudsman dismissed the complainants and the appellants now appeal pursuant to permissions to appeal which I granted to one group of appellants on 26 October 2018 and to the other group of appellants on 29 November 2018.

The organisation of police forces

5. The organisation of police forces is governed by Part I of the Police Act 1996 ("the 1996 Act"). By section 1 of the 1996 Act, England and Wales are divided into the police areas listed in schedule 1 to the 1996 Act. The listed police areas include the areas of Essex and of Avon and Somerset. Section 2 of the 1996 Act requires there to be a police force for every police area.

6. Each police area must have a chief constable: section 2(1) of the Police Reform and Social Responsibility Act 2011 ("the 2011 Act"). A police force, and the civilian staff of a police force, are under the direction and control of the chief constable of the force. A chief constable has the functions conferred by the 2011 Act and by other enactments: section 2(4) of the 2011 Act. Section 2(7) of the 2011 gives effect to schedule 2 to the 2011 Act. Paragraph 2 of schedule 2 provides that a chief constable is a corporation sole. By paragraph 4(2) of schedule 2, the chief constable may appoint such staff as he thinks appropriate to enable him to exercise his functions and otherwise to assist the relevant police force.

7. A police officer is an officer of the Crown and is a public servant: Halsbury's Laws of England, 5th ed. Vol. 84, Police and Investigatory Powers, para. 4. A police officer is not an employee of the police authority or the Police and Crime Commissioner: see Halsbury's Laws of England, 5th ed. Vol.84, Police and Investigatory Powers, para. 5. However, it has been held that the relationship of the chief constable and the officer is closely analogous to that of employer and employee: see *White v Chief Constable of*

South Yorkshire [1999] 2 AC 455 per Lord Steyn at 497E-F and per Lord Hoffmann at 505C and *James-Bowen v Comr of Police of the Metropolis* [2018] 1 WLR 4021 per Lord Lloyd-Jones at [15].

8. The terms on which a police officer holds his office are governed principally by the Police Regulations 2003. It was not suggested by any counsel in this case that these Regulations contained any provisions which are relevant to the issues on these appeals.

9. Originally, section 3 of the 1996 Act provided for the establishment of a police authority for every police area. A police authority was a body corporate: section 3(2) of the 1996 Act. Section 3 of the 1996 Act was repealed by the 2011 Act and the police authorities for Essex and for Avon and Somerset were abolished: section 1(9) of the 2011 Act. They were replaced by the Police and Crime Commissioners for those police areas. A Police and Crime Commissioner is a corporation sole: section 1(2) of the 2011 Act. A Police and Crime Commissioner has the functions conferred by section 1 of the 2011 Act, the functions relating to community safety and crime prevention conferred by Chapter 3 of Part 1 of the 2011 Act and the other functions conferred by the 2011 Act and other enactments: section 1(5) of the 2011 Act. The liabilities of a police authority for a police area before the coming into force of the 2011 Act were transferred to the new Police and Crime Commissioner for that police area: 2011 Act, schedule 15 paras. 5 and 25.

Police pensions

10. Section 1 of the Police Pensions Act 1976 ("the 1976 Act") permits the Secretary of State to make regulations so as to provide for the pensions which are to be paid to and in respect of members of police forces. There are currently three police pension schemes created under this provision. The first scheme was created by the Police Pensions Regulations 1987 ("the 1987 Regulations") and regulations supplementing and modifying those Regulations. The second scheme was created by the Police Pensions Regulations 2006. The third scheme was created under the Police Pensions Regulations 2015. The 1987 scheme was closed to new entrants on 5 April 2006 but all of the appellants in this case were and remain members of the 1987 scheme.

11. In the course of argument on these appeals, I was referred to one or two provisions in the 1987 Regulations but I was not shown the detailed provisions of the 1987 Regulations as regards the entitlement to pensions for which they provided. This tends to emphasise that this case is not about the entitlement of the appellants to pensions in accordance with the regulations which govern such entitlement.

Who administered the scheme?

12. In 2010 and 2011, which is the time relevant for the purposes of the present appeals, the body which was responsible for administering the pensions payable under the 1976 Act and the 1987 Regulations was referred to as "the police authority". This phrase was defined by section 11(2) of the 1976 Act and was used in regulation L1 of the 1987 Regulations.

13. On the facts of the present cases, for the purposes of the 1987 Regulations, the relevant police authority for the Essex appellants was the police authority for Essex

and the relevant police authority for the Avon and Somerset appellants was the police authority for Avon and Somerset. In the case of each authority, it delegated its functions in relation to the pension scheme to the pensions department of the relevant county council.

14. Since the happening of the relevant events in this case, with the changes brought about by the 2011 Act, the 1976 Act and the 1987 Regulations have been amended so that the relevant body is now the police pension authority which is the chief constable for the relevant police force.

15. If the Essex appellants establish that the police authority for Essex was liable to them in relation to the events which occurred in this case in 2010 or 2011, then that liability will have been transferred to its successor, the Police and Crime Commissioner for Essex by virtue of schedule 15 para. 5 of the 2011 Act.

16. If the Avon and Somerset appellants establish that the police authority for Avon and Somerset was liable to them in relation to the events which occurred in this case in 2011, then that liability will have been transferred to its successor, the Police and Crime Commissioner for Avon and Somerset by virtue of schedule 15 para. 5 of the 2011 Act.

The taxation of pensions

17. Part 4 of the Finance Act 2004 deals with the taxation of pension schemes. These provisions came into force on 6 April 2006 which was known as “A-Day”. The provisions involved major changes in the taxation of pensions and received wide publicity.

18. The scheme created by the 1987 Regulations was a public service pension scheme as defined in section 150(2) of the 2004 Act. Further, the scheme was a registered scheme within Chapter 2 of Part 4 of the 2004 Act. The scheme was liable to be de-registered under section 157 of the 2004 Act if the amount of the scheme chargeable payments (as defined in section 241 of the 2004 Act) made by the pension scheme during any period of 12 months exceeded the de-registration threshold of 25% or more: section 158(1)(a), 158(2) of the 2004 Act. Section 241 is considered below.

19. The provisions which I will mention next referred to “the normal minimum pension age”. This phrase was defined by section 279 of the 2004 Act so as to be 50 (before 6 April 2010) and 55 (after that date). In the present cases, therefore, the normal minimum pension age was 55. However, it may be relevant to note that the change in age took effect on 5 April 2010. That change in the age caused the problems in these cases. The minimum age of 50 did not seem to have caused problems with police pensions before 6 April 2010.

20. Section 160(1) of the 2004 Act provided that the only payments which a registered pension scheme was authorised to make to or in respect of a member of the scheme were those specified in section 164. Section 164 of the 2004 Act specified that the only payments that a registered scheme was authorised to make to a member of the pension scheme in relation to pensions and lump sums were in accordance with the rules in sections 165 to 168 of the 2004 Act.

21. Section 165(1), *Pension Rule 1,* provides that no payment of pension may be made before the day on which the member reaches normal minimum pension age, unless the ill health condition is met. Section 166 dealt with the lump sum rule. The lump sum rule authorised a pension commencement lump sum.

22. By section 166(3), Part I of Schedule 29 defined expressions used in the lump sum rule. Schedule 29 para. 1 defined a pension commencement lump sum. Para. 1(1)(d) restricted pension commencement lump sums to lump sums paid when the member had reached "normal minimum pension age".

23. Part 3 of Schedule 36 to the 2004 Act contained transitional provisions as to lump sums: see section 166(4). Part 3 of Schedule 36 dealt more widely with the right to take benefits before normal minimum pension age.

24. Para. 21 of Part 36 provided that if para. 22 or para. 23 applied, then "this Part of this Act" (presumably including all the provisions now relevant) applied as if references to normal minimum pension age were to the member's protected pension age. Para. 22(8) defined the member's protected pension age as the age from which the member had an actual or prospective right to any benefit under the protected pension scheme on 5 April 2006. Para. 22(9) did not permit a protected pension age of more than 50 before 6 April 2010.

25. Para. 22(1) referred to (a) a protected pension scheme and (b) the retirement condition. Para. 22(2) provided that a scheme was a protected pension scheme if Condition A or Condition B was met. Para. 22(3) stated that Condition A was met if, amongst other things, the entitlement condition was met. Para. 22(4) dealt with the entitlement condition which included a requirement that the member had an actual or prospective right under the pension scheme to any benefit from an age of less than 55.

26. Para 22(7) referred to the retirement condition. This sub-paragraph referred to matters which were dealt with in great detail in para. 22(7A) to 22(7J). In order to demonstrate the complexity and the detail of these provisions, I will set them out in full, as follows:

> "22 (7) The retirement condition is met in relation to the member and the pension scheme if—
>
> (a) the member becomes entitled to all the [benefits] payable to the member under arrangements under the pension scheme (to which the member did not have an actual entitlement on or before 5th April 2006) on the same date, and
>
> (b) in a case where on 5th April 2006 the member had an actual or prospective right under the pension scheme to any benefit from an age of less than 50, Condition 1 is met or, in any other case, Condition 2 or 3 is met.
>
> (7A) Condition 1 is met if–
>
> (a) the member is not, after becoming entitled to the benefits mentioned in sub-paragraph (7)(a), employed by a person who

is a sponsoring employer in relation to the pension scheme and with whom the member is connected, and

(b) the member's becoming entitled to those benefits is not part of an arrangement the main purpose (or one of the main purposes) of which is the avoidance of tax or national insurance contributions.

(7B) Condition 2 is met if–

(a) the member is not, after becoming entitled to the benefits mentioned in sub-paragraph (7)(a), employed by a person specified in sub-paragraph (7C), and

(b) the member's becoming entitled to those benefits is not part of an arrangement the main purpose (or one of the main purposes) of which is the avoidance of tax or national insurance contributions.

(7C) The persons referred to in sub-paragraph (7B)(a) are–

(a) any person who was a sponsoring employer in relation to the pension scheme at any time during the period of six months ending with the day on which the member became entitled to the benefits mentioned in sub-paragraph (7)(a) and by whom the member was employed at any time during that period,

(b) any person who is connected with any such person, or

(c) any person who is a sponsoring employer in relation to the pension scheme and with whom the member is connected.

(7D) If the member has become entitled to the benefits payable under arrangements under the pension scheme by reason of service in the armed forces of the Crown, any employment on compulsory recall is to be disregarded for the purposes of sub-paragraph (7B)(a).

(7E) Condition 3 is met if–

(a) paragraph (a) of sub-paragraph (7B) is not satisfied but one of the re-employment conditions is met, and

(b) paragraph (b) of that sub-paragraph is satisfied.

(7F) The re-employment conditions are–

(a) that the member is not employed as mentioned in sub-paragraph (7B)(a) during the period of six months beginning with the day on which the member becomes entitled to the benefits mentioned in sub-paragraph (7)(a), and

(b) that the member is not employed as mentioned in sub-paragraph (7B)(a) during the period of one month beginning with that day, but is so employed during the period of five months beginning at the end of that period, and either the pension abatement condition or the materially different employment condition is met.

(7G) The pension abatement condition is met if–

(a) the pension scheme is a public service pension scheme, and

(b) the member's benefits under the scheme consist of or include a scheme pension which is liable to reduction by abatement while the member is employed as mentioned in sub-paragraph (7B)(a) and is under the age of 55.

(7H) The materially different employment condition is met–

(a) in a case where the member is employed as mentioned in sub-paragraph (7B)(a) in more than one employment during the period of five months mentioned in subparagraph (7F)(b), if each of those employments, and

(b) otherwise, if the employment in which the member is so employed during that period,

is materially different in nature from the employment in which the member was employed immediately before becoming entitled to the benefits mentioned in sub-paragraph (7)(a).

(7I) For the purposes of sub-paragraph (7D) *"employment on compulsory recall"* means permanent service–

(a) under Part 4 of the Reserve Forces Act 1996,

(b) under Part 5 of that Act,

(c) under a call-out or recall order made under that Act,

(d) having been called out or recalled under the Reserve Forces Act 1980, or

(e) because of any other call-out or recall obligation of an officer.

(7J) [Section 1122 of the Corporation Tax Act 2010] (connected persons) applies for the purposes of this paragraph."

27. These are undoubtedly complicated provisions. However, as explained below, the position on the facts in this case was comparatively straightforward. The appellants took up employment with the police authority within one month of retirement and did not satisfy the conditions which would have allowed them to rely on these transitional

provisions. Conversely, if they had postponed the commencement of their new employment to a date more than one month after retirement, they would have been able to take advantage of these provisions.

28. Some of the provisions in para. 22(7) to 22(7J) refer to "the sponsoring employer". As explained earlier, the chief constable is not the employer of the police officer. However, the definitions of "employer" and "employee" in section 279(6) of the 2004 Act cross-refer to sections 4 and 5 of the Income Taxes (Earnings and Pensions) Act 2003 which include employment in the service of the Crown within the concept of employment, and employer and employee have corresponding meanings. Accordingly, in the case of a police officer and the scheme created by the 1987 Regulations, the relevant chief constable is a sponsoring employer.

The lifetime allowance charge

29. Section 214 (and further sections) of the 2004 Act provide for the lifetime allowance charge. This is a matter of great significance in the operation of the 2004 Act. No issue as to the lifetime allowance charge arises in these cases. However, I draw attention to the existence of the provisions because some of the information provided by the police authority to the appellants addressed the position as to this charge.

The tax treatment in the present cases

30. In the present cases, the appellants were entitled to receive a lump sum and annual payments at an age which was below the normal minimum pension age. In order to avoid the adverse tax consequences described in more detail below, the appellants had to bring themselves within the transitional provisions of Part 3 of schedule 36 to the 2004 Act. The particular provisions which mattered were the re-employment conditions in paragraph 22(7F). If the appellants had taken up their new positions as civilian staff more than one month after their dates of retirement, then they would have satisfied the requirements of para. 22(7F) and they would have satisfied all of the other necessary matters in para. 22. However, because they took up their new positions within one month of retirement they did not satisfy the requirements of para. 22(7F). The result was that they did not satisfy the retirement condition in para. 22(7) and therefore para. 22 did not apply to them. This had the effect that they could not rely on para. 21 to produce the result that references to normal minimum pension age were read as a member's protected pension age. This meant that the payment of the lump sum (to which the appellants were entitled under the 1987 Regulations) under the age of 55 was not a pension commencement lump sum because it did not satisfy para. 1(1)(d) of schedule 29. It therefore did not comply with the lump sum rule in section 166 and was not an authorised member payment for the purposes of section 164. Instead, it was an unauthorised member payment.

31. The same provisions produced the same result as regards the annual pension payable to a member before the age of 55.

32. The making of unauthorised member payments had consequences not only for the relevant member but also for the scheme administrator.

33. Section 208(1) imposed a liability on a member to pay an unauthorised payments charge where an unauthorised payment was made by a registered pension scheme. By

section 208(5), the rate of the charge was 40% of the unauthorised payment. Section 208(7) provided that the unauthorised payment might also be subject to an unauthorised payments surcharge under section 209 and a scheme sanction charge under section 239.

34. Section 209 provides for a charge to income tax, known as an unauthorised payments surcharge, to be payable by a member where a surchargeable unauthorised payment is made to the member by a registered pension scheme. Section 210 identifies which unauthorised member payments are surchargeable. Simplifying section 210 and applying it to the case of a single payment, the position is as follows. Section 210(8) refers to the unauthorised payments percentage which is the percentage of the member's pension fund used up by the unauthorised payment. The surcharge threshold is reached when this percentage reaches 25%. When the surcharge threshold is reached, the unauthorised member payment is surchargeable.

35. In 2013, in the light of the problems which had occurred in these cases and other similar cases in other police areas, HMRC offered a concession which dealt with some of the tax consequences of the loss of the protected pension age. The concession provided that if the lump sum payment was made by BACS and if the police authority had begun processing the payment of the lump sum prior to the officer's retirement, then the lump sum payment would not be treated as unauthorised. This concession was restricted to the tax treatment of the lump sum payment and did not affect the tax treatment of the annual pension payments. I understand that all but one of the officers involved in these appeals were able to take advantage of this concession. The exception was Mr Hazell. He was not able to take advantage of the concession because he started his new employment on the same day as the processing of the lump sum payment began. In his complaint to the Pensions Ombudsman, Mr Hazell contended that the delay in processing his pension following his notice of intended retirement amounted to maladministration but this complaint was not raised on Mr Hazell's appeal to the High Court.

36. The HMRC concession, made in 2013, cannot affect the question whether the police authorities and the chief constables owed relevant duties to the appellants in 2010 and 2011 but it might affect the amount of the loss suffered by the appellants and the amount of compensation which ought to be paid.

The consequences for the scheme

37. The making of unauthorised member payments can result in the scheme being liable to pay a scheme sanction charge. The relevant provisions are sections 239 to 241 of the 2004 Act. Section 241 provides that an unauthorised payment by a registered pension scheme is a scheme chargeable payment. Section 239 provides that a charge to income tax arises where in any tax year one or more scheme chargeable payments are made by a registered pension scheme. The person liable to pay the scheme sanction charge is the scheme administrator. By section 240, the scheme sanction charge is at the rate of 40%. However, if the scheme chargeable payment is an unauthorised payment and the member has paid tax on that payment under section 208, then the scheme sanction charge is reduced and may be reduced by as much as 25%, leaving a charge at the rate of 15%.

38. There is a further possible adverse consequence for the scheme. If the scheme chargeable payments as defined in section 241 in a period of 12 months exceeds the de-registration threshold, that is, if the scheme chargeable payments percentage exceeds 25%, then the registration of the scheme may be withdrawn under section 157. This percentage is calculated by comparing the amount of the scheme chargeable payments with the size of the fund. By section 242, the scheme administrator is liable to pay a de-registration charge at the rate of 40% of any sums held for the purpose of the scheme and 40% of the value of any assets so held.

39. The possible adverse consequences for a scheme of making unauthorised member payments, which would be scheme chargeable payments pursuant to section 241, was the subject of modifications during a transitional period which ran to the end of the tax year 2010-2011, as described in the next paragraph.

40. Para. 3 of schedule 36 to the 2004 Act permitted HMRC to make regulations modifying the rules of certain pension schemes (including the scheme created by the 1987 Regulations). Any such modifications could potentially apply until the end of the tax year 2010-2011. Pursuant to this power, HMRC made The Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006 ("the Modification Regulations"). Regulation 3 of the Modification Regulations provided that any rule of an existing scheme which required the trustees or managers of the scheme to make a payment which would, by virtue of section 160 (and therefore section 164), be an unauthorised payment should be construed, in respect of the transitional period, as conferring a discretion upon the trustees or managers to make that payment.

41. Regulation 3 of the Modification Regulations was relevant in the present context because of the way in which it was referred to in another set of regulations made by HMRC, namely, The Registered Pension Schemes (Unauthorised Payments by Existing Schemes) Regulations 2006 ("the Unauthorised Payments Regulations"). Regulation 2 of the Unauthorised Payments Regulations provided that during the transitional period to the end of the tax year 2010-2011, an unauthorised member payment made in exercise of the discretion conferred by Regulation 3(1) of the Modification Regulations was not to be a scheme chargeable payment to the extent that it was referable to subsisting rights which had accrued under defined benefits arrangements before 6 April 2006 (the commencement day for the 2004 Act).

The scheme administrator for the purposes of the 2004 Act

42. Section 239 of the 2004 Act provided that it is the scheme administrator who is liable for the scheme sanction charge. Section 270 of the 2004 Act provided that the scheme administrator was the person who was appointed in accordance with the rules of the scheme to be responsible for the discharge of the functions conferred or imposed on the scheme administrator under Part 4 (Pension Schemes etc) of the 2004 Act. In the case of the scheme created by the 1987 Regulations before the 2004 Act, para. 4 of schedule 36 to the 2004 Act provided that the scheme administrator was to be identified in accordance with the provisions of section 611AA of the Income and Corporation Taxes Act 1988. Under section 611AA, the relevant person was the scheme sponsor and the scheme sponsor was the person who established the scheme. As the 1987 Regulations were made by the Secretary of State for the Home Office, he was the scheme sponsor under section 611AA. Accordingly, before 6 April 2006, the

Secretary of State was the scheme administrator for the purposes of the 2004 Act although, of course, he did not have any liabilities under the 2004 Act in relation to that period.

43. With effect from 6 April 2006, the scheme created by the 1987 Regulations was split into a number of sub-schemes by The Registered Pension Schemes (Splitting of Schemes) Regulations 2006. In summary, the different police authorities were to have their own sub-schemes and so there was a sub-scheme for the Avon and Somerset police authority and a separate sub-scheme for the Essex police authority. Regulation 3(1) of these Regulations provided that the sub-scheme administrator of a sub-scheme should assume the liabilities and the responsibilities set out in schedule 3 to these Regulations. These liabilities included the liability for the scheme sanction charge under section 239 of the 2004 Act. Regulation 1 provided that the sub-scheme administrator was the scheme administrator of a sub-scheme appointed in accordance with the rules of the split scheme.

44. I was told by counsel that they had not identified an express provision which stated that the police authorities for the Avon and Somerset sub-scheme and for the Essex sub-scheme were the sub-scheme administrators for those sub-schemes in the period 2010 to 2011. There were express provisions later in time, in the Police Pensions Regulations 2015, which made the police pension authority the scheme manager for the relevant sub-scheme, and provided that the scheme manager was to be the scheme administrator, but these did not apply to the period 2010 to 2011. I was invited to proceed on the basis that, in that period, the relevant police authority was the sub-scheme administrator for the relevant sub-scheme. This is consistent with what was said in paras. 2.5 and 2.6 of Home Office Circular 7/2006 which treated the police authorities as the administrators of the sub-schemes and, in particular, as the sub-scheme administrators for the purposes of the 2004 Act.

The provision of information

45. The Registered Pension Schemes (Provision of Information) Regulations 2006 ("the Provision of Information Regulations") specify requirements as to the provision of information in connection with registered pension schemes under Part 4 of the 2004 Act. Limited reference was made to these regulations at the hearing of the appeals but I have looked at them more closely since the hearing. The regulations provide for the scheme administrator to give specified information to HMRC but also require the scheme administrator to provide information to members and to others. Further, the regulations require members to give information to the scheme administrator.

46. By regulation 3 of the Provision of Information Regulations, the scheme administrator was obliged to provide an events report in respect of a large number of reportable events which had occurred during a reporting year and the report had to contain specified information. The reportable events included the making of unauthorised payments to members. The specified information included the name of the person to whom the payment had been made together with the nature, amount and date of the payment.

47. By regulation 11 of the Provision of Information Regulations, a member was required to give the scheme administrator information about his lifetime allowance and the various protections relating to it. By regulation 11B, a member was required to give

the scheme administrator certain information which was relevant where the scheme intended to pay to the member a pension commencement lump sum.

48. A number of regulations in the Provision of Information Regulations required the scheme administrator to give information to the member or someone on behalf of the member; see, for example, regulations 8, 10A, 10B, 14, 14ZA, 14A, 14B and 14C. These dealt with specific situations. It is not said in the present case that the police authorities as sub-scheme administrators were in breach of the Provision of Information Regulations on account of any omission to give relevant information to the appellants.

The complaints to the ombudsman

49. The Essex appellants and the Avon and Somerset appellants were five out of eight retired police officers who complained to the Pensions Ombudsman. The respondents to the complaints were the Police and Crime Commissioners for Essex and for Avon and Somerset, respectively, and in addition the chief constables for those areas. There was a further respondent, namely, the Essex and Kent Support Services. I understand that this is not a separate legal entity but is a department of the Essex constabulary. The appellants did not make any submissions as to this respondent and I need not further refer to it in this judgment.

50. In summary, the appellants' complaint to the Pensions Ombudsman was that both the Police and Crime Commissioner for their area and the chief constable for their area were liable to them for breach of duty. As regards the relevant Police and Crime Commissioner, it was contended that the Commissioner had inherited the liability of its predecessor police authority and that that police authority was in breach of a duty owed to the relevant appellants by failing to advise them or failing to inform them as to the consequences for their pensions of taking up employment in a civilian post with the police authority within one month of retirement. As regards the relevant chief constable, it was contended, similarly, that the chief constable was in breach of a duty owed to the relevant appellants by failing to advise them or failing to inform them as to the consequences for their pensions of taking up employment in a civilian post with the Police authority within one month of retirement.

The ombudsman's decision

51. The Ombudsman gave a single decision dealing with the eight complaints made to him. In that decision, the Pensions Ombudsman made some findings of fact as to the position of the individual police officer and gave a lengthy summary of the case being put by the police officer and the case being put forward on behalf of the Police and Crime Commissioner and the Chief constable. I will refer later to the criticisms which have been made to the effect that the Pensions Ombudsman's findings and reasoning were incomplete.

52. The Pensions Ombudsman dismissed the complaints against both the Police and Crime Commissioners and the chief constables. The Pensions Ombudsman considered whether there was a relevant duty in contract owed by the Police and Crime Commissioner (in fact, the predecessor police authority) and held that there was no contract or quasi-contract between the police authority and the officer while the officer was a serving police officer. He then considered the position between the

officer and the chief constable. He held that although there was a quasi-contractual relationship between the officer and the chief constable, the latter did not owe a duty to the officer to inform him of the potential tax consequences for his pension benefits by reason of his taking up employment with the police authority within one month of retirement as a police officer. He discussed, and distinguished, the decision of the House of Lords in *Scally v Southern Health Board* [1992] 1 AC 294 which had been relied upon by the complainants.

53. The Pensions Ombudsman then considered whether the police authority or the chief constable owed a relevant duty in tort to the police officers. He described the position of the police authority in relation to the sub-schemes. He said that the police authority was not the administrator of the sub-scheme and was not a scheme administrator or a sub-scheme administrator under the 2004 Act. It became clear in the course of the hearing of these appeals, that the Pensions Ombudsman was not right about the role of the police authority in relation to the sub-schemes. However, he went on to hold that a scheme administrator had a number of functions under the 2004 Act. He listed these as being:

- registering the scheme with HMRC;
- operating tax relief on contributions under the relief at source system;
- reporting events relating to the scheme and the scheme administrator to HMRC;
- making returns of information to HMRC;
- providing information to scheme members, and others, regarding the lifetime allowance, benefits and transfers;
- acting as the point of contact for communications with HMRC; and
- paying certain tax charges in respect of the scheme.

54. The Pensions Ombudsman held that a scheme administrator owed a duty in tort to the members of the scheme in relation to the functions of a scheme administrator under the 2004 Act but that the duty did not extend to other functions and the duty which had been alleged by the police officers went beyond the scope of the duty owed. This meant that the police authority was not in breach of any relevant duty owed to the police officers.

55. The Pensions Ombudsman then considered whether the chief constables owed a relevant duty in tort to the police officers. He held that there was no relevant duty in tort in relation to the matters complained of, essentially for the same reasons as he had given when considering the duties of the chief constables pursuant to their quasi-contractual relationship with the police officers.

56. The Pensions Ombudsman ended his decision by making the following comments:

> "While the application of the relevant legal principles means that I am unable to uphold the complaints, I do have a great deal of sympathy for the unenviable position that [the complainants] have found themselves in and I can certainly understand why they feel aggrieved. They have chosen to continue working, following their retirement as police officers. Utilising a person with their rich experience and extensive knowledge of policing in a civilian police staff role is clearly to the benefit of both the Avon & Somerset Police and also the Essex Police. Indeed, our investigations in this case suggest that the practice of employing former officers in civilian police staff roles post-retirement is widespread across forces in England and Wales, presumably for that very reason.
>
> Given the clear benefit both services derive from employing former officers in civilian police staff roles, [the respondents] could be said to have a moral duty to ensure that [the complainants] were made aware of any potential adverse financial consequences of their employment with them post retirement."

Findings of fact

57. These appeals are made, and can only be made, on points of law: see Pension Schemes Act 1993, section 151(4). Ordinarily, the appeal court will set out the findings of fact of the Pensions Ombudsman and decide any disputed issue of law to which those facts give rise. The position is not so straightforward in this case.

58. The appellants submit on this appeal that the Pensions Ombudsman did not make all of the findings of fact which are necessary for any decision maker to make a final decision in these cases. Further, as regards the police authority, it is said that the Pensions Ombudsman did not understand that the police authority was the sub-scheme administrator in relation to the sub-scheme. It is also said that the Pensions Ombudsman did not deal with one way in which the case was put against the police authorities, namely, that they were liable for negligent misstatements made to the appellants.

59. I agree with the criticisms of the Pensions Ombudsman made in the last paragraph. The question then arises as to what I should do by way of disposal of these appeals. One course would be to decide the questions of law which have been argued and then to remit the matter to the Pensions Ombudsman for him to make any findings of fact which might prove to be necessary to determine the ultimate question as to the liability of the police authorities and the chief constables. However, it might be said that the questions of law which arise or might arise are heavily dependent on the specific facts of these cases so that the facts should be determined first and only then should any questions of law be considered.

60. The Pensions Ombudsman did not conduct a hearing in this matter. There was no oral evidence and there was no cross-examination. Indeed, there was not much evidence in

the form of witness statements. The documents before the Pensions Ombudsman were mostly submissions which referred to documents which were exhibited. If the allegations which are made in this case had been made in High Court proceedings, then there would have been a thorough exploration of the facts which were potentially relevant to the issues of liability. In particular, I consider that a most important issue in this case relates to what the police authorities knew or ought to have known about relevant matters at critical times.

61. The parties have urged me to avoid remitting the matter to the Pensions Ombudsman if that is at all possible. The matter has already taken a long time and the parties have argued their cases fully at this hearing. They are anxious to obtain finality at this hearing if that can fairly be achieved. Accordingly, I will set about making all of the findings of fact which it is proper for me to make. For that purpose, I will set out the matters of fact which are agreed, or which clearly appear from the agreed documents, or which have been found by the Pensions Ombudsman. I will address the questions of law which arise and in that way it will emerge whether the findings of fact which I have been able to make are adequate for me to make final decisions in these cases.

The individual appellants

62. The Essex appellants are Mr Corsham, Mr Washbrook and Mr Gillies.

63. Mr Corsham's date of birth is 6 June 1960. He served as a police officer with the Essex Constabulary for many years. After 30 years of service, he was entitled to retire from the police force on full pension. In that way, he retired on 31 July 2011. On 15 August 2011, he was employed by the Essex Police authority as a member of the civilian staff.

64. In or around June 2011, Mr Corsham had given notice of his intended retirement on 31 July 2011. This led to him receiving a letter about his entitlement to a pension under the 1987 Regulations. The letter was dated 6 June 2011 and was sent by Essex County Council, Pensions Services. Essex County Council was acting for the Essex police authority. The letter was signed by the Pensions Officer of the Police Pensions Team. The letter enclosed estimates of the pension benefits payable following retirement on 31 July 2011.

65. The letter to Mr Corsham went into detail about the lump sum to which he would be entitled. It explained the HMRC limit of 25% of the total value of the pension which was required to be observed if the lump sum was to be free of tax. The letter explained that the lump sum to which Mr Corsham would be entitled would exceed the 25% limit and he had a choice as to whether to take the full lump sum and pay tax at 40% on the excess over the 25% limit or to take the lump sum which satisfied the 25% limit and receive that lump sum tax free. The letter gave this explanation as to the tax treatment of the amount of the lump sum which exceeded the 25% limit:

> "Such a payment is classed as "unauthorised" and will result in an unauthorised payment tax charge of 40% of the excess amount above the HMRC limit. Should the value of this excess exceed 25% of the value of your "vested benefits" at retirement, an additional 15% surcharge would be payable, taking the total tax charge to 55%."

66. The letter then explained that the 15% surcharge would not apply to Mr Corsham and enclosed two detailed calculations of his pension benefits showing two alternative lump sums, one at the HMRC limit and a higher one showing his entitlement under the scheme. Both calculations also gave details as to Mr Corsham's lifetime allowance and the percentage of his lifetime allowance used by the pension benefits.

67. The letter to Mr Corsham also contained the following statement, in bold type:

> "**Please note that your decision to commute pension to lump sum is a personal choice, and we are unable to provide you with any financial advice. You may wish to seek independent financial advice before making your final decision.**"

68. On 14 July 2011, Essex County Council wrote again to Mr Corsham giving him a detailed statement as to his pension benefits based on the lump sum being within the HMRC limit. The letter was signed by the Pensions Officer "on behalf of Essex Police authority". The letter stated:

> "You should be aware that pensions (other than duty awards) under the Police Pension scheme are treated as earned income for Income Tax purposes and that normal PAYE arrangements apply. Consequently, no Form P45 will be issued. However, a copy P160 will be sent to you shortly after you retire. To ensure that your tax position is properly assessed you should complete the enclosed form P161 and return it to Inland Revenue (address provided)."

69. The letter of 14 July 2011 then stated that if Mr Corsham thought that his pension benefits had been incorrectly assessed, he should contact Essex County Council Pensions Division who would seek to clarify the matter.

70. Mr Washbrook's date of birth is 13 November 1957. He served as a police officer with the Essex Constabulary for many years. After 30 years of service, he was entitled to retire from the police force on full pension. In that way, he retired on 26 August 2011. On 12 September 2011, he was employed by the Essex Police authority as a member of the civilian staff.

71. On 20 July 2011 and 16 August 2011, the Essex County Council sent to Mr Washbrook letters in the same terms (but, of course, using different figures) to those sent to Mr Corsham. The letters were based on Mr Washbrook's last day of service being 25 August 2011. Mr Washbrook elected to take a lump sum above the HMRC limit and tax on the excess over the limit was charged at 40% and deducted by the Essex Police authority who provided Mr Washbrook with a certificate to that effect.

72. Mr Gillies' date of birth is 13 August 1960. He served as a police officer with the Essex Constabulary for many years. After 30 years of service, he was entitled to retire from the police force on full pension. In that way, he retired on 14 November 2010. On 15 November 2010, he was employed by the Essex Police authority as a member of the civilian staff.

73. The appeal bundle did not contain letters addressed to Mr Gillies of the kind referred to above in the cases of Mr Corsham and Mr Washbrook but as the letters in question were standard form letters, I was asked to proceed on the basis that Mr Gillies had received the same letters as the others had.

74. The Avon and Somerset appellants are Mr Hazell and Mr Kendall.

75. Mr Hazell's date of birth is 7 July 1960. He served as a police officer with the Avon and Somerset Constabulary from 1 September 1981. On 31 August 2011, after 30 years of service, he was entitled to retire from the police force on full pension. He retired on 5 September 2011. On 6 September 2011, he was employed by the Avon and Somerset Police authority in a support staff capacity.

76. Following Mr Hazell giving notice of his intended retirement, he contacted the persons dealing with pensions for the Avon and Somerset Police authority in order to obtain a statement of his entitlement to pension benefits. The Police authority wrote to him a letter dated 17 August 2011 (received on 30 August 2011) with information as to his pension benefits. The letter explained his entitlement to a tax free lump sum up to 25% of his gross pension and the charge to tax at 40% of any part of the lump sum which exceeded the 25% limit. Mr Hazell was entitled under the scheme to a lump sum which exceeded that limit. The letter contained calculations showing the relevant figures. The letter also referred to the lifetime allowance of £1.8 million which was above the amount of Mr Hazell's pension benefits but the letter explained that the Police authority did not have any information as to any other pensions which Mr Hazell might be entitled to. The letter stated that it was Mr Hazell's responsibility to declare to the Inland Revenue if he exceeded that limit. Mr Hazell was asked to decide what he wanted to do as regards the lump sum.

77. Following receipt of the letter dated 17 August 2011, Mr Hazell immediately telephoned the Police authority to point out that it had used the wrong figures for his final salary. On 1 September 2011, the Police authority emailed Mr Hazell with revised figures and, on the same day, he replied to the Police authority telling it that he would take the maximum tax-free lump sum. On 6 September 2011, the Police authority wrote again to Mr Hazell with information as to his pension benefits. The letter referred to the payment of benefits and indicated that the first month's payment of the annual pension would be liable to tax. The letter stated that once the pension was set up the Pensions Section of the Police authority would have no involvement with the payment and taxation of pensions and if Mr Hazell had any queries relating to tax deducted, he should contact Pensions Payroll section. However, any disagreement as to his tax code should be raised with HMRC. The letter referred again to the lifetime allowance of £1.8 million.

78. On 8 June 2011, Mr Hazell was offered a civilian post following retirement. The offer referred to him taking up his new post on 20 June 2011. There followed email communications in June and July 2011 as to whether Mr Hazell could take up his new post while he was still a serving police officer. It was decided that he could not and instead he had to wait until he had retired as a police officer and he could then take up the new post.

79. Mr Kendall's date of birth is 26 July 1959. He served as a police officer with the Avon and Somerset Constabulary from 27 July 1981. On 26 July 2011, after 30 years

of service, he was entitled to retire from the police force on full pension. He retired on 31 October 2011. On 1 November 2011, he was employed by the Avon and Somerset Police authority as a licensing officer.

80. On 22 September 2011 and 4 October 2011, the Avon and Somerset Police authority wrote two letters to Mr Kendall which were in essentially the same terms as the two letters written to Mr Hazell, but with different figures.

81. On 16 September 2011, Mr Kendall was offered a civilian post following retirement. The offer letter referred to his new post beginning on 1 November 2011.

The "practice" of further employment after retirement

82. In his decision, in a passage I have already quoted, the Pensions Ombudsman referred to the benefit to the police force of re-employing retired police officers in civilian roles. He also stated that this practice was widespread. In their written submissions, Mr Holl-Allen and Mr Rathmell accepted that the appellants had been encouraged to take up their new positions by former colleagues and/or supervisors.

83. Mr Hazell's witness statement contained more detail as to the practice of re-employing police officers as civilian staff. Mr Hazell stated:

   i) The practice of the Avon and Somerset force was affected by cuts in public spending which had begun to bite by 2010;

   ii) The police force wished to retain skills and not lose them on retirement;

   iii) Although there was a scheme (the 30+ Plus scheme to which I refer below) which allowed the re-employment of police officers in retirement as police officers, it was cheaper to re-employ retired police officers as civilian staff;

   iv) The Chief constable told the police officers in his force that he wished to retain skills within his force;

   v) Around 2010, there were redundancies in the force and there was a tendency to find people who were approaching retirement and to seek to re-employ them as civilian staff so as not to lose the skills of trained and experienced officers but instead to retain their skills at lower salaries as civilian staff;

   vi) This practice was widespread;

   vii) The force specifically encouraged the practice of re-employment on retirement in a civilian role;

   viii) Mr Hazell was encouraged to start in his new civilian role without delay after retirement and he started the day following his retirement.

The presentation

84. Before they retired each of the Avon and Somerset appellants attended a presentation on the subject of retirement. In his decision, the Pensions Ombudsman made findings

about the presentation attended by one of the other complainants, a police officer with the Avon and Somerset force, referred to as "Mr R". It was held:

> "Prior to being re-employed Mr R attended a presentation regarding his retirement options. The presentation was not given by A&SPCC, but a copy of it has been provided to my adjudicator. While the presentation did touch on retirement prior to age 55/60, in a slide entitled 'When to go?', Mr R has confirmed that during the presentation of that slide there was no suggestion raised that individuals should take independent financial advice if retiring prior to age 55; and, specifically, there was no advice relating to a potential loss of protected pension age if retiring before that age and being re-employed."

85. When setting out the submissions for another Avon and Somerset complainant the Pensions Ombudsman recorded this submission:

> "The Chief Constabulary offers pre-retirement courses for retiring officers and employees. The financial sessions are provided by Affinity Connect who describe themselves as 'a leading provider of financial education in the workplace for the public sector'. Affinity Connect provide within the workshop manual an appointment request form which allows delegates to request an appointment with an Independent Financial Adviser and during 2009/2010/2011, when these officers would have attended, all delegates also received a copy of the presentation itself which had links to organisations such as the Financial Conduct Authority and Unbiased.Com. Affinity say they take it very seriously that they should point delegates in the right direction and signpost quite a few times during the course that Independent Financial Advice should be sought, and how to do so. "

86. The appeal bundle contained the agenda for the two day presentation on the subject of "Planning a positive retirement & resettlement". The agenda included a presentation by the Somerset County Council Pension Department. This county council managed the sub-scheme on behalf of the police authority. The agenda also had a topic of "Taxation" and the sub-headings referred to personal tax allowances and taxation in retirement. A later topic referred to an update on inheritance tax.

87. The appeal bundle also included the slides presented by the Somerset County Council. The slides showed that the pension benefits would consist of a commuted lump sum and an annual pension. There was a slide entitled "When to go" which specifically referred to the possibility of retiring before the age of 55. There were worked examples of the amount of the pension depending on the age at retirement. Another slide, headed "After Retirement", referred to "Payment of commuted lump sum (tax free)".

88. Mr Hazell provided a witness statement to the Pensions Ombudsman. Mr Hazell said that while the persons attending the presentation were advised to seek independent financial advice in relation to matters such as investments and other topics, there was

no suggestion that independent financial advice was needed if a police officer was just taking his police pension.

89. Ms Ling stated during her oral submissions that she did not suggest that the Avon and Somerset police authority had assumed a responsibility in relation to the content of the presentation. However, the above facts do show that the Avon and Somerset appellants were not put on notice in any way as to the possibility that they may suffer adverse tax consequences by retiring under 55 and taking up employment as civilian staff within one month of retirement.

90. I was not shown any evidence of a similar presentation to the Essex appellants. However, Mr Cheetham told me that the Essex appellants had attended "a very similar road show". I understand that this was not disputed by Mr Holl-Allen for the Essex respondents.

What the chief constables or police authorities knew or ought to have known

91. It is relevant to consider what information was available to the chief constable or the police authority in 2011 as to the effect on the pensions of the retiring officers if they were to take up employment as civilian staff by the police authority. The first point to make is the obvious one that the 2004 Act is an Act of Parliament which is therefore generally available as such. Further, HMRC published the Registered Pension Schemes Manual which contained guidance as to the changes made by the 2004 Act as regards the tax treatment of pensions. The first version of this Manual was published on 2 June 2005. The relevant section of the Manual is at RPSM03106000. This Manual was referred to in the Home Office circular to which I refer below.

92. The Registered Pension Schemes Manual was summarised in the complaint made to the Pensions Ombudsman by the Avon and Somerset appellants. At the hearing of the appeal, it was agreed that the summary was accurate and it is convenient to set it out here. The summary refers to the link to the Manual given in a Home Office circular (7/2006) to which I refer further below. The summary stated:

> "59. The HMRC on-line guide to which a link was provided was the same guidance that is made available on the internet to all employees, employers and scheme administrators. The link took users through to the Registered Pension Scheme Manual, from which they could select the pages relevant to their status (1). The employer pages (2) gave as an option a 'pension age' page (3) which included a page entitled: 'What if the scheme rules currently allow benefits to be paid before age 55?' (4) At the bottom of that page, employers were directed towards another page 'For further information about the protection of early retirement ages and what is meant by "unqualified right" (5). This further page gave a list of options of which one was: "Loss of protection due to employment after taking benefits: protected pension age 50 to 54" (6). This, finally, gave details of the circumstances in which re-employment would cause the loss of the protected pension age of below 55 and which would render payment of pension below that age 'unauthorised'. To reach it, six links had to be followed.

> 60. The Scheme Administrators' pages (2) had as an option: 'Protecting Pension Rights from tax charges' (3) and one of the contents within that heading was 'Loss of protected pension age due to employment after taking benefits: protected pension ages in the range 50 to 54.' This page (4) again gave details of the circumstances in which re-employment would cause the loss of the protected pension age of below 55 and which would render payment of pension below that age 'unauthorised'. To reach it, four links had to be followed.
>
> 61. Alternatively, the page could have been arrived at via the technical pages, which would also have required four different links to be followed."

93. On 6 April 2006, the Home Office published Home Office Circular 7/2006 which was headed "Police pensions: "A-day" and changes to Police Pensions Regulation 1987". Copies of the circular were sent to chief constables and the clerks to police authorities. The stated purposes of the circular included the following:

> "a) to explain the changes which are being made to the Police Pensions Regulations 1987 and the Police Pensions (AVC) Regulations 1991, including those consequential upon the A-day changes and upon the new financing arrangements for police pensions.
> b) to instruct police pensions administrators on the action they need to take before 6 April ('A-day') to comply with the changes to tax legislation which come into force on that day; …
> "

94. Part 1 of the circular described the changes to the 1987 Regulations and referred to further detail on that subject in Annex A to the circular.

95. Part 2 of the circular gave information about A-day. It referred to Annex D which gave information about some of the changes from that day. It was not said that anything in Annex D is directly relevant to the questions in these appeals. The circular then referred to the HMRC RSPM Manual. Since the hearing, I have accessed the Home Office circular and I was able to follow the link to the HMRC Manual. As one might imagine, it is a very detailed guide as to the changes coming into force on A-day.

96. In his decision, the Pensions Ombudsman set out some of the text which he said appeared in the HMRC Manual, as follows:

> "Technical pages Protecting Members Rights
>
> http://www.hmrc.gov.uk/manuals/rpsmmanual/RPSM03100000.htm.
>
> ….Technical Pages: protecting pension rights from tax charge: taking benefits before normal minimum pension age:

A break in employment of at least six months

If the individual is not employed by any of the employers mentioned in …within the six months after becoming entitled to benefits the individual will not lose their protected pension age.

A break in employment of at least one month and the employment is materially different

An individual who after one month following becoming entitled to benefits, becomes employed by any of the employers mentioned …will not lose their protected pension age if the new employment is materially different.

A simple change in hours will not be a material different employment. To be a material different employment the duties and/or the level of responsibility in the new employment must be different from the old employment."

97. Reverting to the circular 7/2006, paragraph 2.3 of the circular identified the duties which had been imposed on pensions administrators. These included the duty to provide information to HMRC and, in particular, to provide an Event Report annually, which report should include a report as to the making of unauthorised payments.

98. Part 4 of the circular dealt with "Authorised Payments" and the possibility that the making of unauthorised payments would attract a tax charge for both the member and the scheme. However, most of Part 4 and of Annex H which was referred to in Part 4 dealt with matters which did not include the issues raised in these appeals.

99. The Pensions Ombudsman also set out a submission for another Avon and Somerset complainant in which he quoted another note from HMRC in these terms:

> "The Scheme Administrator should tell the member if their right to take benefits has been protected, although there is not requirement for the member to register the protection themselves with HMRC."

The decision suggests that this note related to protected pension ages.

100. In addition to the publication of the Manual, HMRC publish Pension Simplification Newsletters. Newsletters 9 and 11 published in January and March 2006 respectively had links to guidance on the changes to be made by the Finance Act 2006 in relation to one of the relevant conditions: see Finance Act 2006, schedule 23, paragraph 43.

101. HMRC's newsletter number 38 was issued in December 2009 and specifically covered aspects relating to the change in the normal minimum retirement age from 50 to 55 on 6 April 2010. The newsletter stated:

"Change in normal minimum pension age from 6 April 2010

Outline of change

The normal minimum pension age (NMPA) marks the earliest age at which pensions and lump sums may normally be taken as authorised payments under a registered pension scheme. The current NMPA of 50 rises to 55 from 6 April 2010.

From 6 April 2010, benefits in payment to a member under the NMPA of 55 are likely to be unauthorised payments, unless the member has a protected pension age, (see RPSM03106000)."

102. The reference to the Manual took one to RPSM03106064 headed "Technical Pages: Protecting pension rights from tax charges: Taking benefits before normal minimum pension age: Employment after taking benefits – 2010". This stated:

> "Loss of protection due to employment after taking benefits: protected pension ages 50 to 54.
>
> Protection will be lost if after becoming entitled to benefits the individual is employed by one of the following employers and one of the four re-employment conditions listed below is not met.
>
> The four re-employment conditions are set out in more detail in RPSM03106065 but broadly are
>
> 2. a break in employment of at least six months.
>
> …
>
> 4. a break in employment of at least one month and the re-employment is materially different."

103. Mr Buckley, the senior investigator for the Pensions Ombudsman made certain enquiries of HMRC about the guidance published by HMRC and by email dated 13 August 2015, Ms Goodall of HMRC told Mr Buckley:

> "All this information was originally published on the HMRC website and freely available to all whether a pensions professional or an ordinary individual member.
>
> HMRC expects those running and advising registered pension schemes to keep their knowledge of the tax rules up to date. As you can see we publish extensive guidance on how the tax rules work and publicise forthcoming changes to those rules. It is up to scheme administrators, pension scheme trustees/sponsors and their advisers to work out whether or not, and how, changes to the tax rules will impact their particular scheme and design their processes accordingly. … Where there is an uncertainty over the operation of a tax rule in relation to a particular scheme, those representing the scheme can approach HMRC for clarification of the rule where they believe the published guidance is not sufficient."

104. In his decision, the Pensions Ombudsman recorded the position of the Avon and Somerset Police and Crime Commissioner as stated by him in his submissions to the Pensions Ombudsman. The decision recorded:

> "A&SPCC was not made aware of the changes in advance of the Police Federation's circular of 8 December 2011 [to which I refer below]. The Circular that it received on 11 April 2006 does not refer to tax liabilities. So A&SPCC cannot be held responsible for failing to advise on a matter of which it was unaware. The Home Office did not alert pension administrators about the HMRC changes until 23 January 2012.
>
> The Constabulary HR cannot find any reference to Annex D on the Circular and the HMRC guides in the paperwork they hold. They have checked the website and in Annex D there is no link. The link appears to be in the Circular itself and when they tried to access this information via the link it provided unsuccessful."

105. The Pensions Ombudsman did not indicate whether he accepted this submission but it seems likely that he did.

106. It is relevant to refer to a scheme for employing police officers in retirement called the 30+ Plus scheme. The 30+ Plus scheme replaced the earlier 30+ scheme. Under the 30+ Plus scheme, the police officer retires but is then re-employed as a police officer, as distinct from being employed as civilian staff. Under the scheme, the officer's pension is abated in some way. The appellants in this case were not re-employed in accordance with the scheme. Instead, they took their pensions and were re-employed as civilian staff.

107. The relevance of the 30+ Plus scheme to this case is that the Home Office (or the National Policing Improvement Agency who administered the scheme) issued Home Office circular 002/2010 with the title "The 30+ Plus Police Retention Administrative Guidance for Forces". This stated:

> "1.5 The purpose of this guidance is to ensure that forces are able to administer 30 + PLUS effectively with minimal need to refer to the National Policing Improvement Agency which took over responsibility for administration of these retention arrangements on 1st April 2007.
>
> 1.6…forces should use this guidance as a statement of good practice which should be applied at all times…
>
> 1.7 This guidance is valid from 1 April 2010 …
>
> 2.2 Each officer who wishes to participate has to apply for selection, which is at the discretion of management.

> Participants must stay in retirement for at least one month before being reengaged as a shorter period of retirement will result in tax charges for both the officer and the retaining Force.
>
> 3.1 Joining 30+Plus is by application only. It is not an automatic right for officers approaching 30 years' pensionable service.
>
> Tax Codes
>
> There must be a gap of a month between the officer's retirement/pension coming into payment and his or her re-employment by the force on 30+PLUS. Under tax rules in force from April 2010, onwards, this is particularly important where the officer retires before age 55. If this does not happen in such cases, both the officer and the force will be liable for large tax charges payable on any pension benefit paid before age 55…"

108. The Pensions Ombudsman did not make specific findings as to the state of knowledge of the chief constables and the police authorities in 2011 as to the effect on a police officer's pension of re-employment within one month of retirement. As was seen, the Avon and Somerset police authority asserted that they did not know of the relevant effect.

The Police Federation circular

109. The Police Federation of England and Wales issued a circular to all branch boards on 8 December 2011, headed, "Protected Pension Age - Retirement and Reemployment". It said:

> "We have recently become aware of a potential tax issue for members of the 1987…Scheme…who retire and take a pension under the age of 55 and then take up employment as police staff or are re-engaged as police officers.
>
> Our understanding of the issue is, in summary, as follows:
>
> 1. From 6 April 2010, the Minimum Pension Age rose to age 55. The rights of members of the PPS to retire in certain circumstances before that age were protected and those members have a Protected Pension Age.
>
> 2. However, that protection can be lost in certain circumstances, meaning that payments become unauthorised and taxable.
>
> 3. The particular concern is on re-employment by certain employers, including…a police force … one of the four conditions must be satisfied in order for a member aged between 50 and 54 to remain protected.
>
> 4. These conditions are broadly:

…

• A break in employment of at least six months.

…

• A break in employment of at least one month and the re-employment is materially different.

…

6. In relation to re-employment being "materially different", HMRC guidance states:

'A simple change in hours will not be a materially different employment. To be a materially different employment the duties and/or the level of responsibility in the new employment must be different from the old employment.'

…

We are writing to the Home Office and making, amongst others, the following points:

• expressing our concern that this issue does not appear to have been flagged to police forces and police authorities;

…

• asking the Home Office to issue guidance, preferably with HMRC approval, in relation to abatement and that employment as a member of police staff will, in itself, be regarded as "materially different" from service as a police officer.

Branch Boards should avoid giving advice on tax on financial matters or from giving the impression that they are doing so. Members should be encouraged to seek assurances in the circumstances of their case from the Force or Police authority or HMRC and to consider taking their own independent tax advice.

Branch Boards should also contact their pension administrator and HR department and seek assurances that:

• the tax implications are understood and appropriate steps taken to minimise the risk of any adverse impact on retired members; and

• those implications will be explained to any retired member before re-employment starts."

The duties alleged by the appellants

110. In presenting their cases to the Pensions Ombudsman, and in their grounds of appeal against his decision, the appellants tended (at least some of the time) to treat the position of the chief constable and the position of the police authority as being effectively the same for present purposes. In relation to both entities, the appellants placed heavy reliance on the decision of the House of Lords in *Scally v Southern Health Board* [1992] 1 AC 294.

111. *Scally* was a case involving contracts of employment. The contracts contained terms which, taken together with the effect of certain regulations, gave to employees the right to purchase 'added years' of pension entitlement on advantageous terms in order to make up the maximum of 40 years' contribution. Such a right was only exercisable within 12 months of the date of the coming into force of the regulations or of the commencement of employment, if later. Thereafter the right could be exercised only on less favourable terms. The plaintiffs, four doctors who each wished to purchase added years in order to qualify for full pension benefits, had not been informed by the boards of their right to do so. They brought actions against the respective boards, by whom they were employed, claiming damages, for breach of contract and negligence and breach of statutory duty, in respect of the failure to inform them of the right to buy added years. The House of Lords dismissed the claim in so far as it was based on statutory duty but upheld the claim based on an implied term in the contracts of employment.

112. The House of Lords held that the plaintiffs' common law claims were to be considered by reference to the parties' contractual relationship, and not in tort. It was held that where a contract of employment negotiated between employers and a representative body contained a particular term conferring on the employee a valuable right contingent upon his acting as required to obtain the benefit, of which he could not be expected to be aware unless the term was brought to his attention, there was an implied obligation on the employer to take reasonable steps to publicise that term. In those circumstances, it was held that the boards' failure to notify the plaintiffs of their right to purchase added years had been a continuing breach of contract.

113. The appellants submitted that the present cases were covered by the reasoning in *Scally* or, at least, that the present cases were closely analogous to that case. Submissions were made as to the nature of the rights in the present cases, as to whether the relevant terms were negotiated by a representative body and as to whether the appellants could have been expected to have been aware of the legal position as to their pensions. It was submitted that there was a quasi-employment relationship between a police officer and the chief constable so that the position was analogous to that in *Scally*. However, it was accepted that because there was no contract between the police officer and the chief constable, it was not possible to hold that a duty arose in contract, by way of an implied term, but instead the relevant duty arose in tort.

114. In the course of the hearing of the appeals, close attention was paid to the operation of the relevant provisions of the 2004 Act, to the consequences for both the appellants and the scheme administrator of the making of unauthorised payments and to the duty on the scheme administrator to provide information to HMRC as to the making of unauthorised payments. The discussion of these matters tended to show that the chief constable and the police authority as scheme administrator were not in identical positions and the decision in *Scally* might have less to say about the position of the scheme administrator than about the position of an employer or a quasi-employer.

115. In those circumstances, I invited Ms Ling for the Avon and Somerset appellants and Mr Cheetham for the Essex appellants to summarise the duty which it was alleged was owed by the police authority and the duty owed by the chief constable and, in each case, to identify the circumstances which should persuade the court to find that such a duty existed. On the second day of the hearing, Ms Ling and Mr Cheetham provided me with their formulations of the duties alleged and how they arose. I will refer to those formulations later in this judgment.

116. In addition to the general duties which were contended for, the appellants further submitted that the police authority was liable for negligent misstatement. For this purpose, the appellants relied on the letters written by the police authority to each appellant setting out an appellant's entitlement to pension benefits and discussing the question of tax, in particular, the incidence of tax on the lump sum entitlement. It was said that the failure to inform an appellant of the tax consequences of taking up employment as civilian staff within one month of retirement amounted to an actionable negligent misstatement by the Police authority.

117. I consider that I need to discuss separately the way in which the case is put against the police authority and the way it is put against the chief constable. In view of the position of the scheme administrator under the 2004 Act and the Provision of Information Regulations, I will start with the position of the police authority.

The police authorities – submissions as to the general duty

118. Ms Ling for the Avon and Somerset appellants contended for a duty on the part of the police authority in the following terms:

> "In circumstances where:
>
> (a) a scheme employer in relation to a pension scheme has a settled practice which, if followed, would or might result in an unauthorised payment from the scheme in respect of which the scheme administrator in relation to that pension scheme would become liable to a scheme sanction charge pursuant to s239 Finance Act 2004 and/or would have reporting obligations pursuant to the Registered Pension Schemes (Provision of Information) Regulations;
>
> (b) the practice, if followed by one of a recognisable class of employees, would or might deprive that employee of a significant proportion of his accrued pension rights as a result of that unauthorised payment being made from the scheme;
>
> (d) the scheme administrator in relation to that pension scheme could be reasonably be expected to be aware of the existence of that class of employees;
>
> (e) the scheme administrator in relation to that pension scheme would, with reasonable diligence, be able to apprise himself of the employer's practice;

> (f) in relation to an employee of that class of employees, a course of action is open to him that would enable him to avoid the consequences or some of the consequences set out in (b) above;
>
> the scheme administrator owes a duty of care to an employee of that class of employees who is about to retire or to become entitled to benefits from the pension scheme to make reasonable enquiries as to whether he would or might follow the settled practice and, if so, to take reasonable steps to [advise][inform][warn him of the risk of an unauthorised payment being made from the scheme, the tax consequences of the payment being made [and the need to take independent financial advice in respect of it]."

119. Mr Cheetham for the Essex appellants contended for a duty on the part of the police authority in the following terms:

> "In the circumstances described by Ms Ling, the scheme administrator owed a duty to an employee who was about to retire to inform him of the consequence of an unauthorised payment being made from the scheme."

120. It can be seen that the duty which is contended for by the appellants is a duty on the police authority in its capacity as scheme administrator. It was not contended that the scheme administrator owed the relevant duty in equity. Ms Ling accepted that there were differences in that respect between a statutory scheme like the present and a trust-based scheme. Accordingly, the duty contended for is a duty in tort.

121. It was not alleged that the police authority owed a relevant duty under a contract of employment with an appellant. When the appellants were police officers, they were not employed by the police authority but held offices under the Crown; it was accepted that there was a relationship of quasi-employment with the chief constable. When the appellants took up their employment as civilian staff they did become employed by the police authority under contracts of employment. However, it was accepted that the appellants could not contend for a relevant duty on the police authority as the new employer to advise or to inform or to warn the appellants in the ways described above. In particular, it was accepted that there was no relevant duty on the police authority as a prospective future employer at the time when the prospective employees made their decision to accept the offer of future employment.

122. Mr Holl-Allen submitted that the police authority was not liable for anything it had done, or not done, in its capacity as scheme administrator. He said that the appellants received in full the payments they were entitled to under the scheme. Those payments were lawful. For the purposes of the law as to taxation, in particular the 2004 Act, the payments were described as unauthorised payments which gave rise to tax consequences for the appellants. These tax consequences were external to the scheme; they were not part of the operation of the scheme. The membership of the registered scheme in this case brought important tax advantages for members of the scheme and the tax consequences of unauthorised payments were part of the regulation of those tax advantages. He also pointed out that the problem in the present cases was not a

problem at A-Day but only became a problem when the normal minimum retirement age moved from 50 to 55 in April 2010. The problem was not appreciated at that date and only came to the attention of the scheme administrators following the circular from the Police Federation in December 2011.

123. Mr Holl-Allen also relied on the fact that the Provision of Information Regulations which imposed duties on the scheme administrator to give information to various persons, including members of the scheme, imposed no duty on the scheme administrator of the kind now alleged.

124. Mr Holl-Allen also submitted that in so far as it is alleged that the scheme administrator should have advised the appellants or should have recommended that they take financial advice, the appellants would have known that they could take financial advice or legal advice and/or advice from the Police Federation, which was a well-resourced organisation akin to a trade union. In addition, he submitted that it was sufficiently unusual for someone to retire, to draw a pension and then to go back to work so that the appellants ought to have seen for themselves the desirability of taking advice on the tax consequences of acting in that way. If an appellant had sought advice from a tax or financial adviser, the adviser would have needed to obtain from his client the relevant facts and only then could he be expected to advise. There was no occasion when an appellant laid the facts before the scheme administrator and asked for advice as to the consequences of those facts.

125. Mr Holl-Allen also made more general submissions as to why it would not be fair, just or reasonable to impose on the scheme administrator a new duty in tort that not been established in any earlier case. He accepted however that if the scheme administrator did owe the duty contended for, it would be liable for the actions or omissions of the county council to which it had delegated the relevant functions.

126. Ms Ling and Mr Cheetham challenged the assertion that the appellants ought to have realised that they needed tax or financial advice and should have sought such advice. It was submitted that, in 2011, the practice of re-employing retired police offices as civilian staff was an established practice and no one had experienced any problem of the kind which arose in this case. The appellants had no reason to suppose that there could be a problem and nobody warned them or raised the possibility with them. The appellants were therefore fully entitled to assume that because neither the chief constable nor the police authority had raised the possibility of a problem with them that there was no question of such a problem arising.

The police authorities – submissions as to negligent misstatement

127. Ms Ling summarised the case of the Avon and Somerset appellants in relation to negligent misstatement as follows:

> "(i) The Pensions Authority as scheme administrator assumed a responsibility to give accurate information as to whether the lump sum paid to the complainants would be tax free and what option they had to choose to achieve that; alternatively that if they opted to take a sum as a lump sum on which tax had to be paid, the correct amount of that tax.

> (ii) Alternatively, the Pensions Authority as scheme administrator assumed a responsibility [to give advice][to give information][to warn of any risk and the advisability of taking independent financial advice] in relation to the tax consequences that it was reasonably foreseeable, on making the appropriate enquiries, would or might arise on the payment of their benefits pursuant to provisions of the Finance Act 2004 relating to unauthorised payments, to the standard to be expected of a competent scheme administrator."

128. Ms Ling submitted that the scheme administrator knew at the time of sending the letters in this case that they would be relied upon as to the amount of tax that would be due on the lump sums and as to the choices available to reduce or remove the liability to tax. This was advice of a similar kind to that needed by the appellants to avoid the tax charges on unauthorised payments. It was reasonable for the appellants to assume that the letters gave them the information they needed to make informed decisions on how to avoid incurring tax charges or, if such charges were to be incurred, what they would be. She submitted that although the common law did not impose liability in tort for pure omissions, where some advice had been given and a duty was owed in relation to that advice, the duty may be breached by omission.

129. Mr Cheetham summarised the case of the Essex appellants in relation to negligent misstatement as follows:

> "Where the Authority:
>
> (i) was aware of the appellants' particular circumstances, including their re-employment; and
>
> (ii) had actual or constructive knowledge of the tax consequences of that re-employment;
>
> it assumed responsibility for providing the appellants with accurate information about the consequence of that re-employment."

130. Mr Cheetham submitted that the facts of this case, not confined to the writing of letters giving information as to the entitlement to benefits, should lead to the conclusion that the police authorities assumed responsibility for the advice and information which they gave to the appellants. He relied on the facts that the police authority "in one role or another":

i) encouraged the appellants to apply for civilian posts;

ii) encouraged the appellants to take up civilian posts a short time after retirement;

iii) knew or ought to have known of the tax consequences for the appellants of doing so;

iv) knew that the appellants did not know of the tax consequences of doing so;

v) wrote letters setting out their entitlement to benefits and the tax treatment of lump sums.

131. Mr Holl-Allen submitted that if the court held that was no general duty of the kind alleged on the part of the scheme administrators, the court should be cautious before holding that there was a relevant assumption of responsibility. He submitted that the scheme administrators did not actually know of the tax consequences of re-employment within one month. He submitted that there was no duty on them to acquire knowledge as to those tax consequences and so it could not be said that they ought to have known of the tax consequences. He added that there was no duty on the scheme administrators to communicate to scheme members matters which the scheme administrators neither knew or ought to have known. Their duty to communicate was, at most, to inform the members as to their rights under the scheme, not of matters extraneous to the scheme.

132. As to the letters written by the scheme administrators, Mr Holl-Allen submitted that the purpose of those letters was restricted to conveying information about rights under the scheme. For that purpose, the letters contained information as to commutation and the payment of lump sums. These purposes and this information was limited and did not extend to wider advice as to the tax position of the member. Further, if it is said that the scheme administrator assumed a responsibility to the appellants in this case, then in the same way they would have assumed the same responsibility to all members to whom they wrote similar template letters and that could not be right.

The chief constables – submissions as to the general duty

133. Ms Ling for the Avon and Somerset appellants contended for a duty on the part of the Chief constable in the following terms:

> “The duty of care is put in the following alternative ways:
>
> (a) A duty of care not to pursue a settled practice which the employer knows, or ought reasonably to know, will deprive an employee (if he follows it) of a significant proportion of his accrued pension rights [by virtue of its being treated as an unauthorised payment pursuant to the Finance Act 2004].
>
> (b) alternatively, a duty of care to take reasonable steps to ensure that a settled practice followed by the employer will not deprive an employee (if he follows it) of a significant proportion of his accrued pension rights [by virtue of it being treated as an unauthorised payment pursuant to the Finance Act 2004][1].
>
> (c) Alternatively, if an employer pursues a settled practice that, if followed by an employee, would or might result in depriving him of a significant proportion of his accrued pension rights, to alert the employee to the risk of such an outcome and to warn

[1] This version makes the duty to periodically review the legal situation express.

> him of the need to take independent financial advice in respect of it[2].”

134. Mr Cheetham QC for the Essex appellants contended for a duty on the part of the Chief constable in the following terms:

> “(In the particular circumstances of these Appellants) to take reasonable steps to bring to the attention of the employee the consequences to their pension of accepting the offer of immediate re-employment by the police authority.”

135. In relation to the alleged duty on Chief constables, Mr Holl-Allen submitted that the Chief constables had no responsibility in relation to the scheme or the appellants’ entitlement to benefits under the scheme. Further, he relied on a number of matters which I have already referred to when summarising his submissions in relation to the alleged duty on the scheme administrators. These included submissions that:

   i) The tax consequences of the receipt of pension payments were external to the quasi-employment relationship, just as they were external to the terms of the scheme;

   ii) The problem did not exist at A-Day but only arose from April 2010 when the normal minimum retirement age was changed from 50 to 55;

   iii) The appellants should have known that they could seek financial or tax advice and should have sought such advice.

136. Counsel for all parties referred me to *Scally v Southern Health Board* [1992] 1 AC 294 and a number of later cases which considered *Scally*. Mr Holl-Allen submitted that the decided cases disclosed important limitations on the duty of an employer to advise or give information to an employee and that the alleged duty on the Chief constables in this case went beyond those limitations; he submitted that the principle in those cases should not be extended as far as would be required to impose a duty on the chief constables in this case. Ms Ling and Mr Cheetham contended that the duty of care in tort on the chief constables, for which they contended, should be declared by way of analogy with the implied term in *Scally* and if such a decision involved an extension of earlier principle, then such an extension was an incremental one and fair, just and reasonable.

137. Counsel also made similar submissions, based on the same case law, in relation to the alleged duty on the part of the scheme administrators.

The order in which I will consider matters

138. As I have explained, the appellants contend for a duty of care in tort on the part of the police authorities and also on the part of the chief constables. Although many of the submissions made to me were put forward as common to the two alleged duties of

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[2] It is submitted that the specific risk needs to be identified by the employer because otherwise employers would be likely to make a blanket recommendation to take IFA advice irrespective of whether such a risk arose, which would significantly limit its effectiveness.

care, I consider that the duties alleged against the two different entities give rise to somewhat different considerations.

139. In addition, the appellants submit that the police authorities assumed a responsibility for the advice or information which they gave to the appellants when they informed them of their entitlement to benefits and commented on the tax treatment of such benefits. That case is not made against the chief constables.

140. As regards the case against the police authorities, I consider that I should not divide my consideration into two parts, one dealing with the alleged general duty of care and the other dealing with the alleged assumption of responsibility. I prefer to look at all of the circumstances in relation to the police authorities and then decide whether that combination of circumstances leads to a finding of liability.

141. I will therefore consider the case against the police authorities first and when I do so I will have regard to all of the circumstances and all of the matters alleged in relation to them.

The case against the police authorities – discussion and conclusions

142. It is helpful to begin by considering what the police authorities knew or ought to have known. The Avon and Somerset police authority submitted to the Pensions Ombudsman that it did not know of the relevant provisions of the 2004 Act about the inability to rely on protected pension ages where there was re-employment within one month of retirement until a police officer received the circular from the Police Federation and then drew it to the attention of the police authority. I was not asked to make a finding that there was such knowledge on either the part of the Essex police authority or the Avon and Somerset police authority.

143. I will however comment that I find it a remarkable proposition that there was no one at either the relevant police authority (or, it seems to be suggested, at the relevant county council which administered the sub-schemes) who was aware of the relevant provisions of the 2004 Act. The 2004 Act made significant changes to the tax treatment of pensions. The changes were widely publicised. It seems wholly improbable that nobody at the relevant bodies had informed themselves of these important changes. It would have been virtually impossible to administer the schemes after A-Day unless one had educated oneself properly as to the new provisions. If these cases had been the subject of a High Court trial alleging negligence where the knowledge of these matters had been a relevant issue, I would have expected there to have been a witness dealing with that subject and if that witness had asserted that no relevant person at the police authority or the county council had known of the relevant provisions, I would have expected that witness to be cross-examined in detail on that evidence.

144. Nonetheless, I am not asked to make a finding as to actual knowledge of the relevant provisions. I therefore need to ask whether the police authority should have known the law as to the provisions in the 2004 Act which identified what was meant by unauthorised payments and specified the consequences for the member and for the scheme arising from unauthorised payments. For this purpose, I will equate the position of the police authority and the body to whom it delegated its functions as scheme administrator, namely, the county council.

145. At a general level, it can be said that the police authority as scheme administrator should have known the law. However, the case is much stronger in this respect than this general point. The police authority had the functions and the responsibility of a scheme administrator. The 2004 Act laid down serious tax consequences for the scheme resulting from making unauthorised payments. The scheme administrator had specific duties under the Provision of Information Regulations to notify HMRC of the making of unauthorised payments. Further, HMRC took steps to assist scheme administrators, such as these police authorities, to know and understand and apply the law. HMRC made available the Registered Pension Schemes Manual. In addition, the Home Office published a specific circular informing police authorities, as scheme administrators, of the tax changes coming into effect on A-Day. Then, HMRC made available newsletters which reported on developments relevant to the issues as to retirement and re-employment. I conclude from this material that the police authorities in this case, in their capacity as scheme administrators, ought to have known of the relevant provisions in the 2004 Act.

146. I will next consider whether the police authorities should have known of the proposed re-employment of the appellants. In the first instance, I will consider the position of the police authorities as the employers of the appellants as civilian staff.

147. It is clear that the police authorities did employ the appellants in each case within one month of their retirement as police officers. I have investigated the material before me to see if, at the time that the police authority wrote to the appellants with information about their pensions, the police authority knew that it was in the course of employing the appellants as civilian staff and, in particular, whether it knew that such employment would be within one month of retirement.

148. The position here is that I have been given some relevant information as regards the Avon and Somerset appellants (Mr Hazell and Mr Kendall) but rather less in the case of the Essex appellants.

149. In the case of Mr Hazell, he was offered a civilian post on 8 June 2011 to take effect from 20 June 2011 but the start date of that post was put back so that it would start immediately after he retired. The police authority wrote to Mr Hazell referring to tax free lump sums on 17 August 2011 and 6 September 2011 which was therefore after the offer of employment had been made.

150. In the case of Mr Kendall, he was offered a civilian post on 16 September 2011. The new post was to start on 1 November 2011. On 22 September 2011 and 4 October 2011, the police authority wrote to Mr Kendall referring to his tax free lump sums on 22 September 2011 and 4 October 2011. The letters about his pension referred to a retirement date of 31 October 2011 so that the new employment was plainly going to start within one month of retirement.

151. Thus, it emerges that, in the cases of Mr Hazell and Mr Kendall, the police authority knew of the retirement dates and knew of the offer by the police authority to employ them from dates within one month of retirement and the police authority ought to have known the tax consequences of those steps. Yet, the police authority wrote to Mr Hazell and Mr Kendall advising them as to the sums which they were entitled to receive as tax free lump sums.

152. I have considered whether it could have been argued that, in relation to the specific question as to the knowledge of the police authority, I should separate the capacity of the police authority as employers of civilian staff from their capacity as scheme administrators. In fact, I did not understand that any such argument was put to me. In any event I doubt if it would be right to make that distinction. In view of the fact that the point was not argued, I need not consider it further.

153. These findings mean that when the police authority wrote to Mr Hazell and Mr Kendall referring to their tax free lump sums, the police authority ought to have appreciated that the payments of those lump sums (and the annual payments until the age of 55) would be unauthorised payments under the 2004 Act. Quite apart from the adverse tax consequences for Mr Hazell and Mr Kendall, the police authority as scheme administrator was making itself liable for scheme sanction charges. Further, the police authority as scheme administrator would be liable to report to HMRC the making of unauthorised payments pursuant to the Provision of Information Regulations.

154. At the hearing, I raised with counsel a possible difficulty for a scheme administrator of being under a duty to report unauthorised payments to HMRC arising from the fact that the question whether a payment is an unauthorised payment turns on something that might not happen until after the payment is made and, further although the payment is made by the scheme administrator the later relevant event may not involve the scheme administrator. It was suggested by counsel that the scheme administrator would generally be close enough to the fact of re-employment of the retired person to know whether the payment was an unauthorised payment. I was not wholly convinced that one could generalise in that way. However, in the particular circumstances of this case, as regards Mr Hazell and Mr Kendall, I am able to conclude that the police authority knew the relevant facts which, if it had known the law (which it should have done), would have made it realise that the payments to the appellants were unauthorised payments.

155. I will now consider whether I have information which would allow me to make findings as to when (and what) the Essex police authority knew about the proposed re-employment of the Essex appellants. It seems highly likely that if I had specific evidence as to when the police authority offered employment to the Essex appellants, as to when that employment was to commence and having regard to the known dates of the letters to the Essex appellants about their pension entitlement, it would emerge that the position in relation to the Essex appellants would be the same as the position of the Avon and Somerset appellants. However, I do not have specific evidence of that kind and I do not consider that I should make specific findings to that effect.

156. Given that I have made specific findings as to knowledge of re-employment within one month of retirement in the case of the Avon and Somerset appellants, but not in the case of the Essex appellants, the next section of this judgment will discuss the position in relation to the Avon and Somerset appellants and when I have done so I will consider what I am able to decide in relation to the Essex appellants.

157. I will now refer again to the letters written to the Avon and Somerset appellants. The letters referred to the lump sums and the annual benefits. In relation to the lump sums, the letters referred to the lump sums as being “tax free” provided only that the lump sum was within the 25% HMRC limit. I accept that when the letters were drafted that

they were only intended to refer to the 25% limit, under the relevant sections of the 2004 Act which dealt with that limit, and were not intended to refer, one way or the other, to a liability to tax arising by reason of other circumstances. However, the letters contained the statement that the lump sums would be tax free whereas in fact, by reason of facts known to the Avon and Somerset police authority, together with legal provisions of which the police authority ought to have been aware, the lump sums were subject to a significant tax charge.

158. I infer that the Avon and Somerset appellants did understand the letters to contain a statement that they would not be liable for tax on the lump sums referred to in the letters. I also consider that the Avon and Somerset police authority ought to have foreseen that the appellants would understand the letters in that way.

159. As to the legal test to be applied in determining whether the Avon and Somerset police authority should be held to be liable in law for its negligent misstatements on which the appellants reasonably relied, I have considered the discussion of the relevant principles in the judgment of Lord Bingham in *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181 at [4]-[8]. In that passage, Lord Bingham referred to the three different approaches which a court might adopt to determine the question of legal liability for a negligent misstatement which has caused financial loss. The three methods can be described as: (1) whether the defendant assumed (or is to be treated as having assumed) responsibility for the statement; (2) whether the facts satisfied a threefold test of reasonable foreseeability, of proximity and the imposition of liability being fair, just and reasonable; and (3) whether a finding of liability involved an incremental development of the law from earlier cases establishing liability for negligence. Lord Bingham also recommended at [8] that the court should concentrate its attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole. I will follow that recommendation in this case.

160. In these cases where the Avon and Somerset police authority actually knew that the appellants were being re-employed shortly after retirement and where the police authority ought to have known the legal position under the 2004 Act, I consider that the police authority did assume a responsibility to the appellants not to make statements which they should have understood were highly misleading and which did foreseeably mislead.

161. I also consider that the relationship between the parties was a proximate one and involved foreseeability of harm and it would be fair, just and reasonable for the law to impose liability on the Avon and Somerset police authority for its negligent misstatements.

162. I further hold that this is not a case where the Avon and Somerset police authority was entitled to assume that the appellants would seek and obtain independent advice on their position. The appellants did not seek independent advice and I consider that they were not acting unreasonably in that respect.

163. For completeness, I should add that no reliance was placed on the decisions in *Hamar v French* [1996] Pens LR 1 and *NHS Pensions Agency v Beechinor* [1997] Pens LR 95 which considered whether pension trustees are under a duty to advise members of

a pension scheme. I have, however, considered those decisions and there is nothing in them which would cause me to take a different view of the present case.

164. I therefore conclude that the Avon and Somerset police authority were in breach of a duty of care owed to the Avon and Somerset appellants by stating that the lump sums would be tax free when they would not be.

165. I now need to consider what I am able to decide in relation to the Essex appellants. It has been seen that an important part of my reasoning in relation to the Avon and Somerset appellants related to the detailed knowledge which the Avon and Somerset police authority had in relation to the re-employment within one month of retirement. I have not been able to make similar specific findings in relation to the Essex appellants although I have suggested that if specific evidence were to be provided, it is highly likely that similar specific findings would be justified.

166. If upon the hand down of this judgment, the Police and Crime Commissioner for Essex accepts that similar specific findings of fact are appropriate in the case of the Essex appellants, then the result will be that my finding in relation to a duty of care in Avon and Somerset would also be appropriate in the case of Essex. If the Police and Crime Commissioner for Essex is not prepared to accept that, then I will remit the matter to the Pensions Ombudsman to make appropriate findings and then apply the legal principles in this judgment to those findings.

167. I have considered whether I should decide the case in favour of the Essex appellants even without those specific findings on the basis that the police authority knew that there was always a possibility that a retiring police officer might be re-employed as civilian staff and, in addition, that that re-employment might take place within one month of retirement so that the police authority when sending out its standard form letters to every retiring police officer ought to have included some precautionary words about re-employment within one month of retirement. I hesitate about making a finding to that effect. I do not rule out the possibility of that finding but in view of the likelihood of it being possible for there to be more specific findings as described above, I prefer to remit the matter for those specific findings to be made and for the case to be finally decided in the light of the findings which are made.

168. In the remainder of this section of the judgment dealing with the police authorities, I will discuss other matters which arise in the case of Avon and Somerset police authority on the basis that it did breach its duty of care to the Avon and Somerset appellants. If it should later be held that the Essex police authority broke its duty of care in a similar way, then the following findings will apply to it also.

169. It was not specifically argued that the police authorities had disclaimed legal responsibility for any negligent misstatement. Nonetheless, I have considered whether the terms in which the relevant letters were expressed might support an argument that there was such a disclaimer.

170. In the first of the standard letters written by the Essex police authority, the following statements were made:

> "Please note that your decision to commute pension to a lump sum is a personal choice and we are unable to provide you with

> any financial advice. You may wish to seek independent financial advice before making your final decision.
>
> These statements are an estimate only and do not constitute a contract or give an undertaking that any actual final benefits payable will not vary from those shown."

171. I consider that the first sentence of the text quoted above did not amount to a statement that the police authority was not responsible for its statement that a lump sum which conformed to the HMRC 25% limit would be tax free. That sentence related specifically to the question whether a person about to retire should take a commuted lump sum rather than a higher annual pension. The second sentence of the text quoted was also not a statement negating the earlier statement about the lump sum being tax free or disclaiming responsibility. The third sentence was to the effect that the figures were estimated figures at that point. In any event, by the time of the second template letter, the figures were no longer estimates.

172. As regards the letters written by the Avon and Somerset police authority, I do not see any statement that could be relied upon as a disclaimer of responsibility for the information given in the letters.

173. The next step is to consider whether the appellants can show that they suffered loss in reliance on the misstatements made by the police authority and whether they are entitled to be compensated for that loss. The parties did not make any submissions to me on these matters. I consider that I have to ask three questions in this respect, which are:

    i) Did the appellants rely on the statements that the lump sums would be tax free?

    ii) Was that reliance reasonable?

    iii) Would the appellants have acted differently if they had told the correct position?

174. I take these three questions from the way the matter was described in *Hagen v ICI Chemicals & Polymers Ltd* [2002] Pens LR 1 at [105]-[127] and *Thomas v Albutt* [2015] PNLR 29 at [427]-[435], where the earlier authorities were reviewed.

175. I hold that the appellants did rely on the statements made to them that the lump sums would be tax free and, further, that they believed those statements to be correct. I also find that the appellants acted reasonably in relying on those statements. I further find that if the appellants had been given the correct information, namely, that they would be liable for substantial tax charges on their lump sums and their annual benefits, they would have postponed the date of their re-employment to avoid the tax liability. The action needed to avoid the tax liability was very limited and would not have had any significant adverse consequences for the appellants and would have released them from the liability to pay substantial sums by way of tax.

176. Accordingly, the appellants suffered loss represented by the increased amount of the tax payable by them on their lump sums and their annual payments up to the age of 55

as compared with the tax which would have been payable on their annual payments up to the age of 55.

177. I conclude that the Avon and Somerset police authority was liable to the Avon and Somerset appellants for the loss which they suffered and the Avon and Somerset Police and Crime Commissioner is liable to the Avon and Somerset appellants for that loss.

178. For the reasons given earlier, in the absence of any concession from the Essex Police and Crime Commissioner, I will remit the cases of the Essex appellants to the Pensions Ombudsman for him to consider what findings to make as to whether, when the Essex police authority wrote to the Essex appellants referring to tax fee lump sums, the police authority knew of the intended re-employment of the Essex appellants and the likely start date of that re-employment.

The case against the chief constables – discussion and conclusions

179. The appellants accept that they did not have contracts of employment with their chief constables. The chief constables accept that the relationship was one akin to employment.

180. The decision of the House of Lords in *Scally* is central to the way in which the appellants put their case against the chief constables. I have referred above to what was decided in *Scally*. In that case, the House of Lords implied a term into the contract of employment requiring the employer to take reasonable steps to inform the employee of a valuable right conferred by the contract of employment of which the employee could not be expected otherwise to be aware.

181. The appellants accept that the legal analysis in *Scally* cannot be applied directly to them because they did not have contracts of employment. However, they submit, and I accept, that if there had been a contract of employment into which the court would imply a particular term, it is open to the court to hold, in relation to the relationship between a police officer and a chief constable, which is akin to an employment relationship, that the chief constable owed to the officer a duty of care in tort which is in broadly similar terms to the effect of the implied term: see *James-Bowen v Comr of Police for the Metropolis* [2018] 1 WLR 4021 at [15]. It is clear that any duty in tort would be a duty of care and not an absolute duty.

182. The decision in *Scally* has been considered by the courts on many subsequent occasions. I will refer below to the cases that are of principal relevance in the present context. These cases involved contracts of employment and some of the cases considered the implied duty of trust and confidence between employer and employee rather than a duty of care in tort.

183. In *University of Nottingham v Eyett* [1999] ICR 721, the complainant was employed by the university and was a member of the university's pension scheme. Under the rules of the scheme the complainant was entitled to take early retirement at the age of 60 without actuarial reduction. His sixtieth birthday being in July 1994, the complainant inquired in early 1994 as to what his pension entitlement would be if he were to retire on 31 July 1994. The quotation supplied by the university, although entirely accurate, failed to inform the complainant that his pension would be increased

if he retired on the earliest date after 31 July. The complainant, unaware of the advantage of deferring his retirement, duly retired on 31 July 1994.

184. In *Eyett*, the Pensions Ombudsman held that the university had been in breach of its "general duty of good faith" by failing to provide the complainant with sufficient information to enable him to make an informed choice of retirement age, notwithstanding that the university had supplied the complainant with an explanatory booklet from which he could have discovered the financial advantage of deferring his retirement. The university appealed this decision to the High Court. The judge (Hart J) said that *Scally* did not apply on the facts of that case. The remainder of the judgment considered the duty of trust and confidence. As to that, it was held that the implied duty of mutual trust and confidence did not include a positive obligation on an employer to advise an employee on how best to exercise valuable rights under the employment contract and that the university was not in breach of contract in failing to advise the complainant of the financial benefits of deferring his retirement. The judge considered whether the duty of trust and confidence operated only to prohibit conduct or whether it could require positive action to be taken.

185. In *Outram v Academy Plastics Ltd* [2001] ICR 367, the claimant's husband commenced employment with the defendant company in 1974 and became a member of its pension scheme, of which the company was trustee and administrator. In March 1994, he resigned and ceased to be a member of the scheme. He was re-employed by the company from April 1995 to December 1995, when he resigned due to ill-health. He could have re-joined the pension scheme, with the company's consent, when he was re-employed but he did not apply to do so. He died aged 36 in February 1996, and, though he had an entitlement to a deferred pension, as he died before its start date, his estate was entitled only to the return of his contributions. The claimant brought an action in negligence alleging that the company should have advised her husband to re-join the scheme when he was re-employed and if had he done so he could have opted for an immediate pension at the end of 1995 when he resigned on account of incapacity, with the result that on his death his estate would have been entitled to a cash sum to purchase an annuity for his dependants.

186. In *Outram*, the claimant did not seek to bring the claim within the principle in *Scally*. She relied on an alleged duty of care in tort. The Court of Appeal held that there was no general duty on an employer in tort to provide information or advice to an employee in order to prevent economic loss and no such duty on trustees of a pension scheme; that such a duty could not be derived from the tort of negligence unless it was inherent in the contractual relationship between employer and employee, but the claimant did not allege that the employer was under a contractual duty to give advice; and that, further, as there had been no assumption of responsibility by the company to provide pension advice, no allegation that the employee was unaware of the terms of the scheme or had ever asked the company for advice about his pension, and no free standing allegation of negligent misstatement, the claim had no foundation and was bound to fail.

187. In *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, the claimant was a long-standing senior employee and director of the defendant company. He was minded to apply for early retirement on medical grounds. Under the terms of his contract of employment, if he was absent from work due to illness, he was entitled to be paid his full salary for up to six months, and thereafter such remuneration as the

defendant might in its discretion allow; and, as a member of the defendant's long-term disability insurance scheme, in the event that he was "totally unable by reason of sickness ... to follow his occupation", he was entitled to benefits, as of right so long as he remained in the defendant's employment, and thereafter at the discretion of the insurers. Following discussions about the arrangements for his retirement, the claimant wrote a letter confirming that "because of continued ill-health I shall be retiring ... both as an employee and as a director of [the defendant]". In the exercise of their discretion, the insurers paid benefit to the claimant for a year following his retirement, but not thereafter. The claimant brought an action for damages for breach of contract, alleging, inter alia, that, in failing to warn him of the effect which resigning from his employment would have on his entitlement to benefits under the insurance scheme, the defendant had acted in breach of an implied term of the contract of employment requiring it to take reasonable care for the claimant's economic well-being.

188. In *Crossley*, the Court of Appeal held that there was no standard obligation implied by law as a term of all contracts of employment which required an employer to take reasonable care for the economic well-being of his employee; that there was no reason of public policy to impose on employers a general duty to safeguard an employee's economic well-being, particularly where there might be a conflict of interest between employer and employee and where to do so would impose an unfair and unreasonable burden on employers; that a court should, therefore, be astute only to imply a precise term in carefully circumscribed circumstances; that the defendant employer had not assumed any responsibility for giving financial advice to the claimant which could give rise to any contractual duty to take care in giving that advice.

189. In *Crossley,* the Court of Appeal thought that the implied term contended for would a major extension of the law. Dyson LJ said at [43]-[44]:

> "43. But secondly and more fundamentally, quite apart from authority, I would not accept the implied term contended for by [counsel for the claimant]. Such an implied term would impose an unfair and unreasonable burden on employers. It is one thing to say that, if an employer assumes the responsibility for giving financial advice to his employee, he is under a duty to take reasonable care in the giving of that advice. That is no more than an application of the *Hedley Byrne* principle [1964] AC 465. An example of such a case in the context of a contract of employment is *Lennon v Comr of Police for the Metropolis* [2004] ICR 1114. It is quite a different matter to impose on an employer the duty to give his employee financial advice in relation to benefits accruing from his employment, or generally to safeguard the employee's economic well-being.
>
> 44. As [counsel for the defendant] points out, the financial well-being of the employee may be in conflict with that of the employer. Take the case of an employer who is considering whether or not to make an employee redundant. In deciding whether to make a particular employee redundant or to invite him to take voluntary redundancy, does the employer have a duty to consider the financial consequences of redundancy to

> that employee? The all-embracing implied term for which [counsel for the claimant] contends would suggest that he does. But that is surely unreasonable. The employer is not required to have regard to the employee's financial circumstances when he takes lawful business decisions which may affect the employee's economic welfare. There is no reason to suppose that he will even be aware of the details of those circumstances. Nor is it the function of the employer to act as his employee's financial adviser: that is simply not part of the bargain that is comprised in the contract of employment. There are no obvious policy reasons to impose on an employer the general duty to protect his employee's economic well-being. The employee can obtain his own advice, whether from his union or otherwise. The policy considerations in relation to questions of health and safety are wholly different. If an employer fails to provide a safe system of work, it will usually not be possible or reasonable to expect the employee to take steps to make good the shortcomings in the system."

190. In *Crossley*, the claimant also relied on *Scally*. The focus of the decision in the Court of Appeal was on whether the claimant could reasonably have been expected to have been aware of the term if it was not brought to his attention. The court held that the judge at first instance had been entitled to conclude, on the facts, that the claimant, as a senior employee of long-standing, could reasonably have been expected to be aware of the relevant provisions of the scheme, even though they had not been brought to his attention.

191. *Scally* was considered in *James-Bowen v Comr of Police for the Metropolis*. At [19], Lord Lloyd-Jones said that the claim in *Scally* succeeded on a narrow ground and not on a more general duty of care owed by an employer to protect the economic interests of his employees. Lord Lloyd-Jones also referred to the decision in *Crossley* with approval.

192. I will now seek to apply the principles stated above to the present cases.

193. *Scally* was decided on narrow grounds. Even assuming that the implied term in *Scally* could be simply re-expressed as a duty of care in tort in the present context, I do not consider that such a duty arose in this case. *Scally* dealt with a right arising under the contract of employment. There was no right arising under the quasi-employment of the appellants of which they were unaware. Even assuming that the appellants' entitlement to pension benefits were rights arising under their quasi employment by the chief constables, the appellants were aware of those rights and they enjoyed those rights. What was adverse to the appellants were the tax consequences of their re-employment by the police authorities. The tax consequences were external to the quasi-employment relationship by the chief constables. It would be a major and unjustified extension of the decision in *Scally* to hold that the chief constable had a duty to advise or inform or warn the appellants of those tax consequences. In addition, it is relevant that the chief constables were not responsible for the administration of the pension schemes and the new employment was by the police authorities and not by the chief constables.

194. The above reasoning deals with the way in which the alleged duty of care was expressed by Mr Cheetham for the Essex appellants.

195. The duty of care alleged by Ms Ling for the Avon and Somerset appellants was expressed in three ways, in the alternative to each other. The first and second ways in which the duty was expressed bear no real resemblance to the duty implied in *Scally*. Those ways refer to the chief constable pursuing a settled practice and the alleged duty is either not to pursue that practice or to ensure (possibly by modifying the practice) that the practice does not have adverse consequences for the officer. No previous authority provides any support for the imposition of duties of these kinds. If the court were to impose those duties, it would involve a major extension of the law in this area. The decisions to which I have referred above provide no encouragement to such an extension and, instead, advise a very cautious approach. I am not persuaded that it would be fair, just or reasonable to impose the alleged duties on the chief constables.

196. The third way in which Ms Ling expressed the duty on the chief constable was as a duty to warn which is closer to the duty in *Scally*. For the reasons given earlier, I am not persuaded that there was any such duty on the chief constables in this case.

197. It follows that I will hold that the chief constables are not liable to the appellants for the adverse tax consequences of what occurred in this case.

The overall result

198. The result is that:

i) I will allow the appeal of the Avon and Somerset appellants in relation to the liability of the Avon and Somerset Police and Crime Commissioner;

ii) I will remit to the Pensions Ombudsman for the purpose described in this judgment the appeal of the Essex appellants in relation to the Essex Police and Crime Commissioner; and

iii) I will dismiss the appeals of both groups of appellants in relation to the chief constables.