Scottish Police Federation
5 Woodside Place Glasgow G3 7QF

JCC Circular 23 of 2017

Ref: CS/DK/KB

23 June 2017

Attachment – Judicial Review – Held in Reserve

Dear Colleagues

Judicial Review – Held in Reserve

This morning we received notification that Lady Wise has upheld SPF's position regarding the non-payment of monies in the Held in Reserve case.

I would ask that our members be notified of the Judicial Review decision. I have attached the judgement which agrees with our interpretation of the PNB Circulars.

We will now speak with PSOS to see how they plan on processing these claims.

Yours sincerely

Calum Steele
General Secretary

OUTER HOUSE, COURT OF SESSION

[2017] CSOH 92

P758/16

OPINION OF LADY WISE

In the petition

THOMAS BARNES

Petitioner

for Judicial Review of a decision taken on behalf of the Chief Constable of the Police Service of Scotland dated 21 February 2016

CHIEF CONSTABLE, POLICE SERVICE OF SCOTLAND

Respondent

Petitioner: Crawford QC, E Campbell; Kennedys Scotland
Respondent: McGuire QC; Clyde & Co

23 June 2017

Introduction

[1] The petitioner is a serving police officer. He seeks reduction of a decision of the respondent, given through his Assistant Chief Constable (Higgins) and dated 21 February 2016, refusing the petitioner's request for overtime payments and declarator that, if the petitioner was serving away from his normal place of duty, was obliged to stay in a particular specified place and was not allowed home then he was "held in reserve" for the purposes of certain Police Negotiating Board circulars 83/10, 86/15, 88/9 and 96/8 ("the circulars"). On 4 September 2015 an application was made by the petitioner for overtime

payments and that was refused. An internal challenge to that refusal was unsuccessful and these proceedings have been brought to resolve a dispute in relation to the interpretation of certain circulars collectively known as "the Hertfordshire agreement".

[2] The relevant factual background is not in dispute. In essence, the circulars numbered above, known as the Hertfordshire agreement, have been regularly applied by the respondent (and his predecessor Chief Constables) for a number of years. Amongst other matters those circulars define when officers are to be considered "held in reserve". The term "held in reserve" is a duty state which extends an officer's normal hours of duty. The petitioner's particular circumstances were that he attended for royal court duties at Birkhall near Ballater. It is not in dispute that the Assistant Chief Constable (Higgins), acting on behalf of the respondent, accepted that on the relevant days that the petitioner was serving away from his normal place of duty, was obliged to stay in a particular place and was not allowed to return home. The petitioner's position is that in those circumstances his attendance at Birkhall entitled him to have been categorised as "held in reserve resulting in him being entitled to overtime payments". The respondent disputes the petitioner's interpretation of the circulars.

Argument for the Petitioner

[3] Ms Crawford presented her argument in four chapters as follows.

1. Grounds of Challenge

[4] The petitioner's argument is that the respondent's decision is irrational and unreasonable and that the Chief Constable has not properly interpreted the circulars in question. The challenge is more one of illegality than irrationality. It was submitted that the

interpretation of the circulars is a question of law and so it would be incorrect to argue that the court can only intervene if the chosen meaning within a spectrum of meanings is wrong. In this context, it was pointed out that the case of *R* v *Hillingdon London Borough Council ex parte Puhlhoffer* 1986 1 AC 484 was not one where the court was dealing with the proper construction of a document as a matter of law. The case had concerned a matter of fact in relation to housing. In contrast, the question in this case was the meaning, as a question of law, that one requires to give the circulars. What had occurred in this case was that the respondent had misconstrued the circulars in question but even if the court found that he had not so misconstrued them, then he had acted irrationally. It was understood that the respondent would argue, relying on the case of *Puhlhoffer*, that it was for the respondent to construe the circulars to mean whatever he wanted them to mean but that would result in the very situation criticised by Lord Reed in the case of *Tesco Stores Limited* v *Dundee City Council* 2012 SC UKSC 278. There, in a planning context a submission had been made to the court that the meaning of a development plan was a matter to be determined by the planning authority with the court having no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission was rejected with Lord Reed who had expressed the view that:

> "… planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

Ms Crawford submitted that the circulars in this case were analogous to planning policies. Their purpose was to inform police authorities, chief constables and police constables of what is agreed in relation to matters such as paying overtime and how they should proceed. The circulars were designed to ensure consistency and direction of the matters that were their subject. Just as Lord Reed had confirmed in the *Tesco Stores* case that a provision in a

development plan was a matter of textual interpretation which could only be answered by construing the language used in its context, so too did the circulars require to be interpreted by the court. The question of what "held in reserve" means in the circulars is a question of law and must be determined logically prior to the respondent deciding on the facts whether any particular police officer is "held in reserve" or not. Accordingly, there were two questions relevant to the grounds of challenge. The first was how the circulars should be interpreted, which was the question of law, and a secondary question was then to apply that interpretation to a set of facts. Ms Crawford accepted that a decision on the second of those, namely the application of the interpretation to a set of facts could only be challenged on the basis of irrationality or *Wednesbury* unreasonableness. However the first question, namely that of the interpretation of the circulars themselves was something on which the respondent could be challenged on legality grounds.

[5] Ms Crawford submitted that in any event unreasonableness or irrationality no longer required extreme behaviour and in particular things had moved on from an approach based on "*Wednesbury* unreasonableness" - *Kennedy* v *Charity Commission (Secretary of State for Justice and Others Intervening)* 2015 AC 455 at paragraphs 51 - 55. In particular, Lord Mance, at paragraph 55 of that judgment states the following:

> "But the right approach is now surely to recognise, as *de Smith's Judicial Review*, 7th Ed (2013), paragraph 11 - 028 suggests, that it is inappropriate to treat all cases of judicial review together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation."

Ms Crawford then referred to the 7th Edition of *de Smith's Judicial Review* and the categories of unreasonableness referred to by Lord Mance and there listed. The particular category to

which she drew attention as being relevant in this case was that of "Rationality: Logic and Reasoning" beginning at 11 - 036. Under that heading the learned authors state:

> "Instances of irrational decisions include those made in an arbitrary fashion, perhaps 'by spinning a coin or consulting an astrologer'. In such cases the claimant does not have to prove that the decision was 'so bizarre that its author must have been temporarily unhinged', but merely that the decision simply fails to 'add up' - in which, in other words, there has been an error of reasoning which robs the decision of logic".

The learned authors cite the case of *R* v *Parliamentary Commissioner for Administration ex parte Balchin* [1998] 1 P.L.R.1 in support of that passage. In that case, a decision of *Sedley J,* the propositions quoted in *de Smith* can be found. In Ms Crawford's submission if the respondent's decision in this case is being looked at from the perspective of rationality rather than illegality, then it will be seen that the decision shows an error of reasoning which is enough for it to be susceptible to reduction.

2. General Approach to Construction of the Circulars

[6] Ms Crawford made a number of what she referred to as "trite propositions" in relation to the approach the court should take to the meaning of documents such as the circulars in question. These propositions can be supported by authorities such as *Luminar Lava Ignite Limited* v *Mama Group Plc* 2010 SC 310 and *Arnold* v *Britton* [2015] AC 1619 (at paragraph 15). They are that:

- Construction is an objective exercise
- Interpretation must be carried out by construing the language in its proper context, including the internal structure of the documents
- The court must look to the natural meaning of the words used

- The subjective views of the parties must be disregarded. [In this context it was acknowledged that both parties had lodged affidavits about the matter which the court should properly ignore other than as background.]
- The factual background may be relevant in construing the documents in question.

3 The Construction of the Circulars

[7] The first document relevant to the argument about construction of the circulars is number 6/6 of process, police circular No. 3/1983. Section E of that circular related to the implementation of the Police Negotiating Board agreement. It narrates that arrangements (from 1983) have been agreed with the Police Negotiating Board for informing police authorities and chief constables when Secretary of State approval has been given to a Police Negotiating Board ("PNB") agreement. It provides that PNB circulars will give police authorities and chief constables the necessary authority to give effect to particular agreements. Ms Crawford explained that the PNB was a UK national body until 2014. Thereafter it was abolished so far as English police officers were concerned but continues in place for Scottish officers. Section 61 of the Police Act 1996 provides that the PNB shall represent the interests of, *inter alios*, the police and the Secretary of State. The Police and Fire Reform (Scotland) Act 2012 (as amended by subsequent legislation) will establish a separate PNB for Scotland but in the meantime the Board continues for Scottish officers. The circulars relied upon in these proceedings are policy statements recording a formal agreement which in turn is relied on by police authorities, police officers and the Secretary of State. Ms Crawford submitted that accordingly circulars must be applied consistently and that their proper construction is a question of law.

[8] There are four circulars with which the petition is concerned. The first is PNB circular 83/10 (number 6/1 of process). This circular provided authority to implement an agreement on officers held in reserve away from their normal place of duty. Ms Crawford submitted that what it laid down were two conditions which, if met, rendered all hours duty hours save for 8 out of every 24 hours which would effectively be sleeping time. It was submitted that the definition was clear and that the formula made sense, namely that in every 24 hour period for an officer who was held in reserve away from their normal place of duty and required to sleep in a specified location, "all hours shall be counted as duty hours except for a period not exceeding 8 hours in every 24" if proper sleeping accommodation was provided and that the officers were stood down from immediate operational availability. The provisions in relation to sleeping accommodation and being stood down for immediate operational ability were not relevant as a matter of law to the definition of "held in reserve". It was submitted that the term "held in reserve" was the term of art and was only used in respect of officers who were away from their normal place of duty. There was no concept of held in reserve other than when officers were away from home. Officers who could be called into their normal place of work might be described as being "on call" but never held in reserve.

[9] The second circular, number 86/15, superseded 83/10. It provided identical wording in respect of officers held in reserve away from their normal place of duty but provided in addition a lengthy definition of sleeping accommodation. Ms Crawford accepted that any challenge to a decision about the type of sleeping accommodation provided would only be challengeable on irrationality grounds. This circular also introduces payment of a hardship allowance if proper sleeping accommodation is not provided. It also provides a method of

determining payments for travelling time and notes that "mutual aid" hours include travelling time to the aided forces and back again.

[10] The third relevant circular is number 88/9. It provides a definition of the term "held in reserve" as used in the agreement of 14 October 1986 the detail of which is narrated as being contained in PNB circular 86/15. This circular makes certain changes. It provides that in the context of the agreement of 14 October 1986, "held in reserve" means that:

(i) officers are serving away from their normal place of duty;

(ii) are obliged to stay in a particular, specified place, and not allowed to return home.

While nothing turned on those changes for the petitioner's case it was part of the chronology of events that the definition had reiterated and expanded slightly the conditions for being held in reserve.

[11] The fourth and final circular is number 95/8. This circular amends number 86/15. For ease of reference circular 95/8 sets out the terms of circular 86/15 and then provides certain amendments to it in relation to standard of accommodation and hardship allowance. Again nothing turns on the amendments made for the purposes of the petitioner's case. In Ms Crawford's submission what the circulars, taken together, provide, is that if an officer is (i) away from his normal place of duty, (ii) has to sleep in a specified location and (iii) is not allowed to return home then he is "held in reserve" such that all of his hours are treated as duty hours unless sleeping accommodation is provided and he is stood down other than for real emergencies in which case duty hours reduce from 24 to 16. The respondent's construction would allow a reduction of up to 16 hours, in other words the petitioner would only be paid for 8 hours in every 24 hour period that he is held in reserve. The petitioner contends that such a construction of the circulars is wrong. It is not in dispute that the

petitioner was allowed reasonable freedom of movement and did not expect to be contacted and so the respondent's argument is that the duty hours for which he would be paid would only be those during which he was actually working. However, in Ms Crawford's contention , the plain ordinary meaning of the circulars makes that incorrect. The petitioner was required to stay in a particular hotel and the respondent knew where he was and had his mobile telephone number. The fact that the police did not require him to pick up a firearm is irrelevant. The respondent's contention was that five conditions had to be satisfied in order to be held in reserve for the purposes of payment for "duty hours", namely that he was away from his normal place of duty, obliged to stay in a particular place, not allowed to return home, given proper sleeping accommodation and stood down from operational availability whilst remaining contactable in case of emergency or recall.
Ms Crawford submitted that the respondent's interpretation was illogical and failed to give proper weight to the operative part of being "stood down" for 8 of 24 hours. Being "stood down" carries with it an expectation that an officer will not be required to return to his duties.

[12] The petitioner's position was essentially that the respondent's construction of the circulars was not rational. The ordinary contextual construction of the circular was that a maximum of 8 hours could be excluded from duty hours where the officer was held in reserve away from home. If the respondent's interpretation was correct, he would be entitled to choose not to provide proper sleeping accommodation but it would not matter so long as the officer was not stood down. At best he would get a hardship allowance. Effectively the respondent would be able to deprive the officer of the held in reserve allowance depending on whether or not the officer expected to be contacted. No explanation had been given by the respondent of when all hours would be counted as duty

hours. Further, the respondent's interpretation ignored the underlying common sense self-evident policy that officers away from home are not free to do that which they would normally do when off duty and so should be paid for time away from home but not actively working. The terms of the circular clearly acknowledge that position by compensating the officers and allowing what would normally be regarded as free time to be classed as duty hours.

4. Response to the Respondent's Position

[13] In Ms Crawford's submission the respondent's position was to start from the formula of counting hours and use that to construe the expression "held in reserve" but that approach took matters the wrong way round. The construction put on behalf of the respondent runs contrary to practice, in particular the arrangements for the NATO summit in 2014 known as Operation ISMAY. A document relating to that had been lodged, number 6/7 of process. In paragraph 3.2 of the document, there is information confirming that when officers are held in reserve away from their normal place of duty all hours should be counted as duty hours other than a period not exceeding 8 hours in every 24. The respondent was wrong as a matter of law to conclude that an officer requires to meet the qualifying conditions for an allowance and that duty hours can be no more than 8 in every 24. The term "held in reserve" was not an abstract concept but one defined by the circulars. The respondent sought to rely on a concept of a "16 hour allowance" as illustrated by paragraph 15 of the answers. However, this was not an apposite concept. The only allowance relevant to the circulars was a hardship allowance which was defined. What the relevant circular does in relation to that is simply set out a calculation if an officer is not held in reserve.

[14] Ms Crawford referred also to the memorandum from the Scottish Police Federation in respect of "Operation Jersey" dated 11 March 2014 lodged by the respondent as number 7/3 of process. In that memorandum the relevant parts of circular 83/10 are narrated and a concluding statement made that:

> "It is important to highlight that 'held in reserve' is a duty state and NOT an allowance despite some inaccurate references within meeting papers and correspondence."

It was accordingly clear that if an officer was held in reserve that payment followed from that duty state. The respondent appeared to accept that the petitioner was held in reserve but contends that because he was not expected to be contacted he would not be paid for 16 hours but only for 8. However it was unilateral act of the respondent to tell the petitioner that he should not be expected to be contacted. That had no bearing on the construction of the circulars. In all the circumstances, it not being disputed that the two conditions for being held in reserve were met by the petitioner in the circumstances outlined in the petition and a decision not to pay him accordingly ought to be reduced and declarator granted on the basis that the respondent's construction is demonstrative of an error in law, which failing it defied logic and was irrational.

Argument for the Respondent

[15] Ms McGuire QC spoke to her detailed and helpful written submission. She explained that while this Petition affects only one officer it could affect many others whose claims would be determined in accordance with the court's decision. The matter is an important one for the respondent who seeks clarity through judicial determination. He is required to act in accordance with section 37 of the Police and Fire Reform (Scotland)

Act 2012 to secure the best value for the Scottish Police Authority and the Police Service of Scotland.

[16] It was agreed that the Hertfordshire agreement was the colloquial name for the Police Negotiating Board ("PNB") circulars that were the subject of the Petition. The detail of each circular was narrated in a manner similar to the exercise Ms Crawford had undertaken. The specific factual background for the petitioner's claim was also accepted as being the policing of the Royal Court at Birkhall in Balmoral in 2015. Ms McGuire explained that the policing model for the Royal Court in 2015 was completely new as it was the first time the Gold Commander had to draw on assets (personnel) from across Scotland rather than local resources. The allocation of this particular type of resource necessitated some officers being deployed from the east and west of Scotland. Due to the distances involved it was not practical for them to return home following their shifts. They were provided with the option of accommodation locally in a four star hotel in Ballater. The petitioner was one of the officers in question. It was acknowledged that no issue had arisen with the standard of accommodation.

[17] The respondent's position was that during the period that the petitioner was not deployed but was away from home in Ballater he was off duty. During any periods when he was not actively deployed he was stood down from operational activity, he was not required to be contactable in respect of any emergency situation, he did not require to provide any contact information for the periods when he was off duty, he was aware that he would not have been recalled, he was permitted to have complete freedom of movement without restriction, he could have left Ballater as he was not required to remain in that place and he was not required to stay in the actual accommodation provided at all. The only requirement was that he had to be capable of reporting at Balmoral or Birkhall before his

next deployment, a requirement which applies to any place of duty. The petitioner's situation was contrasted with the position in respect of the normal conditions of service where there might be exigencies which require officers to be called on duty. The normal local officers in this situation were not ordered to refrain from returning home albeit the logistics of that would require to be such that they were available for duty at the appointed time of deployment.

[18] In the absence of a legitimate expectation argument, the issue for determination by the court was in fairly narrow focus, being restricted to the interpretation of the Hertfordshire agreement in the agreed background circumstances. The real issue was whether or not it was unlawful or irrational for the respondent to have interpreted the agreement as meaning that the petitioner is not entitled to 16 hours duty payout of every 24 because he was (a) not on duty during the whole of these periods, (b) not expected to be called on duty and (c) was free to reside wherever he wished and go and do whatever he wished during those periods provided he could attend for duty at Ballater at the start of his shift. The case turned on whether in those particular circumstances it was unlawful or irrational for the respondent to decline to award an allowance to an officer such as the petitioner having regard to the agreement and the respondent's interpretation of it.

The Interpretation of the Agreement by the Respondent

[19] Ms McGuire explained that the way in which the agreement has been interpreted by the respondent is to consider that before an officer can qualify for payment for 16 hours in a 24 hour period, irrespective of deployment, the following conditions require to be satisfied:

1. The officer must be serving away from their normal place of duty;
2. the officer must be obliged to stay in a particular specified place;

3. the officer must not be allowed to return home;

4. the officer must be given proper sleeping accommodation; and

5. the officer must be stood down from operational availability, be allowed reasonable freedom of movement whilst remaining contactable in case of emergency or recall.

It was submitted for the respondent that this was a reasonable interpretation of the provisions of the agreement. The crux of the dispute between the parties appeared to be the interpretation of the fifth and last condition. The latter part of that condition imposed a positive obligation to remain contactable and subject to recall to duty. Officers in those circumstances require to provide personal contact details. It was submitted that an officer would not qualify for a payment of all hours as duty hours merely by being "held in reserve", namely staying away from the normal place of duty without consideration of the other conditions. The petitioner's contention that the only requirements for qualification were to be away from home and to stay overnight was wrong given the full terms of the circular. Further, an interpretation of "held in reserve" amounting to no more than a simple requirement to be away overnight is not supported by the Scottish Police Federation in their memorandum dated 11 March 2014 regarding a previous operation. The relevant document had been lodged at 7/3 and the last page made clear that there were four criteria to be fulfilled before "compensation" was due. The petitioner was not on duty or on call while he was away from home, he worked shifts and would be paid for those. It was submitted that if the respondent's interpretation was an acceptable one it fell to be regarded as a logical one.

The Approach to Construction

[20] There was nothing between the parties on the correct approach to construction of an agreement. Ms McGuire accepted that the key issue was the objective construction of the words used in the agreement, according to the standards of a reasonable third party who is aware of the context in which the agreement occurred – *Luminar Lava Ignite Ltd* v *Mamma Group Plc* 2010 SC 310 at paragraph 3. The starting point was the word used in the agreement understood in the context of that agreement as a whole. A reference was made to the observations of Lord Neuberger in *Arnold* v *Britton* [2015] AC 1619, at paragraph 15, in relation to a need to focus on the documentary factual and commercial context of the relevant words. Ms McGuire submitted that context was key to the process of construction.

The Decision under Challenge

[21] It was conceded by the decision maker in this case that the first four conditions listed were satisfied. The issue from the decision maker was the second part of condition 5. That was evident from the decision letter (6/2 of process paragraph 5). The obligation to remain contactable was removed completely. However, as part of that, it was clear that there was no obligation to stay in a particular specified place albeit that the officer would not logistically be able to return home and back in time for duty from a welfare perspective. The key component missing from the condition was the requirement to be contactable during the off duty period. Once this obligation was removed the rationale for applying the 16 hour period disappeared. The petitioner simply did not meet the requirements set down.

Approach to Judicial Review

[22] As anticipated by Ms Crawford, it was contended on behalf of the respondent that,

even if the court was persuaded that the agreement could possibly be read in the way proposed by the petitioner that did not permit interference with the decision if the agreement could also be read in the way proposed by the respondent without irrationality. In terms of the *Wednesbury* test, which was still said to be the relevant one, the petitioner required to satisfy the court that the decision was so outrageous, so defiant of logic that no reasonable decision maker, appraised of the facts, could have reached the same decision. The petitioner had failed to satisfy that high test.

[23] So far as the petitioner's reliance on the observations of Lord Mance in *Kennedy* v *Charity Commission (Secretary of State for Justice and Others Intervening)* [2015] AC 455, it was pointed out that Lord Carnwath in the same case had reiterated that the applicant would only be entitled to Judicial Review on conventional administrative law principles. It was emphasised that the jurisprudential basis for the more flexible approach and its practical consequences in different legal and factual contexts, remained uncertain and open to debate – *Kennedy* at paragraphs 245 and 246. In any event the discussions in *Kennedy* had to be seen in the context that they were informed by the approach to proportionality in the common law remedy. The position in Scotland remained as determined in the Inner House in *Sommerville* v *Scottish Ministers* [2007] SC 140, namely that *Wednesbury* unreasonableness remained as the test and that the law does not recognise proportionality as a criterion by which to test the validity of administrative action. However, even if there was flexibility in the approach to be taken as contended for by the petitioner, then having regard to the context of the decision, the decision under scrutiny in this petition was one very much at the lower end of a scale of intensity of review or anxious scrutiny. The response given by the Assistant Chief Constable was one clearly open to a reasonable decision maker. Accordingly viewed in context it was neither unreasonable nor irrational. If, as articulated in *R* v

Parliamentary Commissioner for Administration Ex parte Balchin [1998] 1 PLR 13, irrationality generally means that "the decision does not add up" or "there is an error of reasoning which robs the decision of logic" then it could not be said that the respondent's decision was in that category. The facts set out in the decision letters were logically capable of sustaining the conclusion reached, namely that failure to fulfil the condition in the sub-clause of circular 83/10 for qualifying for the payment meant that the payment could not be approved. Accordingly, the application of either the traditional general principles of *Wednesbury* as enunciated clearly by Lord Diplock or a more developed and flexible approach to the question of irrationality in the circumstances of this case demonstrated that the decision was entirely logical and consistent with the facts before the decision maker. On the contrary, a decision to pay the petitioner for all hours worked as if they were duty hours might be said to be one which was not logical. It would be inconsistent with the obligations on the respondent in terms of section 37 of the Police and Fire Reform (Scotland) Act 2012.

[24] In response to the submission of Ms Crawford that the respondent could not make the circulars mean whatever he would like them to mean, Ms McGuire referred back to the case of *Tesco Stores* v *Dundee City Council* 2012 SC 278. She drew attention to paragraph 21 in relation to extreme interpretation. By analogy with interpretation of the circulars she contended that, as in that case, the question in this petition could only be answered by construing the language used in the agreement in its context. In any event, even if the petitioner's interpretation of the agreement was correct, it would be sufficient to restrict any remedy to the reduction sought. No declarator was necessary. The Police Negotiating Board was still charged with negotiating these agreements, and all that the court could do would be to determine the issue of interpretation so far as this petitioner was concerned.

Reply for the Petitioner

[25] In a brief reply Ms Crawford disputed that 2015 was the first time that police from other forces across Scotland had been deployed rather than local resources. The respondent's memorandum, no 7/3 of process dated 11 March 2014 in relation to operation Jersey was an example prior to that year. So far as the circulars to be construed were concerned, these described the circumstances in which all hours were to be counted as duty hours. It was not a question of a pay or allowance and the pay for duty hours could differ. For example an officer might be paid at a basic rate or an overtime rate. Any time worked over 40 hours is in general paid at overtime rates in the police force. Accordingly it was not a question of an extra payment or allowance as the petitioner could, in theory at least, be paid more when he was not working than when he was working. The central issue was whether hours were counted as duty hours not the level and extent of payment. So far as requirement to stay in a particular hotel is concerned it was pointed out that the decision letter number 6/2 of process confirmed that the first four conditions imposed by the respondent were satisfied. The second condition was being obliged to stay in a particular specified place.

Discussion

[26] The issue in dispute in this case relates to the duty state, referred to as "held in reserve" and the consequences that flow therefrom. While a number of PNB circulars were drawn to my attention in argument and provide context, the central definition of the term held in reserve and its consequences has not changed in so far as central to the argument since the initial circular number 83/10. The relevant part of that circular is in the following terms:

> "Officer held in reserve away from their normal place of duty
>
> This agreement applies to officers held in reserve away from their normal place of duty, when they are required to sleep in a specific location. In such cases all hours shall be counted as duty hours except for a period not exceeding 8 hours in every 24 providing that in respect of that period
>
> 1) proper sleeping accommodation is provided; and
> 2) the officers are stood down from immediate operational availability and, according to the particular circumstances, are allowed reasonable freedom of movement while remaining contactable in case an emergency requiring their recall should arise."

While it may be thought that the definition of being held in reserve is clear enough from that first circular, the third circular, number 88/9 clarified and extended the definition of the term held in reserve, stating :

> "In the context of the agreement reached on 14 October 1986, 'held in reserve' means that:
> (i) officers are serving away from their normal place of duty; and
> (ii) are obliged to stay in a particular, specified place, and not allowed to return home."

The parties in this case disagree as to what conditions require to be fulfilled in order for hours to be counted as duty hours as a result of being classified as "held in reserve". Interpretation of the parts of the circular narrated above on behalf of the respondent is contended to be incorrect, irrational and/or unreasonable.

[27] The decision under challenge is that of Assistant Chief Constable Higgins (on behalf of the respondent) dated 21 February 2016 in a letter to the Deputy General Secretary of the Scottish Police Federation. The letter relates solely to the petitioner's claim and narrates that the petitioner's position is that he was "held in reserve" on 10 August 2015 and entitled, as a result, to be paid for that day as if all hours were duty hours (except for a period not exceeding 8 hours) irrespective of the hours he actually worked. In refusing the petitioner's claim the decision letter includes the following passage:

> "At the beginning of your email you drew my attention to the definition 'held in reserve' contained within Police Negotiating Board Circular 88/9. This provides that 'held in reserve' means that 'officers are serving away from their normal place of duty; and (ii) are obliged to stay in a particular, specified place, and not allowed to return home". However, the fact that Constable Barnes could be said to have been 'held in reserve' within the meaning of Circular 88/9 during his deployment in Ballater, does not mean that he is entitled to be paid as he claims. The Circulars are clear that, in order to be paid as if all hours were duty hours (except for a period not exceeding eight hours) irrespective of the hours actually worked, the particular circumstances of an officer's deployment must satisfy all of the following conditions:
>
> 1. The officer must be serving away from their normal place of duty.
>
> 2. They must be obliged to stay in a particular, specified place.
>
> 3. The must not be allowed to return home.
>
> 4. They must be given proper sleeping accommodation.
>
> 5. They must be stood down from immediate operational availability and, according to the particular circumstances, be allowed reasonable freedom of movement whist remaining contactable in case an emergency requiring their recall should arise.
>
> I see that these conditions are contained in the excerpts from Circular 83/10 you have included in your email.
>
> It is accepted that the circumstances of Constable Barnes' deployment met the first four qualifying conditions. I do not consider that the fifth condition was satisfied because whilst he was off duty Constable Barnes was allowed complete freedom of movement and was not expected to remain contactable in case of emergency."

[28] The letter goes on to explain that in reaching that decision the Assistant Chief Constable had regard to a lack of expectation that officers in the petitioner's position would have to remain contactable in case of an emergency and would therefore be permitted complete freedom of movement whilst off duty. There is also reference to officers such as the petitioner not being required to be fit to use a firearm and not required to provide a personal contact telephone number for the periods they are off duty. It is clear from the letter that the decision turned on the respondent's interpretation of the circulars in question and in particular the excerpt from circular 83/10 quoted above.

[29] It is appropriate first to address the difference between counsel as to the extent of the susceptibility of the respondent's decision to Judicial Review. In essence, the petitioner, relying on certain passages from the judgment of Lord Mance in *Kennedy* v *Information Commissioner* [2015] AC 455 contends that a rigid test of irrationality once thought applicable under the *Wednesbury* principle has been departed from to the extent that the nature of Judicial Review in every case depends on the context. The respondent's contention, on the other hand, is that the *Wednesbury* test is still the relevant one and that the pursuer would require to satisfy the court that the decision was so defiant of logic that no reasonable decision maker, appraised of the facts in the agreed context could have reached the same decision as that now challenged. As will become apparent, I have been able to decide this case on what might be regarded as traditional Judicial Review grounds in that, as I will set out, I consider that only one rational interpretation of the circular was available to the respondent on the issue of what hours would be counted as duty hours for officers held in reserve. It does seem that the approach to judicial review has broadened, at least in England, since the decision at the Inner House stage of *Somerville v Scottish Ministers* 2007 SC 140. However, it is noteworthy that in *Somerville* the court rejected the recognition of proportionality alongside *Wednesbury* unreasonableness partly because of the "*undesirable dichotomy between the approach to judicial review in Scotland and in England*" that would be the result of such recognition. Since then the discussion in this area in England has moved on, as illustrated by the case of *Kennedy* v *Charity Commission (Secretary of State for Justice and Others intervening)* 2015 AC 455. As Ms Maguire pointed out, however, that case does not amount to a wholesale departure from conventional administrative law principles. Lord Carnwath in particular, albeit in a dissenting judgment, emphasised that it is currently at best uncertain to what extent the proportionality test has become part of domestic public law.

Both Lord Mance and Lord Carnwath supported a position that the intensity of the scrutiny to be given to a decision of this sort is rather less than, for example, one where a potential common law right or constitutional principle is in issue. Proceeding for purpose of this case on the basis of conventional judicial review principles, it is the duty of the court, in the exercise of the supervisory jurisdiction, to intervene if a decision is seen to have been made on an irrational basis. Accordingly, if there is *"an error of reasoning which robs the decision of logic"* as articulated in *R* v *Parliamentary Commissioner for Administration Ex Parte Blachin* [1998] 1 PLR 13, the decision is so flawed that it cannot stand. Both sides to this litigation accept that, in order to assess whether the decision reached was logical, the circulars in question require to be construed objectively, looking at the natural meaning of the words used and ignoring the subjective views of the parties albeit that the factual background may be relevant.

[31] In my view, the PNB circulars are on the face of it clear and unambiguous and provide that there are only two conditions that require to be fulfilled before an officer can be categorised as "held in reserve" Those two conditions are that the officer (i) is away from his normal place of duty and (ii) is required to sleep in a specified location and not allowed to return home. The extension to the second condition by adding the requirement of not being allowed to return home was introduced by circular 88/9. The respondent has treated this as a third condition but nothing turns on whether it is regarded as an addition to the second condition or as a separate third condition. There are undoubtedly three requirements within the two specified conditions and the decision maker in this case accepted that those requirements were fulfilled. What the respondent then decided, was that two other conditions required to be satisfied before an officer could be paid "... *as if all hours were duty hours*". Those were that the officer must be given proper sleeping accommodation and must

be stood down from operational availability, allowed reasonable freedom of movement whilst remaining contactable in case an emergency requiring their recall should arise. In my opinion, such an interpretation erroneously and irrationally conflates two separate aspects of PNB circular 83/10 (and where the material terms appear in subsequent circulars). The wording of that circular provides that where officers are held in reserve (in such cases),"...all hours shall be counted as duty hours except for a period not exceeding 8 hours in every 24 provided that in **respect of that period…**" (emphasis added). The reference that follows to the provision of proper sleeping accommodation and a standing down from immediate operational availability and so on are conditions that relate exclusively to what might be regarded as "sleeping hours" namely the 8 hours in every 24 that, if those conditions are met, will not be regarded as duty hours. In other words if an officer is not provided with proper sleeping accommodation or is not stood down other than in emergency situations, they can categorise all 24 hours as duty hours rather than the 16 that flow naturally from the duty state known as "held in reserve". In my view that is the only rational interpretation that can be given to PNB circular 83/10. The restriction of the conditions to be met before an officer can qualify as being held in reserve is beyond any doubt by the definition in circular 88/9. As already indicated, nothing turns on the addition of the words "and not allowed to return home" in that definition for the purposes of the present case. The error in the respondent's reasoning can be seen in the coupling of the sleeping accommodation and "standing down" requirements with hours being counted as duty hours rather than a restriction of those duty hours to 16 rather than 24 in any 24 hour period. The operative words that, in the context of what the circular is defining, lead to the only rational interpretation of PNB circular 83/10 being that contended for by the petitioner in this case are "in such cases" at the beginning of the second sentence, the words " not

exceeding 8 hours" and the expression "in respect of that period" immediately prior to the conditions that follow. The first of those expressions, " in such cases", makes clear that the cases being referred to are cases where the officers are away from their normal place of duty and required to sleep in a specified location (and returned home) in which case they are held in reserve and all hours shall be counted as duty hours. What follows is the exception for an 8 hour period of rest which shall not be counted as duty hours on the conditions already referred to in relation to sleeping accommodation and being stood down. The words "not exceeding 8 hours" clarify that the number of hours that will not be counted as duty hours when an officer is held in reserve has an absolute limit of 8 in any 24 hour period. Finally, the expression "in respect of that period" can only relate to the period of possible exemption from duty hours, namely the 8 hour maximum that immediately precedes it.

[32] The reasons given by the respondent in the decision letter are erroneous and irrational because of this failure to understand that the clear terms of the circulars in question separate the two concepts of being held in reserve from the conditions that will except 8 in every 24 hours from counting as duty hours. There is no logical basis for a decision that required the petitioner to satisfy all of the five conditions listed in the respondent's decision letter before 16 out of 24 hours could be counted as duty hours. To the contrary, the only rational interpretation is that once an officer satisfied the conditions for being held in reserve, the default position is that all hours are counted as duty hours. It is then for the respondent to fulfil the conditions on sleeping accommodation and "standing down" before the hours that qualify as duty hours can be reduced to 16 in every 24 hour period.

[33] It is important to distinguish the concept of reasonableness in general approach from the sharp question of construction of the circulars that I have been asked to determine. No

criticism can be levelled at the respondent for taking his duties under section 37 of the Police and Fire Reform (Scotland) Act 2012 consciously and seriously. Had the role of the respondent in this matter been to make a standalone decision on what might be fair if an officer was serving away from their normal place of duty so far as payments or allowances were concerned, the matter would not be subject to the same level of scrutiny and the overall decision reached may well have been regarded as reasonable in a general sense and having regard to the respondent's statutory duties. However the context was that the respondent's decision sought to interpret an agreement that had been reached after negotiation between relevant agencies responsible for policy pay and conditions and deemed thereafter to be determinative on the matters covered by them. While it is not contended that this case raises any question of legitimate expectation, the respondent was clearly not entitled to interpret the circulars in question such as to render their terms "devoid of logic". The error in the respondent's approach was essentially to divide the petitioner's claim into hours actually worked and hours he regarded as "off duty". The whole point of the duty state known as "held in reserve" is that, in accordance with the circulars, all the hours are treated as duty hours, save for a later period where the conditions narrated are satisfied. As Ms Crawford pointed out, no issue of allowance or level of payment arises from the interpretation of the circulars. Duty hours may be paid at a normal rate or an overtime rate depending on the particular circumstances. The payment may reflect a period when an officer is not working but whose time is regarded as "duty hours" because of the inability to return home. In conclusion, the respondent's approach of rejecting a contention that the default position for an officer held in reserve was that all hours comprise duty hours (save for 8 hours sleeping time where the respondent made appropriate provision and stood the

officer down) was irrational standing the terms of the circulars directly applicable to the situation.

Decision and Disposal

[34] For the reasons given, the decision of the respondent in the letter of 21 February 2016 was irrational and falls to be reduced. However, I accept Ms McGuire's argument that it is unnecessary to grant the declarator sought in addition to reducing the decision. I have determined the issue of interpretation so far as this petitioner was concerned on the basis of agreed background facts. Accordingly I will grant the prayer of the Petition only to the extent of reducing the decision of 21 February 2016, reserving meantime all questions of expenses.