Case No: CH/2015/0108

[2015] EWHC 2686 (CH)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
110 Fetter Lane
London EC4A 1NL

Wednesday, 8 July 2015

BEFORE:

MR JUSTICE NUGEE

BETWEEN:

YOUNG

Appellant

- and -

NHS BUSINESS AUTHORITY

Respondent

MR D LEACH (instructed by **Royal College of Nursing**) appeared on behalf of the Appellant

MR E WEST (instructed by **GLD**) appeared on behalf of the Respondent

---

Judgment
(As Approved)

Digital Transcript of Wordwave International, a Merrill Communications Company
101 Finsbury Pavement London EC2A 1ER
Tel No: 020 7422 6131 Fax No: 020 7422 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

Wednesday, 8 July 2015

1. MR JUSTICE NUGEE: I have before me an appeal from the Deputy Pensions Ombudsman, Mrs Jane Irvine, in relation to a determination dated 28 November 2014, in which she dismissed a complaint by Mrs Karen Young against the NHS Business Services Authority (NHS BSA) which is now responsible for administering a scheme known as the NHS Injury Benefit scheme, which is governed by regulations.

2. Under section 151(4) of the Pension Schemes Act 1993, an appeal lies to the High Court against a decision of the Pensions Ombudsman, but only on a point of law. It is well established what that means in practice. I was referred, by way of example, to what Mummery LJ said in an early appeal from the Pensions Ombudsman, Wakelin v Read [2000] OPLR 277, and at page 10 of the print that I have been provided with, Mummery LJ said this:

> "The only question for the High Court and for this court, on appeal from the High Court, is this: is there an error of law in the determination or direction of the Ombudsman? In answering that restricted question, the appellate court should be astute not to entertain appeals on points of fact dressed up as points of law. A point of law is one which arises from the wrong application of a legal principle, or from the misconstruction of a statutory provision or from a decision that no reasonable Ombudsman, properly directing himself on the facts and the law, could have reached."

3. Under CPR 52:21 it is now provided that:

> "Where an appeal lies to the High Court—
>
> (a) under section 151(4) of the Pensions Schemes Act 1993 from a determination or direction of the Pensions Ombudsman; or
>
> (b) under section 217(1) of the Pensions Act 2004 from a determination or direction of the Pension Protection Fund Ombudsman,
>
> the permission of the High Court is required for such an appeal to be brought."

4. I myself granted permission for this appeal on 17 March 2015. Mrs Young was previously employed within the NHS as a Community Nurse. On 16 February 2010, while she was at work, she sustained an injury while attending a patient. It is not entirely clear from the papers before me whether the injury was due to her attempting to move the patient, or whether it was due to her bending low over the patient, but for present purposes it does not matter. That caused an episode of ongoing back pain that prevented her from working. She went off sick, and in the event never returned to work. Her employment was ultimately terminated in 2011. The date of the termination is given as two different dates in the papers. In the first determination of the Ombudsman, which I will come to in due course, the Ombudsman recorded her as having her employment terminated on 26 April 2011, but other evidence before me

indicates that her employment came to an end on 23 July 2011. Again, it does not matter for present purposes which of those is correct.

5. She applied to the relevant authority under the NHS Injury Benefit Scheme, for what is called PIB, that is Permanent Injury Benefit. As I have said, the scheme is governed by regulations, and I give the text of the regulations below, but for present purposes it is sufficient to note that they confer an entitlement to a significant annual benefit where an employee suffers an injury in the course of, and wholly or mainly attributable to employment, which causes a permanent loss of earning ability. There have been a succession of occasions on which that application has been considered. It is not necessary to detail all the various prior reasons why the application has been refused. It was initially refused in September 2011.

6. Mrs Young exercised rights of appeal and it was considered two more times, once in November 2011 and again in November 2012, and each time rejected. That led Mrs Young to appeal to the Pensions Ombudsman, asking for it to be reconsidered. The Pensions Ombudsman, Mr Tony King, upheld that complaint, and on 29 May 2013, directed that it should be reconsidered. He also gave some directions as to what NHS BSA should take into account, which I will have to look at in more detail in due course. In fact the scheme was not then administered by NHS BSA but by an entity called NHS Pensions, subsequently replaced by NHS BSA.

7. The result of that was that a Dr Jim McLaren was consulted and he gave a report on 20 June 2013 and I should read in the light of the arguments that have been addressed to me, the substance of his report which is as follows:

> "The applicant was referred for an MRI scan of the cervical, thoracic and lumbar spine, which was reported on 28/07/10 ...
>
> The MRI scan has demonstrated that the applicant has degenerative changes in her cervical and lumber spine which are much more severe than would be expected for a healthy woman of the same age (she was 53 at that time) ...
>
> Degenerative disease is a gradual process which occurs over many years. It is a normal consequence of ageing. It may occur more rapidly in some individuals than others; however, cumulative work factors are likely to make only a minor contribution to the advancement of such a degenerative disease. Constitutional factors (i.e. factors which are intrinsic to the individual and not related to work) are considered to play the major causal role.
>
> There are no exceptional features in the applicant's case; therefore the above statements regarding low back pain and degenerative disease are likely to apply to her.
>
> It is assessed that the injury on 16/02/10, on its own has not resulted in a PLOEA of more than 10%. The injury on its own is likely to have resulted in some soft tissue strain of her cervical spine and lumbar spine. This strain injury would be expected to resolve within a few weeks / months in a woman of the applicant's age with normal age related degeneration.
>
> The applicant's continuing symptoms, and associated functional impairment, are likely to be entirely due to the advanced degenerative changes in her cervical and lumbar spine. The fact that the applicant's

degeneration is greater than expected cannot be wholly or mainly attributed to the NHS employment."

8. In the light of that report, the decision of NHS BSA on 25 June 2013 was to say that the application for Permanent Injury Benefit was not accepted. The writer of the letter said:

> "I can see nothing in the medical adviser's rationale that would cause me to disagree with his advice and recommendation so I have therefore accepted it. It is accepted that you sustained an injury to your neck and back on 16 February 2010 which is wholly or mainly attributable to your NHS employment, but that injury has not resulted in any PLOEA. This is because considering only the impact of the index event in a setting where you did not have a pre-existing condition and had comparable degenerative changes to a woman of your age at that time; the index event as described could not have caused more than a temporary soft tissue injury to your cervical spine and lumbar spine which would have resolved in a few weeks or months. The condition from which you now suffer and which is incapacitating you for work is a different pre-existing degenerative condition which is not wholly or mainly attributable to your NHS employment as explained by the Medical Advisor in his rationale. Hence there can be no PLOEA resulted from the claimed and accepted injury. It attaches instead to the non work related degenerative condition and so does attract any benefit."

9. That was appealed by Mrs Young a second time to the Pensions Ombudsman. The Pensions Ombudsman's office referred it to a senior investigator called Mr Ken Buckley. He produced an opinion dated 3 November 2014, recommending that the complaint not be upheld, and that recommendation was accepted by the Deputy Pension Ombudsman, Mrs Irvine, and she, in her short determination said as follows:

> "My decision is that this complaint should not be upheld against NHSBSA.
>
> My reasons are essentially the same as in Ken Buckley's Opinion of 3 November 2014, (the Opinion), a copy of which is attached. My additional comments follow.
>
> Mrs Young maintains that prior to her accident of 16 February 2010 while on duty with the NHS that she was a healthy active person with no evidence of back trouble. She therefore says that she should be entitled to PIB.
>
> However, NHSBSA concluded that the injury on 16 February 2010, on its own had not resulted in a PLOEA of more than 10%. As explained by Mr Buckley in the Opinion. NHSBSA had properly considered Mrs Young's claim taking into account the appropriate medical evidence available to them. I therefore do not consider that there are any grounds for me to find that their final decision in refusing her a PIB was perverse.
>
> I therefore do not uphold Mrs Young's complaint."

10. The relevant regulations are the National Health Service (Injury Benefits) Regulations 1995/866. In the usual way these regulations have been amended from time to time. In

a decision of the Ombudsman in the case of Rutherford, the then Pensions Ombudsman, Mr David Laverick, in July 2003, held that:

> "The right to receive the benefit accrues at the date employment ceased (see Regulation 4(2)."

That has not been suggested before me to be wrong, and whether Mrs Young's employment ceased in April 2011 or in July 2011, the form of regulations was fortunately the same, as indeed they were at the date of the index injury on 16 February 2010. The form of regulations as they then stood are helpfully set out in the skeleton argument provided by Mr West, who appears for the respondent, that is NHS BSA, and so far as material are as follows:

> "
>
> (1) ...[T]hese Regulations apply to any person who, while he (a) is in the paid employment of an employing authority ... (hereinafter referred to in this regulation as "his employment"), sustains an injury, or contracts a disease, to which paragraph (2) applies.
> (2) This paragraph applies to an injury which is sustained and to a disease which is contracted in the course of the person's employment and which is wholly or mainly attributable to his employment and also to any other injury sustained and similarly, to any other disease contracted, if—
> (a) it is wholly or mainly attributable to the duties of his employment; ..."

I need not read any more of regulation 3.

11. Regulation 4, headed "Scale of benefits" provided as follows:

> " ... benefits in accordance with this regulation shall be payable by the Secretary of State to any person to whom regulation 3(1) applies whose earning ability is permanently reduced by more than 10 per cent, by reason of the injury or disease, ...
> (2) Where a person to whom regulation 3(1) applies ceases to be employed as such a person by reason of the injury or disease and no allowance or lump sum, other than an allowance under paragraph (5), has been paid under these Regulations in consequence of the injury or disease, there shall be payable, from the date of cessation of employment, an annual allowance of the amount, if any, which when added to the value, expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6) will provide an income of the percentage of his average remuneration shown in whichever column of the table hereunder is appropriate to his service in relation to the degree by which his earning ability is reduced at that date."

There then follows a table which calculates by reference to the degree of reduction of earning ability and the length of service of the person concerned, the target amount as a percentage of his remuneration, so that, for example, if the degree of reduction of earning ability is between 10 per cent and 25 per cent, the target figure is between 15 per cent of remuneration for someone with less than five years' service, but 60 per cent for someone of service of 25 years and over, but if the degree of reduction of earning ability is more than 75 per cent, the target is, in each case, 85 per cent of remuneration.

As can be seen from the terms of regulation 4(2) the precise amount of benefit depends on a number of other matters, which it is not necessary to refer to, the general effect being that the income of the person concerned is topped up to the target amount.

12. It is apparent from that that this is a generous benefit, and I am told that it subsists for the remainder of the employee's life, and can well understand, in those circumstances, why the authority responsible for administering the scheme is concerned to see that benefit is only payable when properly payable under the regulations.

13. In the present case, the position that has now been reached is that quite a lot of the pre-conditions for claiming benefit are common ground. It has never been disputed that Mrs Young is a person who was in the paid employment of an employing authority. It is not now disputed that, for the purposes of regulation 3(1), she sustained an injury, namely the injury which she sustained on 16 February 2010, and that, for the purposes of regulation 3(2), that injury was sustained in the course of her employment, and was wholly or mainly attributable to her employment.

14. The pre-conditions of regulation 3(1) and 3(2) are therefore now accepted to be satisfied. The argument has centred on regulation 4(1). As appears from the text, regulation 4(1) provides that benefit "shall be payable by the Secretary of State to any person to whom regulation 3(1) applies," and, as I say, that is not in dispute, "whose earning ability is permanently reduced by more than 10 per cent", and I interpose there to say that it is not disputed that Mrs Young is unable to carry out any paid employment, and her earning ability has therefore been permanently reduced by 100 per cent. It appears from the papers that the NHS treats the force of the word "permanently" as meaning until at least age 65. I have heard no argument in relation to that but as I say, it is common ground before me that Mrs Young's earning ability has been 100 per cent reduced because she is unable to work at all.

15. The remaining requirement is found in the last few words of regulation 4(1) which is that that permanent reduction of earning ability is "by reason of the injury". I can ignore the words "or disease". There have been, it is clear from the materials put before me, a number of decisions of the Pensions Ombudsman, in relation to these provisions, but it is not suggested that any of those are binding on me and I have not in fact been referred to them at all extensively. Mr West, who, as I say appears for NHS BSA, has told me that they adopt a consistent view of the regulations, which is the same of that of Dr McLaren in the present case. There have not, however, been any consideration of these provisions by the High Court or Court of Appeal, save for one case, which was called NHS v Suggett, in which there was an appeal to the High Court, heard by Etherton J, as he then was, [2005] EWHC 1265 (Ch) which is reported at [2005] OPLR 287. In that case the Ombudsman had taken the view that the agency's decision letter had contained a logical flaw. The effective rationale put forward by the agency in that case for refusing Mrs Suggett Permanent Injury Benefit was as follows: after detailed evaluation of the notes from the GP records and the correspondence from various sources, it remains the opinion that the weight of evidence points to the presence of symptoms prior to the index event; therefore it is not considered that the specific claimed incident on 23 May 1975 can be accepted as being wholly or mainly responsible for the impairment now arising from her bad condition, therefore the criteria were not met; and, as Etherton J records at paragraph [26] of his judgment:

> "He concluded in paragraph 35 of the Determination that the Agency appears to have been operating on the mistaken assumption that, if Mrs Suggett had previously been presenting with similar symptoms, or indeed been diagnosed with a similar condition, her present condition cannot be attributed wholly or mainly to her employment. He said in paragraph 37, in that connection, that the Agency should have realised that there was clear flaw in the medical advice quoted in the Agency's decision letter of 21 November 2003: the "presence of symptoms prior to the index event" does not, he said, "therefore" lead to the identified conclusions."

16. That decision of the Ombudsman was upheld by Etherton J at paragraph [43], where he said the Ombudsman was entitled to come to that conclusion, and at paragraph [45], that the Ombudsman was justified in criticising the way he did the medical advice quoted in the decision letter.

17. It is of some interest that Mrs Suggett was not represented and did not appear at the hearing, which was an appeal by the NHS agency which, as I have said, was dismissed on those grounds. There was a subsequent appeal to the Court of Appeal, the Court of Appeal's judgment being reported under a neutral citation [2006] EWCA Civ 10 but it did not give any further relevant consideration to the question. Gage LJ said, in reference to the decision letter, at paragraph [35]:

> "So far as that letter is concerned I am quite satisfied that it did display an error of approach which amounted to an error of law. Nowhere does it deal with the important questions referred to by Mr Eadie in his submissions. The most that can be said is that the medical adviser must have had in mind the GP's notes recording complaints of back pain by Mrs Suggett in 1970 and 1974. It does not explain why those complaints are considered to be symptoms of a degenerative condition and not on-going symptoms from the 1970 work-related injury. Nor does it address the important question of causation in the event that the 1974 symptoms were not work-related. The bald assertion that the existence of the earlier symptoms must indicate the existence of a pre-existing degenerative condition which had a causative effect on the injuries sustained in 1975 does not on the facts of this case seem to me automatically to follow."

18. Those points are slightly different from the points which arise in the present case, and it is not suggested that the Court of Appeal's decision is in any way determinative of the issue which has been argued before me. What is of some interest is that the OPLR report of Etherton J's decision contains, in the way that those reports usually did, a quite detailed commentary, in this case by the consultant editor, Professor John Mesher and since the commentary encapsulates the argument which Mr Leach has put forward before me, he referred me to it, and I will read some of what Mr Mesher has said. He referred to an example given by the Ombudsman in his determination of "the professional footballer with a leg weakened by fracture in a car accident, who then breaks it in a match", and he says of that, this:

> "...was exactly in point, although rejected as a valid analogy by the agency. There could be no doubt that the injury was sustained in the course of employment and was wholly or

> mainly attributable to employment. The agency's argument against the analogy was that the injury, the footballer's continuing incapacity, would not necessarily have been wholly or mainly attributable to his employment. It argued that the question to be asked was whether the main cause of permanent injury was a pre-existing condition, accepting that a mere existing predisposition to injury was to be ignored. The Ombudsman did not pursue that argument, but was able to show that the agency had adopted a wrong approach by apparently accepting that, if Mrs Suggett had degenerative disc disease already in operation before 23 April 1975, her later condition could not be wholly or mainly due to the incident on that date. On that he was upheld by Etherton J. But as it was the agency's appeal, and Mrs Suggett was not present or represented, a possible further legal flaw in the agency's approach was not examined. The argument would run as follows, "Injury" is not defined in the 1995 Regulations and should bear its ordinary meaning, as in the social security industrial injuries scheme, of a physiological or psychological change for the worse. It indicates a particular occurrence and should be kept separate from the loss of faculty or the impairment in the normal power or function of some part or organ of the body that might result from the injury either alone or in conjunction with other causes. Under the 1995 Regulations the "wholly or mainly" test only applies to the connection of the injury to employment. Thus, in Mrs Suggett's case (as in the example of the footballer) there was no question that the injury she received in the lifting incident on 23 April 1975 was wholly or mainly attributable to her employment under reg. 3(2). What had to be decided was whether, under reg. 4(1), her earning ability at the date of the application was permanently reduced by more than 10 % by reason of the injury. In reg. 4(1) there is no "wholly or mainly" condition. The test must therefore be whether the injury was still by the relevant date *an* operative cause of the reduction in earning ability, even though there were other causes that might be more substantial. That was not the approach taken by agency, but the question of whether it is the correct approach has been left open by the judge's decision."

19. As I say, that, in effect, encapsulates the argument that Mr Leach, who appears for Mrs Young has put before me.

20. It can be seen that, in the end, there is one very short point of construction of the regulations, and that is, what is the force of the words at the end of regulation 4(1) that the permanent reduction in earning ability has to be "by reason of the injury". The words "by reason of", obviously incorporate a causation test. So the question is, did the injury cause Mrs Young's permanent reduction in earning ability?

21. Questions of whether A causes B abound in the law, and there is, indeed a very great deal of learning and a good deal of authority on the whole topic of causation, but on

this appeal, I have not been burdened with any of that philosophical investigation of the nature of causation. I have rather, been presented with a stark choice between Mr Leach's argument, which says that A causes B if A is *an* operative cause of B – in this case, if the injury that Mrs Young sustained on 16 February 2010 was an operative cause of the permanent reduction in her earning ability – or whether, as Mr West says, that A is only the cause of B if it is *the* operative cause of B – in this case, that the injury on 16 February 2010 is the cause of the earning ability being permanently reduced.

22. I have to say that I do not find the language of regulation 4(1) as helpful on this as it might have been. It would have been quite possible for whoever was responsible for drafting the regulations to have made a clear choice between those two possibilities, but that has not been done. Purely as a matter of language, I am inclined to the view that if A is said to cause B, it is sufficient for A to be a cause of B, it is not normally a necessary requirement before A can be said to have caused B, that A is the sole or dominant cause or the operative cause. Coincidentally, there is by chance a good example of this very principle in the Rutherford case which I referred to earlier. One of the questions in the Rutherford case was which version of the regulations was applicable, and as I have already said, the Ombudsman resolved that by deciding that it was the version of the regulations in force at the time when Mr Rutherford's employment came to an end. The significance in that case was that the earlier version of the regulations, in regulation 3(2), only required the injury to be "attributable" to the employment as opposed to the later version of the regulations which required it to be "wholly or mainly attributable". In the course of his decision, the Ombudsman referred to a case called Walsh v Rother District Council [1978] AER 510 at 514, a case which he said was affirmed on appeal and had been applied in other contexts, saying that in that case the court had to decide whether loss of employment was attributable to a cause, and he quoted from the judgment as follows:

> "Suffice it to say that these are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient."

23. That, as I say, is just a fortuitous example which happens to be before me but it accords with my own understanding of the normal use of language, that if you posit the question, "Does A cause B?" it is not necessary before a positive answer can be given to that question to conclude that A is the sole, dominant, direct or proximate cause of B; instead it is enough for A to be a contributory cause of B, or an operative cause of B.

24. So far as the language, therefore, is concerned, although it does not clearly point one way or the other, it does seem to me to support Mr Leach's submission that in this case, the question that the statutory regulations require to be answered is whether Mrs Young's injury on 16 February was a contributory cause of her permanent loss of earning ability.

25. Mr West, as well as saying that the language favoured him, also submitted that a consideration of the purpose of the regulations supported the more restrictive and

narrow interpretation which he urged. He said that the general purpose of the regulations was fairly easy to see, it was to ensure that those who had lost their earning capacity because of matter attributable to their employment should receive a substitute income from the NHS. I agree with that: at a high level of generality, it is easy to see that that is the general purpose of the regulations. I accept entirely that this is an expensive and generous benefit which is designed to provide substitute income where the loss of income is something that has been caused by the employment. I accept too that the regulations were tightened up in, I believe, 1998 by inserting "wholly or mainly" into regulation 3(2), the purpose of which was to confine the injuries which would be potentially qualifying for the purposes of regulation 3(1) to those that could be seen to be properly attributable to employment.

26. I can also see that, as the regulations stood after that amendment, it is possible to point to potential anomalies. The result of the introduction of those words into regulation 3(2) is that an injury which is partially attributable to employment, but is not wholly or mainly so – Mr West had difficulty in suggesting a real-life example of an injury of that type but did point out that the regulation also applies to disease, and that one might have a disease that was partially attributable to employment but mainly attributable to something else – such an injury or disease would not qualify the employee for any benefit, regardless of how serious and significant the impact on the employee's earning capacity had been, and even if it was entirely clear that it was solely responsible for a complete loss of earning capacity; and he said it was anomalous if an injury which was wholly or mainly due to employment but which was only a contributory cause of a loss of earning capacity, should nevertheless trigger the entirety of the benefit.

27. I can see that that is a real possibility that gives rise to a significant anomaly. The question is whether it is sufficiently anomalous to require a reading of the words at the end of regulation 4(1) "by reason of the injury", which are designed to prevent that result. I am not satisfied that this is a sufficient basis on which to displace what I regard as the normal use of the language. It is always dangerous to speculate on the way in which regulations were envisaged by the draftsman as working, especially where the paradigm case, which the draftsman primarily would have had in mind, is a case where the injury or disease is plainly attributable to employment and, by itself causes the reduction in earning capacity. It is not obvious, simply by reading the regulations, what the draftsman has envisaged would be the case in circumstances where an injury which is attributable wholly or mainly to employment has contributed, maybe significantly to a loss of earning capacity, but could not be said to be the operative cause. It may well be that that is not something which the draftsman has focussed on at all. If one reverts to the example given by Mr Mesher in his commentary, to the example of the footballer, or if one can make it slightly more realistic in the context of the NHS scheme, a nurse who has had a car accident, as a result of which she has a significantly weakened leg, if she slips in the course of employment and breaks her leg, it may very well be that, if asking the question whether that the slip was the predominant cause of a total loss of earning capacity, the answer would be no, the predominant cause being the pre-existing injury to the leg. But if one asks the question, whether her injury sustained in the course of employment has caused her to have to give up work forever, it is not at all obvious that the answer to that would also be "no". I think most people would regard the answer to that as "yes": however fortuitous it may be, she has slipped at work, she has broken her leg, that has caused,

due to her pre-existing weakness, a permanent loss of earning capacity and has required her to give up her job.

28. So too here: if in fact the relatively minor episode which Mrs Young suffered on 16 February did trigger an underlying condition, and had the result that she was thereafter incapacitated, unable to work and unable to earn, it is not at all obvious to me that that does not satisfy the language of regulation 4(1) as being an injury by reason of which Mrs Young's earning ability has been permanently reduced. I am not therefore persuaded that a purposive construction requires an interpretation of regulation 4(2) under which permanent injury benefit is only payable if the injury in question is the dominant or sole or main or operative cause of the reduction in earning ability.

29. In the course of his written argument, although not, I think, specifically addressed orally, Mr West said that the concept of the eggshell skull has no place in this field. I accept of course that the concept of the eggshell skull is a rule applicable to the liability of tortfeasors but it does not seem to me that that necessarily means that it is inapplicable. The basis of the rule is that if A tortiously injures B and due to some inherent weakness in B's constitution the consequences are very much more serious than they would be in the normal case, that is nevertheless damage which has been caused by A's tortious wrong, for which A is liable in law. It does not seem to me that such a reasoning is necessarily inappropriate to the different situation in which, as a result of an injury sustained in an employment, an employee who suffers from a pre-existing, unusual weakness, suffers consequences which are very much more serious than they would be for an ordinary employee of ordinary constitution.

30. In those circumstances, Mr Leach suggests that the question which the Ombudsman in her first determination required the NHS agency to answer, and which NHS BSA, in due course, did answer, was not the right statutory question. That requires me to go back to what the first Ombudsman directed the NHS agency to do. I can take that from paragraph 27 of the Ombudsman's first decision and that was as follows:

> "Some caution needs to be taken in cases where age related degeneration is present. Mrs Young was 53 at the time of the relevant event. If her degeneration was no more than would be expected for a woman of her age, then it should have been disregarded as a contributing factor to the injury. In my judgment the question of whether the injury was attributable to her employment should be approached by considering whether an ordinary and healthy woman of Mrs Young's age would have suffered the same injury in the same circumstances.
>
> The evidence suggests that Mrs Young did not experience any symptoms of her condition and that she was able to carry out her role with the NHS before the incident in question. I think some care needs to be taken in determining that an event does not amount to an injury if it makes a non-symptomatic condition into a symptomatic one.

> NHS Pensions argue that they *did* consider Mrs Young's application by asking what would have happened to her if only the impact of the index event was considered in the setting where she had comparable degenerative changes to a woman of her age. That is not clear from the papers, though, particularly given that NHS Pensions also contend that they ignore any non-work related conditions and assess only the effects of the injury. The correct procedure is to have in mind whether the individual's degenerative condition was more than would have been expected of a person of the same age. If the degeneration was greater than would be expected then it should be taken into consideration as a contributing factor to the injury, however, if it was no more than would be expected then it can be disregarded. It remains unclear to me that this is what NHS Pensions did when considering Mrs Young's application."

Then, at 31:

> "I find that NHS Pensions have not clearly taken a relevant factor (Mrs Young's age as well as her condition relative to the norm for that age) into account in reaching their decision. That is not to say that, properly considered, Mrs Young will be entitled to PIB. That is a decision for NHS Pensions, but it is one they must reach having considered the matters of attribution and permanence on the right basis."

Paragraph 33 directed as follows:

> "I direct that within 28 days NHS Pensions shall consider whether Mrs Young's work injury on its own (that is, disregarding normal age related degeneration) has caused her to suffer a permanent reduction in her earnings ability of more than 10%. In doing so NHS Pensions are to take into account what I have said above."

31. Mr Leach criticises that as in effect, requiring the NHS agency not to consider the impact that the injury had on Mrs Young, with all her pre-existing conditions as they were, but the impact that the injury would have had on a woman aged 53, with no more than normal age-related degeneration to her spine, and indeed that does seem to be what the NHS's medical advisor and NHS BSA did in the decision. As I have already referred to, NHS BSA's decision is that "considering only the impact of the index event in a setting where you did not have a pre-existing condition and had comparable degenerative changes to a woman of your age at that time, the index event as described could not have caused more than a temporary soft tissue injury to your cervical spine, and lumbar spine which would have resolved in a few weeks or months."

32. In those circumstances, it does seem to me that NHS BSA asked the wrong question, and I agree with Mr Leach that the question that should have been asked was not what impact the injury would have had on a woman of Mrs Young's age who did not suffer from degeneration of the spine, but what impact it had on Mrs Young, given her pre-existing condition. It by no means follows that the injury will have been an operative cause at all of the permanent loss of earning capacity. It may be, and neither Mr Leach

nor I, nor indeed Mr West, suggested that we have the medical qualifications to form any view of this, that the impact of the injury was something that, even for Mrs Young, had no lasting or permanent effect, and that the lasting or permanent effect was entirely attributable to her pre-existing condition. But it does seem to me that Mr Leach is right, that that question has not been asked and has not been answered.

33. Two other points were taken by Mr West in opposition to this appeal. One was to suggest that the medical advisor who was consulted, Dr Jim McLaren, had in fact already answered that question I have read earlier the relevant sections of his report, and Mr West suggested that the statement that constitutional factors were considered to play the major causal role in degenerative disease and that there being no exceptional features in the applicant's case, that statement was likely to apply to her, combined with the statement that the applicant's continuing symptoms and associated functional impairment are likely to be entirely due to the advanced changes in her cervical and lumber spine, amounted to an answer to the question which should have been asked. I am not satisfied that is the appropriate way to read Dr McLaren's report, and, in any event, as I have said, the decision of NHS BSA, whose decision it is, is clearly premised on the basis that the index event would not have caused anything more than a temporary soft tissue injury in the case of a woman of her age without a pre-existing condition. Dr McLaren's report, it seems to me, might equally well be read as saying that the cause of a degenerative disease before 16 February 2010 was a constitutional one, something that Mr Leach has not disputed, and the conclusion that the continuing symptoms were entirely due to advanced changes in her cervical and lumbar spine has to be read with the previous advice that the injury on its own is likely to have resulted in some soft tissue strain which would be expected to resolve within a few weeks / months in a woman of the applicant's age with normal age-related degeneration. Reading Dr McLaren's report, or the part of it which has been extracted, as a whole, I do not think it can safely be assumed that he would have given the same answer to the question whether the injury on 16 February 2010 was an operative cause of the permanent reduction in earning ability.

34. The final point taken by Mr West is a jurisdictional question. He points out that Mrs Young did not appeal the Ombudsman's first determination, and says that NHS BSA can scarcely be criticised for complying with the Ombudsman's directions in the first determination, and it is therefore too late to complain of the way in which NHS BSA have gone about it. The answer that Mr Leach gives to that is that, if NHS BSA has in fact asked the wrong question in law, that is something that can now be appealed. I think the position is this: in the case of the first appeal to the Pensions Ombudsman, the relief sought by Mrs Young was to quash the determination and have it reconsidered. The Ombudsman did quash the determination and require it to be reconsidered. At that stage there was no determination in existence. It was not until the determination had been taken a second time by NHS BSA, that there was a determination which was capable of being further appealed, and in those circumstances it does not seem to me that there is anything inappropriate in Mrs Young waiting to see whether a determination was produced which she wished to appeal again, and that when she did wish to appeal it again, it was still open to her to take the point of law that the question that had been answered was the wrong question.

35. There is of course, no criticism of NHS BSA in doing what the Pensions Ombudsman directed them to do. Indeed they could have been criticised had they not done so, but

that does not affect the ability of Mrs Young, now that she has a determination which is against her, which is a live determination, as it were, from continuing to pursue it to the Ombudsman, and from the Ombudsman to this court.

36. In those circumstances, I find that the appeal succeeds and that the determination of the Deputy Pensions Ombudsman should be set aside. It is open to me to direct, which I will do, that the matter be remitted to NHS BSA to consider the question on the basis of medical advice, in accordance with this judgment. It should be pointed out, although nothing was made of this in argument, that, under regulation 4, not only is it a requirement that the permanent reduction in earning ability is "by reason of the injury", it also has to be, under regulation 4(2) that the applicant ceases to be employed by reason of the injury and it may be that that is a question that should be considered at the same time. The words "by reason of the injury" obviously mean the same in both parts of regulation 4.