Coghlan (Arran) & Ors v Chief Constable of Greater Manchester Police & Independant Police Complaints Commission (Interested Party) (2004) (Post Judgment Discussion)

[2004] EWHC 2801 (Admin)

Wilkie J

Case No: CO/1331/2004 **Date: 02/12/2004**

Heading: Police, Employment, Judicial Review

Sub-heading: Unlawful termination of employment

Nicholas Blake QC and Matthew Ryder	instructed by Bhatt Murphy for the claimant
John Howell QC and James Eadie	instructed by Halliwells for the defendant. Jeremy Johnson instructed by Treaseury Solicitor for the interested party

Judgment Status: Given
Transcript Status: Approved

Case No: CO/133/2004
Neutral Citation Number: [2004] EWHC 2801 (Admin)
IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 2 December 2004

Before :

THE HONOURABLE MR JUSTICE WILKIE

- -

Between :

ARRAN COGHLAN and Others **Claimants**
- and -
CHIEF CONSTABLE OF GREATER MANCHESTER POLICE **Defendant**

And

INDEPENDENT POLICE COMPLAINTS COMMISSION **Interested Party**

- -

(Transcript of the Handed Down Judgment of

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Official Shorthand Writers to the Court)

- -

Nicholas Blake QC and Matthew Ryder (instructed by **Bhatt Murphy) for the Claimants**

John Howell QC and James Eadie (instructed by **Halliwells) for the Defendant**

Jeremy Johnson (Instructed by **The Treasury Solicitor) for the Interested Party**

- -

Judgment
As Approved by the Court

Mr Justice Wilkie :

1. This is a claim for judicial review brought by Arran Coghlan, Steven Beddows, Dennis Burgess, Neil Grice and Philip Moore. They seek judicial review of the decision of the Chief Constable of the Greater Manchester Police on 20 October 2003 to terminate the suspension of Chief Inspector Kenneth Caldwell which suspension had been imposed upon him on 15 September 2003. The relief sought by the claimants is a declaration that the decision to terminate DCI Caldwell's

suspension was unlawful. Permission to claim judicial review was granted by Mr Justice Owen on 20 May 2004. The defendant to these proceedings is the Chief Constable of Greater Manchester Police. Also served as an Interested Party was the Independent Police Complaints Commission (the IPCC) which is the successor body to the Police Complaints Authority (the PCA) which had a statutory role to play in the events with which the court is concerned. The IPCC has intervened actively by submitting legal argument both in writing and orally through Mr Johnson of counsel. Other interested parties, namely Mr Caldwell and the Chief Constable of Lancashire, have elected not to take part in these proceedings save that Mr Caldwell filed an acknowledgement of service which opposed the substantive claim for judicial review. In effect Mr Caldwell has adopted the substantive case of the Chief Constable of the Greater Manchester Police.

The primary facts

2. This claim arises out of the investigation and trial of the kidnap and murder of a Mr David Barnshaw on 20 September 1999. DCI Caldwell was the deputy Senior Investigating Officer in the murder investigation and bore day to day responsibility for its conduct. The claimants were charged with that murder in April 2001. Their trial commenced in September 2002 at Preston Crown Court presided over by Mr Justice Penry-Davey. On 16 June 2003, some 9 months after the start of the trial, Mr Justice Penry-Davey delivered judgment on renewed submissions on behalf of the defendants that the indictment be stayed on the grounds of abuse of process. Mr Justice Penry-Davey acceded to that application and accordingly the claimants were discharged.

3. Mr Justice Penry-Davey had conducted a hearing in respect of that application which ran to some 3 weeks and which involved extensive evidence given by a number of police officers, some of significant seniority, including DCI Caldwell. His judgment was lengthy and detailed covering some 37 pages of text. In the course of that judgment he made a number of observations of general application none of which have been subject to any criticism in these proceedings:

> "(i) It is no part of a judge's function to exercise disciplinary powers over the police or prosecution.
>
> (ii) The power to stay for abuse must be sparingly exercised for compelling reasons in exceptional cases and with the greatest caution.
>
> (iii) A stay should be granted if the behaviour of the prosecution is so bad that it is not fair that the defendant should be tried.
>
> (iv) The onus of proof in showing an abuse of process is on the accused. The standard is the balance of probabilities.
>
> (v) The more improbable the event the stronger must be the evidence that it did occur before on the balance of probability its occurrence is established. Accordingly, misconduct or bad faith must be proved by the accused by cogent evidence."

4. Insofar as his ruling concerned the conduct of DCI Caldwell the essential elements which the judge investigated were as follows:

> i) The claimants asserted that they were innocent but that another man, Mr Finlayson, and his associates had been involved in the murder. The claimants alleged that GMP officers had deliberately ignored and downplayed important evidence that would have implicated Mr Finlayson and thereby assisted their defence.
>
> ii) In August 2000, DCI Caldwell learned that a National Crime Squad (NCS) informant had shared important information implicating Mr Finlayson in the murder. In particular the information was that on the day after the murder, the informant had

witnessed Finlayson removing a petrol can and gloves from the back seat of a vehicle that had been specially adapted for performing kidnappings and which Finlayson had arranged to have available to him shortly before the murder. DCI Caldwell had made an entry in his day book on 31 August 2000 but had taken no further action and made no inquiries on that information.

iii) In May 2002 junior prosecuting counsel, Miss Blackwell, reviewed DCI Caldwell's day book entry for 31 August 2000 and asked him to retrieve the source material upon which the entry was based so that she might review that material in the context of disclosure.

iv) DCI Caldwell personally received the source information known as "log 89" and some attachments. The evidence was that the documents given to him constituted at least 13 pages. He made notes of the content of these documents. He then prepared an envelope purporting to contain the entirety of the documents he had received and handed it to an officer for delivery back to NCS where the envelope was kept in a safe.

v) On viewing the notes made by DCI Caldwell of log 89, prosecuting counsel was not content to rely merely on those notes. She requested sight of the original documents. When the envelope was retrieved from NCS it was found to contain only 3 pages. The other pages that had previously been given to DCI Caldwell were missing. The pages provided to prosecuting counsel and the corresponding entry in DCI Caldwell's day book of May 2002 misled the court with regard to any earlier contact information provided by the informant with regard to Finlayson.

vi) During the course of the Voir Dire DCI Caldwell sought to explain his role in dealing with log 89. He was directly contradicted by several officers and at one point changed his evidence when his own notes revealed that his account to the court was inaccurate.

5. Before turning to his findings Mr Justice Penry-Davey made the following observation:-

> "It is an extraordinary feature of the evidence I have heard on Voir Dire over some 3 weeks that there are considerable differences and extensive contradictions in that evidence, which includes the evidence of a number of very senior police officers. As the prosecution points out, it is of course important to bear in mind after long gaps of time the frailty of human memory and I take that into account, but it is equally the case, in my judgment, that there were occasions when lack of memory was convenient rather than genuine."

In connection with DCI Caldwell's conduct and evidence concerning whether the informant's report about the petrol can being in the vehicle available to Mr Finlayson on the day after the murder and DCI Caldwell's attempts to pursue that with the officer who had direct contact with that vehicle on that day the judge said as follows:-

> "I am driven to the conclusion that DCI Caldwell was wrong in saying that any attempt had been made to check the point with PC Cooper. In my judgment in giving the explanation he did he was seeking to downgrade the seriousness of the Crew information because, as he accepted, nothing whatever had been done about it at

> any stage, nor does it appear that it was ever mentioned, even if only to be substantially discounted, at the review meeting that took place on 7 January 2001 in the presence of senior officers and the CPS."

6. In connection with the disappearance of eight original documents from log 89 the judge said as follows:-

> "Having considered all the evidence, it is my conclusion that the absence of the 8 pages of log 89 from that envelope was not something that happened accidentally or by mistake. In my judgment it was done deliberately and so that log 89 and its contents would not be seen by the prosecution or by the court."

He went on to consider the possibility that someone other than DCI Caldwell had removed those documents. He said as follows:-

> "I have reached the conclusion on all the evidence that I have heard on the Voir Dire that it was Mr Caldwell who removed the documents at some stage before the envelope was handed back to Belger."

He then set out in five numbered paragraphs his reasons for drawing that conclusion. In the course of so doing he made the following comments on the evidence which DCI Caldwell had given to him in the course of the Voir Dire.

> "Mr Caldwell's evidence on this vital aspect of the matter was significantly less than forthcoming….I am driven to the conclusion that he was not telling the truth when dealing with his recollection of the contents of that envelope."

7. The learned judge then went on to draw his conclusions in respect of the abuse application. He concluded that: by reason of the fact that critical information, suggesting that a person other than the defendants was principally involved in the murder of Mr Barnshaw, was effectively ignored; and in the light of the fact that this was the central aspect of the defence that had been put forward from a very early stage, those events had caused serious prejudice and unfairness to the defendants in a way that could not be put right through the trial process. He concluded that that would in itself have provided a proper basis for a finding of abuse of process. He then went on to focus on what, in his judgment, was a much more serious matter namely the events of May 2002. He said as follows:-

> "I have set out my conclusions as to who in my judgment removed the document, but whether it was somebody from the major incident room, from the National Crime Squad or anybody else involved with investigative process or the disclosure process in this case, the gravity of the matter in my judgment is the same. The deliberate withholding of material from the prosecution and court results in a distortion of the process which depends on frankness, openness and cooperation between investigating officers and prosecuting counsel, so that this vital aspect of the trial process can be carried out with completeness and integrity."

He goes on to draw the following conclusions:-

> "In this case, however, those various failures (in respect of earlier disclosure) are now combined with the deliberate withholding of relevant material in May 2002, an instance which has only been exposed on the extensive evidence that I have heard over a long period on the Voir Dire, the whole of which only arose as a consequence of the court ordering the disclosure of the identity of the informant, Crew. But for that, none of these matters would have come to light. That deliberate withholding and consequent distortion is in my judgment an extremely serious matter. As Rose LJ pointed

out in the case of **Early:** "Judges can only make decisions and counsel can only act and advise on the basis of the information with which they are provided".

The integrity of the criminal trial system depends upon judges being able to rely on what they are told by counsel. Counsel in their turn have to be able to rely in the public interest immunity process on the frankness and integrity of others and that was not forthcoming in my judgment on this particular occasion."

A little later on in his judgment he says as follows:-

"Any attempt to manipulate that process (the public interest immunity process) must be viewed as a serious manipulation of the process of the court. A dishonest attempt by anybody involved with the process strikes at the heart of what constitutes a fair trial. Rose LJ in the **Early** case said that in the event of witnesses lying to the judge in the course of a PII hearing or an abuse argument it was likely that the prosecution case would be regarded as tainted beyond redemption however strong the evidence against the defendant might otherwise be."

He then concluded:-

"In this case, in the light of all the matters I have set out, I have concluded: that the allegation of abuse of process is made out; that the defendants have thereby been prejudiced, so that there cannot be a fair trial; but further that the deliberate conduct of a senior member of the investigation team in withholding material from the prosecution and the court on 14 May is such that it would in any event be unfair for these defendants to be tried either by way of this trial continuing or by way of a retrial. In reaching the conclusion I have reached I am only too aware of the extremely serious nature of the charges faced by these defendants and of the fact that my ordering of the stay of this indictment has the inevitable result of depriving the prosecution of the opportunity of proving these charges and the defendants of the opportunity of demonstrating their innocence through a jury verdict. It is, for those reasons, the conclusion I reach, with considerable reluctance but it is the conclusion I reach. The order I make is that this indictment is stayed. It is also appropriate in all the circumstances that I should refer the papers in this case to the Director of Public Prosecutions"

8. Unsurprisingly, Greater Manchester Police took this ruling and the terms of the judgment extremely seriously. On 30 June 2003 Superintendent Scofield, the operational support to the Discipline and Complaints branch, reported to Assistant Chief Constable Seabridge, responsible for community and internal affairs. This was a detailed memo dealing with a number of the officers who had been mentioned in the course of that judgment. As far as DCI Caldwell was concerned Superintendent Scofield summarised the heart of the allegations against him. He recorded that the judge had concluded that the removal of the eight sheets of log 89 was deliberate in order that its contents should not be seen by prosecution or court. He records that the judge had discounted the possibility that anyone else other than Mr Caldwell was responsible for that deliberate removal of the relevant documents and referred to the reasons to which I have already referred. Superintendent Scofield concluded "clearly the allegations – which Penry-Davey J. stated were much more serious than those relating to another officer – are both criminal (doing an act intending to pervert the course of justice, misconduct in a

public office) and disciplinary (breaches of the code re honesty and integrity and performance of duties). I consider the learned judge's remarks must necessarily result in investigation into those allegations." It is clear from the terms of that memorandum that on 18 June 2003, at the direction of ACC Seabridge, Superintendent Scofield had canvassed with the PCA their involvement, possibly on the basis of a voluntary referral , in supervising any such investigation. In his memorandum he referred to that possibility and indeed that is what happened.

9. On 4 July Superintendent Scofield wrote an e-mail to ACC Seabridge. He records that he had now been asked to advise on issues surrounding suspension and pension forfeiture. He says as follows:-

> "1. Taking the judgment in **R v Coghlan and others** as a report alleging crime and misconduct of a serious nature the criteria set out in the suspension policy is met in respect of all three of the named officers (but you may feel that the levels of culpability alleged are at their highest in respect of DCI Caldwell). The overriding principle, though, is that suspension should only be used exceptionally and as a "last resort" when a restriction of duties has been explored and discounted. There is one further consideration (again in respect of Mr Caldwell, as an officer who may retire shortly on a full pension or immediately on a slightly reduced pension). GMP cannot refuse his retirement unless he is suspended from duty, which means that misconduct proceedings (but not criminal proceedings) cannot be contemplated without suspension. On the other hand suspension would involve a full payment throughout what may become an extensive investigation, with the consequent conclusion that the public interest may be offended."

He went on to deal with the possibility that in the event of a criminal conviction, but not otherwise, pension forfeiture could be considered.

10. On or about 4 July ACC Seabridge decided not to suspend DCI Caldwell. On 10 July ACC Seabridge appointed Detective Superintendent Turner of the Lancashire Constabulary as an investigating officer pursuant to regulation 8 of the relevant Conduct Regulations 1999. This appointment was confirmed on 11 July by letter from ACC Seabridge to the Chief Constable of Lancashire Police Chief Constable Stevenson. As indicated by Mr Scofield, one of the persons whose conduct was to be investigated was DCI Caldwell. On 15 July Detective Superintendent Turner gave notice of the investigation to DCI Caldwell and on 16 July there was notice to the PCA of the voluntary referral of the investigation for them to perform their supervisory functions.

11. The PCA file contains a note of Ms Boustred, one of its members, of a telephone conversation with Detective Superintendent Turner on 17 July which contains the following passage:-

> "Caldwell – will retire October 03 – dep SIO Stockport inquiry. J finds as fact he removed docs – suspended – 2 years on full pay – better to let him go. If INV shows he was guilty of crime – nothing lost."

12. On 15 September an article appeared in the Manchester Evening News. It says amongst other things as follows:-

> "The police chief blamed by a judge for the collapse of a multi-million gangland murder trial is to lecture at Manchester University – on solving murders. …Now the MEN has learned that DCI Caldwell is to deliver two public lectures about policing at Manchester University at a cost of £24 a head. Although he has not officially

> announced his retirement, he is described as "recently retired" in a university prospectus for weekend courses…DCI Caldwell would escape internal disciplinary proceedings relating to either case if he was no longer in the force. He will have completed 30 years service later this year – the customary length of service after which an officer usually retires. If he was suspended he could not retire, but police chiefs have so far allowed him to continue working. The MEN has passed information to the police about DCI Caldwell's university lectures. It is understood that they were unaware of his plans."

13. On that same date Chief Superintendent Brown of the Discipline and Complaints branch wrote a memorandum to ACC Seabridge concerning DCI Caldwell. He says amongst other things as follows:-

> "Information has now come to light that the officer, who completes 30 years service on 8 October 2003, has already been involved in the provision of further education at the University of Manchester…and will continue to be so post retirement (accredited as an experienced operational detective from Greater Manchester Police recently retired) "

He then summarises the two inquiries to which DCI Caldwell was by that stage subject. The second in time is the inquiry arising out of the Barnshaw murder trial. The other (the Stockport TIC investigation) concerned allegations of irregularities concerning offences taken into consideration said to have occurred at Stockport police station between 1 April 2001 and 30 September 2001. As far as that was concerned Chief Superintendent Brown states that whilst criminal proceedings are considered to be unlikely, disciplinary proceedings may be undertaken in the future, subject to Mr Caldwell remaining a serving officer. He then refers at some length to the recent information in respect of the Manchester Evening News article and, under the heading Suspension (Re-evaluation), indicates that whilst the matter of an unregistered business interest would itself not normally result in suspension from duty it was clear that his apparent involvement in further educational courses as a senior operational detective of the GMP required particular consideration under the terms of the GMP policy. He says as follows:-

> "Firstly enquiries into this new allegation will result in three simultaneous internal disciplinary investigations into Mr Caldwell's conduct. Secondly the publicity likely to be generated as a result of the officer's previous future activities will have a direct impact on the reputation of the force."

He suggested that suspension should now be considered in the light of (1) the nature, seriousness and frequency of three separate disciplinary investigations; and (2) the cogency of the evidence in respect of the allegations therein; (3) the impact the allegations will have on the reputation of the force and (4) the likelihood of dismissal or requirement to resign in the event that misconduct allegations arising, separately or together, were to be proved before a tribunal.

14. Following receipt of that memorandum, and consideration of it, ACC Seabridge suspended DCI Caldwell and gave him notice of it on 15 September. He cited the existence of the, now three, internal investigations and set out the four grounds already referred to as being the grounds upon which suspension arose.

15. On 16 September Martin Worden, the Deputy Investigating Officer in Lancashire Constabulary involved in the investigation, e-mailed Collette Oliver, a case worker at the PCA. It informed her that Greater Manchester Police had notified them that DCI Caldwell was now suspended. He is recorded as saying the Chief Constable had considered the public re-assurance aspect and made the decision

to suspend Mr Caldwell. Mr Worden is recorded as saying that he did not see this as having any immediate effect on the investigation. He noted that Mr Caldwell was due to retire next month and would not have had to agree to an interview relating to a breach of police regulations. He notes that this decision changes that. This was confirmed on the same date in writing and Ms Boustred of the PCA acknowledged receipt of that information on 17 September.

16. On 28 September Mr Caldwell gave formal notification of his intention to retire from the force on 26 October 2003.

17. On 14 October Chief Superintendent Brown sent a memorandum to ACC Seabridge. It informed ACC Seabridge that DCI Caldwell was currently suspended from duty and was subject to three investigations. The document was an update in respect of those.

18. In respect of the Lancashire Constabulary investigation he says as follows:-

> "This is likely to be a protracted investigation following the collapse of the Barnshaw murder trial. Preliminary interviews for crime and misconduct allegations are scheduled for 17 November 2003. Whilst this investigation is yet to run its full course, the early indications are that if there were any acts of criminality it may be difficult to identify the individual responsible. Nonetheless, there is prima facie evidence of misconduct in respect of several officers including Chief Inspector Caldwell, however, my understanding is that they would warrant category B charges and therefore dismissal would not be a sanction."

It is not in dispute that this information came from a telephone conversation between Chief Superintendent Brown and Chief Inspector Worden the second officer in charge of the Lancashire Constabulary investigation.

19. As to the Stockport TIC investigation he recorded that following deliberation by the CPS there were no longer criminal charges to be considered. The TIC investigation would likely result in formal disciplinary proceedings against several officers but that DCI Caldwell's culpability was that he was in breach of the Code of Conduct in performance of duties by obstructing the diligent investigation of a robbery and blatantly failing to exercise management and supervision of his staff. Whilst there was sufficient evidence to put Caldwell before a disciplinary tribunal on category B charges it would be more expeditious to issue him with a formal warning (subject to his acceptance). If he declined to accept the formal warning the alternative would be for formal ACC advice albeit the evidence was sufficient to justify greater sanction. This course could be completed within the next few days.

20. As to the third matter, which related to business interests, there were two matters of concern. The first was to do with an autobiography which DCI Caldwell was apparently writing and, on that, the legal advice obtained was that there was very little that the GMP could do about that prior to publication. The second matter concerned the lectures at Manchester University. CS Brown reported that the university had suspended the programme following criticism of DCI Caldwell in the Manchester Evening News. He noted that there was sufficient for DCI Caldwell to be given ACC's advice for pursuing a business without authority.

21. CS Brown summarised the position: that it had changed since DCI Caldwell's suspension in that evidence of misconduct had superceded any allegations of criminality. He expressed the opinion that DCI Caldwell should not be permitted to retire without formal censure for the two matters referred to. He indicated that this course of action was meritorious for a number of reasons which he could justify if necessary including public and internal perception.

22. The evidence of ACC Seabridge was that he considered that memo with Chief Superintendent Brown and they agreed that DCI Caldwell's suspension should not be lifted without him receiving appropriate sanctions in respect of the non disclosure of the business interest and the Stockport TIC inquiry. On 15 October ACC Seabridge met with Deputy Chief Constable Green and provided him with the Brown memorandum. It appeared to ACC Seabridge that senior officers had already discussed DCI Caldwell's retirement. ACC Seabridge informed DCC Green of his views. He then says that DCC Green made the decision to accept DCI Caldwell's retirement on the disposal of the TIC and business interests investigations. DCC Green agreed, however, that DCI Caldwell should receive a formal warning and advice respectively.

23. In his evidence DCC Green states that following DCI Caldwell's suspension he was contacted by the Chair of the police federation who advised him that DCI Caldwell intended to retire on grounds of ill health and, in any event, it had always been his intention to retire after 30 years service which he was due to complete on 8 October 2003. DCC Green had to give consideration to whether DCI Caldwell should be permitted to retire. In his evidence he sets out his process of reasoning, to which I will turn later, but his evidence is that on 15 October final discussions took place with ACC Seabridge and it was agreed that the retirement notice would be accepted and the suspension would be lifted subject to DCI Caldwell being administered with a notice of formal warning in respect of the Stockport TIC inquiry and a notice of advice given in respect of the business interest. It is clear from the evidence presented to the court and from the submissions of Mr Howell QC that the taker of the relevant decision was DCC Green.

24. On 20 October DCI Caldwell received and accepted a formal warning in respect of the Stockport TIC matter which was administered by Chief Superintendent Brown. On the same day he was given a notice of advice, also by Chief Superintendent Brown, which DCI Caldwell declined to accept. Those two matters having been dealt with, at 2.25pm on 20 October ACC Seabridge gave notice to DCI Caldwell that his suspension was terminated with effect from 20 October. This left his notice of retirement to run its course which it did by expiration on 26 October 2003.

25. On 5 November a meeting took place between Anne Boustred of the PCA and Detective Superintendent Turner and DCI Worden. The note of that meeting contained the following paragraph:-

> "Caldwell – DCS Brown of GMP has said that Caldwell's suspension may be about to be lifted. He was suspended because of a Stockport telephone call investigation for which he will receive a formal warning and then be allowed to retire. There will be no further action on the inquiry as to the lectures he was proposing to give." (the reference to the Stockport "telephone call investigation" is thought to be a misdescription of the Stockport TIC investigation).

In the same meeting the following passage appears in the note:-

> "Caldwell may be allowed to retire. AMB (Anne Boustred) asked if the report could be written as if he was still serving, if potential misconduct is identified."

This appears to be the extent of the response of the PCA to the information they were being then given about an impending retirement by DCI Caldwell. In fact, as is apparent, the information given to that meeting was out of date as DCI Caldwell had already retired.

26. On 5 November the solicitors acting for the claimants wrote to the PCA

seeking an update on the arrangements for the investigation. They were sent on the next day a response, copies of which were sent to DS Turner and to Chief Superintendent Brown and another GMP officer. That response from Anne Boustred stated amongst other things as follows:-

> "The investigations undertaken to date have been focussed on gathering relevant evidence, including transcriptions of the proceedings in Preston Crown Court and taking statements from witnesses. Your client's individual account are clearly potentially crucial to the inquiry. The likely timetable is estimated to be within the first quarter of 2004 for completion of the report, assuming no major delays."

27. On the same date, 5 November, the claimants' solicitors wrote to Detective Superintendent Turner seeking a meeting and on the next day a reply was sent by DS Turner in the course of which he stated that it was his desire "to complete this inquiry as soon as possible and certainly within the strict timetable I have agreed with the Police Complaints Authority".

28. On 17 December the claimants' solicitors wrote to Detective Superintendent Turner, amongst other things recording that he had informed the writer on 16 December that Mr Caldwell had been reinstated and had proceeded to retire from the Greater Manchester Police placing him beyond disciplinary sanction. On the same date she wrote to the Chief Constable of the GMP recording her disappointment to learn these matters. She received a formal acknowledgement with this letter from ACC Seabridge on 18 December. There then followed a substantive, purported, response dated 22 December from Chief Superintendent Brown. He stated as follows:-

> "DCI Caldwell was suspended in relation to other matters which were unconnected to the discontinuance of criminal proceedings relating to your clients. Once these other matters had been finalised the officer was subject to disciplinary action which therefore removed the requirement for his suspension to remain in place. In view of DCI Caldwell having completed 30 years service, he was then eligible to retire from the Greater Manchester Police in accordance with the terms and conditions of his employment."

This appears to be an untrue response but one which is in line with that which had been proffered in discussion with Lancashire and the PCA. CS Brown has not given evidence and, very properly, the Chief Constable has dissociated himself from its inaccuracies.

On 5 January the claimants' solicitors wrote to Chief Superintendent Brown expressing their astonishment that his suspension in September 2003 was unrelated to the matters which directly concerned their clients. They referred to a Manchester Evening News report containing a statement commenting on "further and new information being brought to GMP's attention and leading to the suspension". She asked for the GMP's detailed comments with regard to the timing of DCI Caldwell's suspension and the details of the further additional information which was unrelated to their clients' acquittal. This resulted in a response dated 13 January from Chief Superintendent Brown indicating that he did not intend to comment further in respect of these matters.

The law

29. Statutory and Regulatory provisions

At the material time the relevant statutory provisions were contained in the Police Act 1996 and Regulations made under that Act. Section 50 of that Act provides amongst other things as follows:-

"(1) Subject to the provisions of this section, the Secretary of State may make regulations as to the government administration and conditions of service of police forces.
(2) Without prejudice to the generality of sub section (1), regulations under this section may make provision with respect to – (d) voluntary retirement of members of police forces; (e) the conduct, efficiency and effectiveness of members police forces and the maintenance of discipline; (f) the suspension of members of a police force from membership of that force and from their office as constable
(3) Without prejudice to the powers conferred by this section regulations under this section shall – (a) establish, or make a provision for the establishment of, procedures for cases in which a member of a police force may be dealt with by dismissal, requirement to resign, reduction in rank, reduction in rate of pay, fine, reprimand or caution."

30. The regulations made pursuant to section 50 include the Police (Conduct) Regulations 1999 ("the 1999 Regulations") and the Police Regulations 2003 ("The 2003 Regulations").

31. Under the 1999 Regulations the relevant provisions in respect of this case are as follows:-

Regulation 5 provides for suspension. It provides that where there has been a report, complaint or allegation which indicates that the conduct of a member of a police force does not meet the appropriate standard, the chief officer of the force concerned may suspend the member concerned from membership of the force and from his office of constable whether or not the matter has been investigated. That suspension will last until any of a number of specified events occur or until the chief officer decides that the member shall cease to be suspended, whichever occurs first. The chief officer may delegate his powers to an officer of at least the rank of Assistant Chief Constable.

32. Regulation 9 makes provision for notice of investigation. It requires the investigating officer to cause the member concerned to be given written notice of a number of matters. Those matters include his absolute right to silence. That is to say it is not subject to any provision permitting an adverse inference to be drawn from such silence.

33. Regulations 24 and 27 provide for those who may attend the hearing in respect of any such complaint. They provide that the member concerned shall be ordered to attend the hearing and must do so (Regulation 24). It provides that the complainant shall be allowed to attend the hearing while witnesses are being examined or cross-examined and may be accompanied by a relative or friend. That right is subject to two exceptions. The first is that where the complainant is to be a witness he shall not be allowed to attend in advance of his giving evidence. The second is that he may be excluded if he or any person allowed to accompany him intervenes or interrupts or behaves in a disorderly or abusive manner or otherwise misconducts himself. (Regulation 25). Subject to these matters the hearing shall be in private provided that it is within the discretion of the presiding officer to allow any solicitor or any such other person as he considers desirable to attend the whole or part of the hearing as he may think fit but subject to the consent of all the parties. (Regulation 26). There is a power in the presiding officer to exclude all members of the public including the complainant on the grounds of public interest immunity. (Regulation 27).

34. Regulation 31 provides for the sanctions which may be imposed and they

replicate the sanctions referred to already. Where the sanction is to be dismissal, a requirement to resign, or reduction in rank, that may not be done until the officer has had the opportunity to be legally represented (section 84(1) of the 1996 Act).

35. Regulation 33 provides for notification of the finding. It provides that the member shall be informed orally of the finding and of any sanction imposed at the conclusion of the hearing and shall be provided with a written notification and summary of the reasons within three days. Regulation 38 obliges the chief officer to cause a book of record to be kept in which shall be entered every case brought against a member of the police force together with the finding thereon and a record of the decision in any further proceedings in connection therewith.

36. Regulation 23 governs the procedure at the hearing.

Sub regulation (3) provides that the officers conducting the hearing shall not find that the conduct of the member concerned failed to meet the appropriate standard unless the conduct is:

(a) admitted by the member concerned; or

(b) proved by the person presenting the case on the balance of probabilities.

This regulation signals a major change from the previous regime which required charges to be proved to the criminal standard.

37. The 2003 Regulations, insofar as they are relevant for this case, provide by regulation 14 for retirement. That regulation provides that members of a police force may retire in such circumstances as shall be determined by the Secretary of State and, in making such determination, the Secretary of State may require notice of intention to retire and may require the consent of the chief officer to be obtained before giving such notice. The Secretary of State has made a determination pursuant to those regulations by the Home Office Circular No 23 of 2003. The circumstances in which a member of a police force may retire are specified in Annex D to that circular. Annex D, insofar as it applied to a person of the rank of Chief Inspector, provides that a member of a police force may retire only if he has given to the police authority one months written notice of his intention to retire or such shorter notice as may have been accepted by that authority. It goes on to provide that:-

> "While suspended under the Conduct Regulations, a member may not, without the consent of the chief officer of police, give notice for the purposes of this determination or retire in pursuant of a notice previously given."

The role of the Police Complaints Authority

38. Section 70 of the 1996 Act makes provision for references of complaints to the PCA. There is an obligation to refer to the PCA any complaint alleging that the conduct complained of resulted in the death of, or serious injury to, some other person. It also makes provision for the Secretary of State in regulations to specify other types of complaint which have to be referred to the PCA. In addition, section 70 empowers the chief officer to refer to the PCA any complaint which is not required to be referred to them.

39. Section 71 provides for references of other matters to the PCA.

It provides that the chief officer may refer to the PCA any matter which appears to the chief officer to indicate that a member of a police force may have committed a criminal offence, or behaved in a manner which would justify disciplinary proceedings, and which is not the subject of a complaint. The chief officer may only refer such a matter to the PCA if it appears to him that it ought to be referred by reason of its gravity or exceptional circumstances.

It appears that the findings by Mr Justice Penry-Davey were treated as a report rather than as a complaint and accordingly the chief officer referred this matter to the PCA pursuant to section 71.

40. Section 72 requires the PCA to supervise the investigation of a matter which is referred to it pursuant to section 71.

41. Section 73 provides that at the end of an investigation which the PCA has supervised the investigating officer shall submit a report on the investigation to the authority and send a copy of that report to the chief officer.

> Sub-section (2) imposes on the PCA an obligation after considering the report to submit an appropriate statement to the chief officer. Sub-section (9) provides that an appropriate statement means a statement: (a) whether the investigation was or was not conducted to the authority's satisfaction; (b) if not specifying any respect in respect in which it was not so conducted; and (c) dealing with any such other matters as the Secretary of State may by regulations provide.

There is a statutory hiatus as to what happens where the appropriate statement includes a statement that the investigation was not conducted to the authority's satisfaction. This was addressed by the House of Lords in the case of *R (Green) v police Complaints Authority* [2004] UKHL 6 in which Lord Rodger of Earlsferry in delivering the leading speech says at paragraph 45 as follows:-

> "The Act does not spell out what is to happen if the authority submit a statement to the effect that the investigation was not satisfactory. The implication must be, however, that the Chief Constable will take account of the authority's criticisms and, unless they can be shown to be mistaken, ensure that the perceived defects in the investigation are remedied. Otherwise, the authority's supervision of the investigation would be at best ineffective and the purposes of the legislation be frustrated. This would be apparent not only to the complainant to all interested members of the public."

42. Section 75 of the 1996 Act makes provision for steps to be taken after investigation in the case of officers including those of the rank of Chief Inspector.

> It provides that on receiving a report of an investigation the chief officer shall determine whether the report indicates that a criminal offence may have been committed by a member of the police force for his area. If so the chief officer is obliged to send a copy of the report to the Director of Public Prosecutions. The matter there rests with the DPP until he has dealt with the question of criminal proceedings.
>
> After the Director has dealt with that question (including by implication the prosecution of any such criminal offence to a conclusion, whether conviction or acquittal), the chief officer is obliged in such cases as may be prescribed by regulations made by the Secretary of State to send to the PCA a memorandum which states whether he has brought or proposed to bring disciplinary proceedings in respect of the conduct the subject of the investigation and if he has not brought or does not propose to bring such proceedings giving his reasons. (Section 75(4)).

This provision makes an important change in that it removes from Police Officers the protection of the rule against double jeopardy which had previously meant that an officer who had been acquitted on a criminal charge could not be required to face disciplinary action in respect of the same matter.

> If the chief officer considers that the report does not indicate that a criminal offence may have been committed by a member of the police force he shall, in such cases as may be prescribed by regulations, send the PCA a

memorandum to that effect and which states whether he has brought or proposes to bring disciplinary proceedings in respect of the conduct which was the subject of the investigation and if not, giving his reasons. (Section 75(5)).

43. Section 76 provides for the powers of the PCA in respect of disciplinary proceedings.

It provides that where a memorandum under section 75 states that a Chief Officer of police has not brought, or does not propose to bring, disciplinary proceedings, the PCA may recommend him to bring such proceedings (Section 75(1)).

If, after such a recommendation and following consultation, the chief officer is still unwilling to bring disciplinary proceedings, the PCA may direct him to do so (Section 76(3)).

Where such a direction is given the PCA shall supply the chief officer with a written statement of their reasons and it shall be the duty of a chief officer to comply with such a direction unless they PCA withdraws it. (section 76(4)(6)).

Ministerial Guidance and other statements of Policy

44. Section 87 of the 1996 Act is headed "Guidance Concerning Disciplinary Proceedings etc". Sub-section (1) provides as follows:-

> "The Secretary of State may issue guidance to police authorities, Chief Officers of police and other members of police forces concerning the discharge of their functions under regulations made under section 50 in relation to the matters mentioned in sub-section (2)(e) of that section, and they shall have regard to any such guidance in the discharge of their functions."

45. Such guidance has been issued and, in particular, guidance was published on 12 December 2002. Section 3 of that guidance is headed "Misconduct Procedures." It contains a number of parts. Part ii is headed "Formal Investigation" and runs from paragraphs 3.16 to 3.25. Within that part there is a small sub-section headed "Suspension and Removal from Normal Duties" which runs from paragraphs 3.18 to 3.20. Paragraph 3.18 provides as follows:-

> "In serious cases, it might be decided that the officer concerned should be removed from his or her normal duties or be suspended at the start of or during the course of the formal investigation or pending the outcome of criminal or misconduct proceedings. Consideration should first be given to a temporary transfer to other duties rather than suspension, which should not be used as a matter of routine. The decision to suspend should be taken only where the presence of the officer on duty might be detrimental to or hinder an investigation or proceedings (criminal or disciplinary), or when it is in the public interest to do so. That will normally apply only to cases where the complaint or allegation is of a serious nature, likely to result in criminal conviction or disciplinary conviction which would be likely to lead to dismissal from the service, requirement to resign or reduction in rank. In such serious cases, or in cases where the completion of disciplinary proceedings is necessary for the maintenance of public confidence, the public interest may require that an officer should be required to face disciplinary proceedings, notwithstanding that the officer may wish to retire from the service. Retirement should not be a means for avoiding disciplinary action in such cases. However, where the decision to suspend an officer in

such circumstances is based on the necessity to maintain public confidence, the officer should be advised in writing of the specific factors relevant to this decision."

Paragraph 3.20 states as follows:-

"Where an officer is suspended, the Chief Officer will ensure that the continuing need for suspension is subject to, at least, monthly reviews. The purpose of each review will be to determine whether the conditions which required the suspension still apply. The officer concerned should be notified of the outcome of each review."

46. There has been dispute in this case as to the status of paragraph 3.18 to 3.20. Mr Blake for the claimant maintains that it is statutory guidance pursuant to section 87 of the 1996 Act and as such imposes a statutory obligation on the decision maker to have regard to it. Mr Howell says that it is non statutory guidance. These particular paragraphs do not fall within the terms of section 87. As such its legal effect has to be determined by reference to general principles of administrative law. In my judgment Mr Howell's contention is correct. Section 87 is highly specific in limiting guidance to the discharge of functions under regulations made under section 50 in relation to the matters mentioned in sub-section (2)(e) of that section. Those matters are "the conduct, efficiency and effectiveness of members of police forces and the maintenance of discipline". Mr Blake argues, with some force, that paragraphs 3.18 to 3.20 fall within section 3 of the guidance which deals with misconduct procedures and within that sub-section which deals with formal investigation. He therefore says that the discussion of suspension and voluntary retirement in that context is guidance in relation to the maintenance of discipline. If sub-section (2)(e) stood alone then I would be persuaded by Mr Blake's argument that section 87 (1) was capable of encompassing the contents of those paragraphs. It does not, however, stand alone. Sub-section 2(d) provides that regulations may make provision with respect to voluntary retirement and sub-section (f) in respect of the suspension of members of a police force from membership of that force and from their officer as constable. Those are matters which are listed separately from the maintenance of discipline. In the regulations they are provided for in separate places and, indeed, in separate regulations. In my judgment this context means that the power to issue guidance pursuant to section 87 is not a power to issue guidance in respect of suspension or retirement. Thus the guidance issued by the Secretary of State in those particular paragraphs is not issued pursuant to section 87 but is non statutory guidance.

47. The question follows what is the legal effect of these paragraphs. Mr Howell does not contend that they are ultra vires and should be entirely disregarded. He accepts that the Secretary of State may issue non statutory guidance the effect of which falls to be determined by reference to the general principles of administrative law. Mr Howell refers me to a passage in the speech of Lord Scarman in *Re Findlay* [1985] AC 318 pp333 to 334 in which Lord Scarman stated:-

" He (counsel) prayed in aid some observations of Cook J. in the New Zealand case of CREEDNZ v Governor General (1981) 1NZLR 172.. The facts of that case bear no resemblance to this case. But the judge did consider the question of the proper exercise of an administrative discretion in a situation where a statute permits but does not require consideration of certain matters. The judge said, at page 183: "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that

> the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may be properly taken into account, nor even that it is one that many people, including the court itself, would have taken into account if they had to make the decision" These words certainly do not support (counsels) submission but…..the judge in a later passage page 183, line 33, did recognise that in certain circumstances, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers….would not be in accordance with the intention of the act." These two passages are in my view a correct statement of principle."

48. This passage has most recently been considered and applied by the Court of Appeal in *R (Khatun) v Newham LDC* [2004] EWCA Civ 55 in which Lord Justice Laws having cited that passage from *In Re Findlay* said as follows:-

> "In my judgment the CREEDNZ Inc case (via the decision *In Re Findlay) does … support the proposition that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision maker, then it is for the decision maker and not the court to conclude what is relevant subject only to Wednesbury review."*

In my judgment the approach I must take on the effect of this non statutory guidance is that which is identified in the above two citations.

Other sources of policy and statements of authority

49. The interplay between: the statute based police disciplinary procedures; the normal incident of employment, or service, which permits a person to retire by giving notice; and its inhibition by virtue of the fact that a police officer holds a public office so that retirement is governed by statute; has been the subject of comment and debate in the public domain. In the case of *R v Chief Constable of Devon and Cornwall Constabulary ex parte Hay* [1996] 2AER 711 Mr Justice Sedley, as he then was, considered a Chief Constable's discretion to permit a person to retire on medical grounds in circumstances where he was facing disciplinary proceedings thereby allowing him to avoid those proceedings. Mr Justice Sedley emphasised the public dimension to the Chief Constable's decision at page 723:-

> "The Chief Constable has a choice: he may decide not to require the officer to resign by reason of unfitness, in which case the officer's service continues and the disciplinary process with it, or he may require the officer to resign by reason of his unfitness, in which case he cannot postpone the effective date of retirement pending the completion of the disciplinary process (see *R v Chief Constable of Northumbria Police ex parte Charlton 1994 Times 6 May). It follows that in order to take a lawful decision which does not leave the relevant matters out of account, a Chief Officer of police who is invited to require the retirement of one of his officers must consider not only the evidence tendered to him in support of retirement, but also the fact that he is not obliged to accede to it if there is a good reason for refusal, and must go on to consider, for example, whether the interest of the police service and the public in seeing any disciplinary proceedings against the officer to their end outweighs for the time being the case for his retirement."*

50. The question of the impact of retirement upon police disciplinary procedures was a matter which exercised the authors of the report of Sir William

MacPherson into the investigation of the murder of Stephen Lawrence. One of the matters which concerned them was that a number of police officers in respect of whom issues of misconduct arose had retired either compulsorily through the attainment of the relevant age or for ill health or voluntarily. By so doing police disciplinary procedures were unavailable. The authors of the report made a specific recommendation - number 56 - "that in order to eliminate the present provision which prevents disciplinary action after retirement, disciplinary action should be available for at least 5 years after an officer's retirement."

51. This particular inquiry was of such import and public interest that the Home Secretary undertook to respond by a specific action plan which was updated annually. Over the three years 1999-2001 he consistently indicated that this recommendation required further consideration. In 1999 he stated as follows:-

> "We will review whether sanctions should be available after retirement. The new procedures will reduce the possibility of officers retiring while facing discipline. We will consider through the mechanism of the police advisory board what more can be done, in the light of the changes brought about by the new procedures which will be closely monitored."

52. The matter was ventilated in Parliament prior to the report of the Lawrence Inquiry. On 20 January 1999 Mrs Ellman MP raised the issue of "the ability of police officers to avoid disciplinary procedures by taking retirement". Mr Boateng, the Minister of State, stated that the Home Affairs Committee inquiry report into police disciplinary and complaints procedures made no recommendations about police officers taking retirement to avoid disciplinary proceedings. It expressed concerns, however, about officers who go sick which effectively halts disciplinary proceedings, and recommended that the regulations should be changed to enable Chief Officers to complete hearings in the absence of an accused officer. The Government had accepted that recommendation and it would be incorporated into changes in the regulations which were to come in force on 1 April 1999. Mr Efford MP asked the Secretary of State if he would review the procedures under which Metropolitan police officers are able to take early retirement to avoid facing disciplinary action which is outstanding at the time of their retirement. The Secretary of State responded amongst other things by saying:-

> "Police authorities and forces aim to complete any outstanding disciplinary proceedings before retirement but this is sometimes not possible in the time remaining. In those disciplinary cases in which police officers are already suspended, retirement cannot take place. Under the police pensions regulations, police authorities have discretion to decide against requiring an officer to retire on the grounds of ill health and may, therefore, withhold medical retirement in a case where there are outstanding disciplinary proceedings. The implications for these procedures for police discipline are matters which we keep constantly under review with regard to all forces, to identify the potential for improved performance in this aspect."

53. The Greater Manchester Police had at the relevant time a policy on restricted duty and suspension. This was adopted in November 2001 having been recommended by ACPO in respect of North West England and Wales. The policy states, amongst other things, as follows:-

> "1.2..when determining whether to suspend an officer from duty, the decision to suspend will always be made by a chief officer and will only be taken in exceptional circumstances when all other alternative options, including restricted duties, have been explored and

discounted. Restricted duties include duties which remove the opportunity for the officer to repeat the alleged misconduct. The interests of the officer should also be considered.

1.3 When considering whether suspension or restricted duties is appropriate or not, each case will be treated on its own individual merits. One or more of the following factors will be considered.

(i) The nature and seriousness of the alleged offence(s) and their frequency (if appropriate).

(ii) The cogency of the evidence in respect of the alleged offence(s)

(iii) The impact the allegation(s) will have on the reputation of the force

(iv) The likelihood that if the criminal or misconduct offence(s) were proved the officer would be punished with a term of imprisonment or be required to resign, or dismissed from the force.

(v) If the officer is not suspended is there a likelihood that he or she will interfere with witnesses or evidence?

(vi) Is it in the public interest that the officer should be suspended?

(vii) That the officer performs supervisory duties, and that the nature of the allegations is such that his or hers supervisory duties would be compromised whilst under investigation.

(viii) Any other factor relevant in the circumstances.

1.4 After a decision to suspend or place an officer on restricted duties has been made, that decision will be reviewed monthly to establish if there has been any material change in circumstances e.g. following initial inquiry into an allegation of criminal activity when it is clear to the investigating officer that criminal proceedings will not ensue on submission of case reports to PCA/CPS, or on receipt of a decision from the CPS or PCA not to institute criminal or misconduct proceedings, or in misconduct matters when it becomes apparent the dismissal or requirement to resign from the force is not a likely outcome etc. A suspension review notice will be completed each month by the reviewing officer."

Conclusion on the legal effect of Home Office Guidance paras 3.18 and 3.20

54. In my judgment the non statutory guidance given by the Home Office in paragraphs 3.18 and 3.20 does fall within the category of matters which were so obviously material to the decision whether to remove the suspension of DCI Caldwell that anything short of direct consideration of them by the decision maker would not be in accordance with the intention of the statutory scheme. In so deciding I am fortified not only by the clear statement to that effect in *ex parte Hay* but also by the fact that it is manifest that this subject has been aired repeatedly and anxiously by different bodies in different public forums at the highest level of public debate.

55. In my judgment, therefore, if the evidence were that the maker of this decision simply did not take it into account at all then it would render his decision a flawed one regardless of the question of whether, had he had regard to it, he could have reasonably come to the same conclusion as he did.

56. In the event that he did have regard to it but decided to depart from it then the approach which, in my judgment, is the correct one in this case is to adopt what Lord Justice Laws in *Khatun* described as "conventional law, namely that respondents to such a circular must (a) take it into account and (b) if they decide to depart from it, give clear reasons for doing so."

57. I now apply this approach to the facts in this case.

58. The decision taker was DCC Green. His evidence indicates that he had been considering the question of permitting DCI Caldwell to retire well in advance of receipt of the memorandum of 14 October. The matter had been raised by the Chair of the Police Federation at a date which appears to have been prior to 8 October. His evidence is unclear whether he took the decision to remove the suspension before or after a discussion with ACC Seabridge. His witness statement tends to suggest that the discussion with ACC Seabridge on 15 October concerned the conditions to be attached to the lifting of the suspension – namely - the finalisation of disciplinary procedures in respect of the TIC investigation and the Manchester University lectures. ACC Seabridge, however, tends to suggest that he had an opportunity to express his view to DCC Green in advance of a final decision being taken by DCC Green and I accept that evidence.

59. DCC Green has, however, set out clearly and succinctly the factors which he took into account in concluding that it was not in the public interest to refuse DCI Caldwell's notice of retirement and to keep him suspended on full pay pending the outcome of the Lancashire Constabulary investigation. I now repeat them:-

- "The TIC investigation was near completion and it was determined that DCI Caldwell should be provided with notice of formal warning. There was no evidence to support a full disciplinary hearing. The CPS had confirmed that it did not intend to bring criminal charges against him or any of the other officers;
- The inquiry into the provision of lectures and the non registration of a business interest was concluded. It transpired that DCI Caldwell had not received remuneration for the provision of the lectures and that senior officers of Stockport sub division knew about the lectures. In addition, the University cancelled future lectures. It was determined that DCI Caldwell should be provided with a formal advice for his failure to notify the Chief Constable of this business interest. This feature, which had as I understood it, tipped the balance in favour of reversing the original decision not to suspend had accordingly transpired to be considerably less serious than at first thought.
- Following the conclusion of the two matters referred to above, the outstanding issue related to the collapse of the Barnshaw murder trial. The latest indications were that there might be real difficulties in identifying those responsible for any criminality and that, at the early stages of the investigation, there was only prima facie evidence to support a category B disciplinary charge against DCI Caldwell.
- At that stage, Lancashire Constabulary was undertaking an external investigation into the allegation made by the trial judge, Mr Justice Penry-Davey. The Inquiry could take up to at least 2 years. Even if the inquiry ultimately might lead to more serious disciplinary charges against DCI Caldwell, the highest sanction would be for GMP to dismiss DCI

Caldwell or to require him to resign.

- Even if DCI Caldwell was found guilty of the most serious disciplinary matters arising out of Mr Justice Penry-Davey's findings and the Lancashire Constabulary investigation, this would not affect his pension for which he was eligible after 30 years service. However, he would have been suspended on full pay throughout what was likely to be a lengthy Lancashire investigation (this has still not been concluded).
- If the Lancashire Constabulary investigation were to uncover sufficient evidence to warrant criminal charges and if DCI Caldwell were subsequently to be found guilty of criminal charges connected with his police service, GMP could apply for forfeit of part of his pension."

60. It is of significance that nowhere in the evidence of DCC Green or ACC Seabridge is any reference made to their having any knowledge of, let alone having had regard to, paragraph 3.18 or 3.20 or the Home Office guidance nor of their applying their minds to such a factor however expressed. It is plain that ACC Seabridge did have regard to the GMP policy to which I have already referred. Whilst it is true that many of the elements contained in paragraph 3.18 and 3.20 of the Home Office guidance find expression, albeit in different terms, in the GMP policy, there is nowhere any explicit acknowledgement that "in such serious cases, or in cases where the completion of disciplinary proceedings is necessary for the maintenance of public confidence, the public interest may require that an officer should be required to face disciplinary proceedings, notwithstanding the officer may wish to retire from the service. Retirement should not be a means of avoiding disciplinary action in such cases" or any similar passage. Nor is there any acknowledgement in the witness statement of either DCC Green or ACC Seabridge that there may be a positive public interest, necessary for the maintenance of public confidence, in requiring an officer to face disciplinary proceedings notwithstanding that he may wish to retire from the service. At its highest, each of their witness statements does no more than identify that as a consequence of removing the suspension, disciplinary proceedings could no longer take place. I reject the contention of Mr Howell that it is "a glimpse of the blindingly obvious" that awareness that this was a consequence of lifting the suspension necessarily involved either officer being aware of, let alone addressing, the fact that there may be a free standing positive public interest in the maintenance of the confidence of the public in requiring such procedure to be pursued to its end.

61. Had they been so aware one would have expected some consideration of the following: that DCI Caldwell had been found by a High Court Judge, at the end of a three week hearing, and on evidence which, in the main, derived from the police or the prosecution, to have been personally responsible for the most serious instances of misconduct in tampering with evidence and lying about it on oath to the court; and that had resulted in a high profile prosecution being stayed for abuse of process in circumstances where a senior officer of the GMP was publicly criticised both by the judge and in the news media. One would have expected, at the very least, a serious consideration of whether the other factors which pointed against continuing the suspension outweighed what must have been the obvious potential damage to public confidence in the GMP by permitting that officer to retire, and as a consequence avoiding any possibility of internal police discipline, whatever might

have been the position in respect of potential criminal charges. There is simply no hint of any of this passing through the minds of either ACC Seabridge, or more significantly, DCC Green. If they did have regard to such a factor and decided to disregard it they do not give clear reasons for doing so as required by the case law to which I have referred.

62. It follows from the above that, in my judgment, the decision of DCC Green was flawed and a declaration should issue to that effect. It is on the basis that he failed to have regard to a relevant consideration namely, that element of public interest which finds expression in that part of paragraph 3.18 of the Home Office guidance to which I have referred, or that, if he did have regard to it and decided to disregard it, he has not said that he did so and has not given his clear reasons for doing so. In my judgment, those matters were so obviously material to the decision to be taken by DCC Green that a failure to consider them was not in accordance with the intention of the Act conferring on DCC Green the power to lift the suspension.

63. That is not to say that DCC Green could not have reasonably taken the decision that he did had he had regard to paragraph 3.18. Had he done so, and had he given clear reasons for acting other than in accordance with that guidance, then, in my judgment, a lawful decision to lift the suspension was possible. I reject the contention of Mr Blake that it was impermissible for Mr Green to have regard to matters such as the fact that were he to remain suspended DCI Caldwell would remain on full pay for an extensive period of time whilst the investigation and any subsequent disciplinary procedure took place. Nor do I accept his criticism that the assessment of a two year suspension was an unreasonable one. True it is that the anticipated termination of the investigation was to be envisaged to be by Spring 2004. At the end of that investigation there would have had to have been a report, a decision taken on that report, and, if disciplinary proceedings were to result, then such disciplinary proceedings would have to have been conducted. That would have taken some time. In my judgment, the overall assessment of a period of two years was not an unreasonable one. DCC Green was also entitled to have regard to the fact that two other investigations had been concluded and that neither of them were going to result in either a criminal prosecution or disciplinary action which could involve dismissal, a requirement to resign, or a reduction in rank. He was, therefore, entitled to have regard to the impact of the sole remaining matter namely, the investigation arising out of the Barnshaw murder trial.

64. I also reject the contention that DCC Green was not entitled to have regard to any information that he had concerning the progress of the Lancashire investigation. In weighing it, however, he would have been obliged to consider the fact that it was informally given, it was apparently unreasoned, it was at an early stage of the investigation and, in particular, one month before anyone had been interviewed who might be a witness. In those circumstances any indication must have been of relative little weight. There is no evidence to suggest, however, that DCC Green gave those preliminary and informal indications any significant weight.

65. In his skeleton argument, and in the course of oral submissions, Mr Howell developed a line of argument which is in itself attractive but which also points to the failure on the part of DCC Green and ACC Seabridge to engage in any way with the public interest issue addressed in paragraph 3.18. This was that, whilst there may well be a public interest in taking steps to ensure that investigation into complaints or allegations is completed where they have not yet been the subject of a full and public examination leading to conclusions, the present case was entirely different. In the present case there had been a full and public examination of the conduct of DCI Caldwell. Mr Justice Penry-Davey had reached final and specific conclusions about his conduct in the context of the abuse argument in the Barnshaw

murder trial. Accordingly, the public interest in ensuring that complaints are fully examined and not cut short by virtue of voluntary retirement might reasonably have been thought to have been substantially met by what had happened at the trial. Such an argument might well have resulted in a reasonable decision to have lifted the suspension. The fact that it appears nowhere in the evidence of either ACC Seabridge or DCC Green simply points up the fact that their evidence discloses no engagement with this issue at all.

66. Finally, I reject the contention that the decision was unlawful by reason of the fact that DCC Green did not, directly or indirectly, consult the PCA. In my judgment, at this early stage of the matter, the PCA had no interest in being consulted. True it is that, once the investigation has been completed and a report made the PCA has functions to perform in advising, or directing, a chief officer of police to take disciplinary action where it seems appropriate for them that he should do so and where he is reluctant to do so. There may come a time, when the investigation has been completed and a report submitted, that the PCA is so engaged in the process that the chief officer of police should consult them about lifting a suspension lest his action should cut across their statutory role. In my judgment that point had not remotely been reached. Furthermore, the evidence is that the PCA did not think that it had. It is clear that, from the outset, the possibility of DCI Caldwell being allowed to retire, thereby removing the possibility of disciplinary proceedings against him, was being discussed and that the PCA was aware of this. At no stage did they express any concern about that or, ask that they should be informed before any such decision was taken. At its highest Ms Boustred, very properly and sensibly, on 5 November requested of Lancashire that their report into the investigation should be couched in terms which included DCI Caldwell, albeit there would be no prospect of disciplinary proceedings being taken against him. As Mr Phillips of the Treasury Solicitor in his evidence has commented "It would appear that the supervising member regarded issues of suspension as being exclusively within the responsibility of the employing police force." I agree with his assessment of the PCA's view at the time and I also accept that it was a proper view to take.

67. In summary, therefore, in my judgment the GMP in deciding to lift the suspension of DCI Caldwell erred in law in that it failed to have any regard to the matters of potential public interest given expression in paragraph 3.18 of the Home Office guidance. To the extent that it did, it has failed utterly to articulate that it was aware of this aspect of the guidance, that it had regard to it, and its reasons for deciding in a way which was contrary to that potential public interest. Accordingly, whilst it would have been open to the GMP reasonably to have lifted DCI Caldwell's suspension after proper consideration of all the relevant matters, its failure to have regard to this relevant matter means that the decision it took was flawed in the *Wednesbury* sense. I therefore make the following declaration - that the decision of the Chief Constable of Greater Manchester Police on 20 October 2003 to lift the suspension of DCI Caldwell imposed on 15 September 2003 was unlawful.

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1. MR JUSTICE WILKIE: For the reasons set out in the approved judgment of today's date, the claimants succeed and I therefore make the declaration in the terms set out at the end of paragraph 67 of the judgment, namely that the decision of the Chief Constable of Greater Manchester police, on 20th October 2003, to lift the suspension of DCI Caldwell, imposed on 15th September 2003, was unlawful.

2. MR BLAKE: My Lord, I am most obliged. Two short matters. May we then have the declaration as my Lord has ordered. We seek our costs against the defendant and an assessment of our CLS funded --

3. MR JUSTICE WILKIE: Yes. Mr Eadie, do you have anything to say in opposition to either

of those?
4. MR EADIE: My Lord, there is plainly no difficulty so far as CLS funding is concerned. In relation to the costs order that is sought by my learned friend, perhaps three short points, my Lord.
5. The first of them is that, as my Lord will know, we lost on a very narrow basis. In reality it came down to the construction of DCC Greaves' statement and whether or not he had taken into account the public interest reflected in paragraph 3.18 and 3.20 of the Home Office guidelines. That was in itself a short and discrete point, perhaps characterised, and properly characterised, as a point of construction of the witness statements. If that had been the only point that had been fought over the grounds would have been short, the skeleton arguments would not have extended to 40-pages and the hearing would not have lasted for two days. So that is the first point. We lost on a narrow basis.
6. The second point is that we won on a series of points which occupied a considerable amount of time and effort, both in the skeletons and in the oral hearing. We won on the status of the Home Office guidance, on all the matters listed in paragraph 63 of my Lord's judgment, could the decision -- have been taken within the bounds of Wednesbury reasonableness? Answer, yes, it could in theory. Was it legitimate to take into account suspension for two years on full pay? Yes. Was it reasonable to take into account the two year suspension period as a realistic period? Answer, yes. And so on.
7. Paragraph 64 also in relation to the progress of the Lancashire investigation. My learned friend submitted that was an irrelevant factor in all the circumstances and my Lord rejected that, albeit giving that factor little weight.
8. Finally, in relation to PCA consultation, the full blown case was run by my learned friend, but the decision was unlawful because there had been no prior consultation with the PCA. That also was rejected in paragraph 65 of my Lord's judgment.
9. So there were a succession of points which were points of substance on which we won.
10. The third and final point in relation to costs, my Lord, is this. This is not straightforward result litigation, if I can put it in that way. My learned friend has highlighted from the outset that he was not seeking to overturn or unravel the decision about DCC Caldwell's suspension. All that was being sought, and deliberately all that was being sought, was a declaration, and the stated purpose of that by my learned friend was in order to obtain guidance to ensure that these decisions were taken properly in the future. So that factor does, I submit, take it outside the usual run of case where a successful party can turn up to the court and say we won. We may have lost on some bits around the edges, but the core of it is in the result. This, I submit, is not that sort of case, as my learned friend has acknowledged in the relief that has been sought. And in relation to those broader issues of principle, by and large the arguments that he run were unsuccessful. So those are the three short points we make in relation to costs.
11. Whether there is leave, my Lord, is very much a matter for my Lord to decide. My submission, although it is perhaps putting it a little high, perhaps suggestion would be better, is that some reflection of those three points should be made in the costs order that is handed down. And by way of suggestion, and suggestion only, something along the lines of an order that we should pay a percentage of the claimant's costs, perhaps somewhere between 50 per cent and two thirds, would, in my submission, reflect the justice of the case and would reflect fairly on its nature and a fair split on those points on which we have won and lost.
12. My Lord, those are my submissions. I will leave one other short matter for a convenient moment.
13. MR BLAKE: My Lord, what my Lord has heard is no basis whatsoever for making a split or an apportioned costs order in this case. There was a single issue: was the decision lawful? On that single issue of relief the claimants have succeeded. It was necessary in order to look at that question to put before my Lord all the material that was put before my Lord in terms of how the decision was reached and the relevant criteria, and my friend is simply wrong to say that this was a narrow point that can be isolated from the surrounding material, the nature of the policy was of course central.

14. As to its legal status, that issue was only raised late when the intervener came in and made a submission on it. It was not part of the claimant's case that it had a particular status in law, but it was the crucial issue to be taken into account. So there is no basis for a split order at all.
15. Indeed, my Lord, the claimants might credibly have made an application for indemnity costs up until the period for lodging of these proceedings until the lodging of the defendant's evidence. They haven't sought to make that application. But in the light of the way certainly the way in which they were misled by Mr Brown that would be a credible application, but it would be wholly wrong in those circumstances not to compensate the Fund who have supported the claimants in this case. They were still interested victims in this decision and costs should reflect that event.
16. MR JUSTICE WILKIE: Thank you very much. Mr Eadie in his short submissions accepts that the claimants succeeded and succeeded on the matter which was at the heart of the litigation, namely the failure to take into account the Secretary of State's guidance. He says, however, that the claimant's case was always put on a high basis, namely that no reasonable Chief Constable could have come to the decision which he took and raised certain issues which they claimed would be improper for him to take into account.
17. I have not found for the claimants in respect of those matters and, in my judgment, justice requires that there should be some reflection of this in the order for costs which I make. I make an order that the defendants pay two thirds of the claimant's costs. I also make an order for detailed assessment of the claimant's Legal Services Commission funded costs.
18. MR EADIE: My Lord, I am grateful. That leaves simply one other matter which is permission to appeal. My Lord, will need no reminding that the test to be surmounted by someone in my position is whether or not there are real prospects of success on an appeal, that is CPR52.3.6(a). And "real", as the Court of Appeal have clarified on a number of occasions, see the notes at 32.3.6 of the White Book, "real" means -- real prospect means real as opposed to fanciful. The substantive grounds for interfering with a decision of the High Court in the Court of Appeal, one of the substantive grounds for doing so, is that the decision was "wrong judgment", see 53.11.3(a).
19. My Lord, the short point on which I seek permission is this. The real and dispositive question on which my Lord found against us was whether or not Messrs Green or Seabridge had regard to the public interest in maintaining disciplinary proceedings in relation to the matters raised in the judgment of Penry-Davey J. That was, as I have already submitted, a short point, and I accept, of course, that at the outset, at least in relation to the statement of DCC Green, that public interest was not expressly addressed in his statement.
20. The short point, however, that I would invite my Lord to consider in this context is that the whole premise of DCC Green's statement and consideration is that public interest in maintaining disciplinary proceedings. If he didn't have the public interest -- that public interest, that specific public in mind, what then, it may rhetorically be asked, was the point of listing, considering all the matters that he did. The factors without that public interest would all have pointed one way. There would have been no need for a balanced decision, or a weighing of factors at all, because the factors would simply all have pointed in the direction of him leaving. What caused the need for a balanced consideration for the listing of those various factors was precisely a recognition --
21. MR JUSTICE WILKIE: Well, I heard the argument.
22. MR EADIE: I know my Lord has, but you will appreciate the great difficulty in trying to persuade someone they are wrong in a judgment handed down --
23. MR JUSTICE WILKIE: I appreciate there is disagreement and I heard the argument.
24. MR EADIE: My Lord has the point. The real question is whether there are real as opposed to fanciful prospects of success, and I emphasise that there is not a fanciful prospect of success of the Court of Appeal taking a different view in circumstances where all those features are listed. If they hadn't been listed, or that public interest hadn't been there --
25. MR JUSTICE WILKIE: I suppose your best point is that this isn't a matter which depends on the view one takes of oral evidence.
26. MR EADIE: My Lord, that is plainly right.

27. MR JUSTICE WILKIE: It is all in the documents.
28. MR EADIE: And the Court of Appeal is in just as good a position to make a decision about the construction of the witness statements as my Lord was. In those circumstances it can't be said that the prospects of success on that short and narrow point are fanciful.
29. MR JUSTICE WILKIE: Well, I hear what you say. Yes.
30. MR EADIE: My Lord, I know my Lord has disagreed with me, otherwise I wouldn't be making the application, but that is not the test. The test is not whether my Lord has concluded it is right. It is whether or not there is a realistic prospect of a differently constituted court, viewing the matter effectively as primary decision makers at that stage, because they can look at the documents and need not rely on evidence, is there any prospect of them taking a different view, and, in my submission, the answer is yes. That is the short point.
31. MR JUSTICE WILKIE: Yes, thank you.
32. MR BLAKE: This is manifestly not a case for a permission to appeal to the Court of Appeal. On the broader issues, there is no broad question of public law that requires consideration and that would be the usual basis upon which this court would grant permission. If my learned friend wishes to renew the unsuccessful advocacy, he can do it elsewhere, if he thinks it appropriate, but he should not maintain it before my Lord, and seek to do so somewhat narrowly, mischaracterising the nature of the issues of my Lord's judgment. That is simply without substance.
33. My Lord, there are plenty of factual realities why, given the nature of the relief sought, this is not a case that should linger on at public expense and we are anxious that there is finality in the light of the previous order made.
34. MR JUSTICE WILKIE: Thank you very much. I think Mr Eadie and/or Mr Howell should exercise their advocacy before the Court of Appeal in seeking permission because I refuse it.