

R(AF) 4/07

**Mr J Mesher
Commissioner
31 May 2007**

CAF/2858/2006

War disablement pension – allowance for lowered standard of occupation – alternative suitable occupation with equivalent gross income – whether London weighting allowance to be included in “gross income”

The claimant was receiving war disablement pension with an allowance for lowered standard of occupation (ALSO) at the maximum rate in accordance with what is now article 15 of the Naval, Military and Armed Forces Etc (Disablement and Death) Service Pensions Order 2006. One condition of entitlement was that he was incapable of following any occupation other than his regular service occupation with equivalent gross income. On review the Secretary of State decided that he was no longer entitled to ALSO because his earnings from his current occupation were now higher than those in his regular service occupation. The claimant appealed. The question for the tribunal and for the Commissioner on further appeal was whether his London weighting allowance in his present occupation should count as part of his gross income for calculating ALSO. The claimant argued that London weighting was a temporary payment and should be excluded from the calculation of earning capacity just as certain temporary payments (non-skills-based allowances) were excluded from the calculation of service pay. The Secretary of State argued that the London weighting was not a temporary allowance and was part of “gross income” in the natural and ordinary meaning of that term.

Held, allowing the appeal, that:

1. as a matter of fairness and equity there was a requirement to compare like with like (*R v Deputy Industrial Injuries Commissioner, ex parte Humphreys* [1966] 2 QB 1 (also reported as appendix to R(I) 2/66) followed) (paragraph 27);
2. the distinction is not between temporary and permanent but between what is a normal part of the claimant’s income and what is not (R(I) 1/72 followed) (paragraph 28);
3. following that approach, the hypothetical comparison should be made between the claimant’s normal pay in his current occupation, including the London weighting allowance, and what he would normally be paid in his regular occupation if carried out in the location of the comparator occupation for as long as the comparator occupation has been carried out there, thus including the service recruitment and retention allowance (London) (paragraph 29);
4. in calculating the income from the regular occupation the prospect of promotion to a different rank or a shift to a different pay scale should not be taken into account as it would in fact be assuming a different regular occupation from that followed at the relevant date (paragraph 32).

The Commissioner set aside the tribunal’s decision and referred the case to a differently constituted tribunal with directions.

DECISION OF THE PENSIONS APPEAL COMMISSIONER

1. The claimant’s appeal to the Commissioner is allowed. The decision of the London pensions appeal tribunal dated 12 May 2006 is erroneous in point of law, for the reasons given below, and I set it aside. The claimant’s case is referred to a differently constituted pensions appeal tribunal for determination in accordance with the directions given in paragraphs 35 to 38 below (Pensions Appeal Tribunals Act 1943, section 6A(4)(b)).
2. There was an oral hearing of the appeal on 19 April 2007, at the request of the claimant. He attended and was represented by Mr James Clifford of Counsel, acting

through the Free Representation Unit (FRU). The Secretary of State for Defence was represented by Mr Garreth Wong of Counsel, instructed by the Treasury Solicitor. I am grateful to both representatives for thorough submissions and helpful written skeleton arguments. Further written submissions have been made on one particular point (that in the end I have not needed to consider) by Emma Baldwin of FRU and Mona Fawaz of the Treasury Solicitor's Litigation and Employment Group.

The issue and the relevant legislation

3. This appeal is about the allowance for lowered standard of occupation (ALSO) under article 15 of the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 2006 (SI 2006/606). Most of the relevant decisions were made at dates when the 1983 Service Pensions Order (SI 1983/883) was still in effect, under which the relevant provision was article 21. The consolidating 2006 Order came into force on 10 April 2006, before the pensions appeal tribunal's (PAT's) decision, and things done under a provision of the 1983 Order that has been re-enacted in the 2006 Order are to be treated as done under the 2006 Order (see article 71(5) of the latter), so that references ought now to be to the 2006 Order. There is no difference in the substance so far as ALSO is concerned. As the setting-out of article 15 of the 2006 Order is a little clearer, I shall refer to that from now on.

4. Article 15(1) provides:

“(1) Except in the circumstances specified in paragraph (2), where a member of the armed forces is—

- (a) in receipt of retired pay or a pension in respect of disablement the degree of which is less than 100 per cent; and
- (b) the disablement is such as to render him incapable, and likely to remain permanently incapable, of following his regular occupation and incapable of following any other occupation with equivalent gross income which is suitable in his case taking into account his education, training and experience

he shall, subject to paragraph (3), be awarded an allowance for lowered standard of occupation at the appropriate rate specified in paragraph 8 of Part IV of Schedule 1.”

Paragraph (2) excludes cases where the claimant's assessment of disablement is below 40 per cent and where a new claim is made after the date the claimant reaches the age of 65. Paragraph (3) caps the amount of ALSO at the difference between the disablement pension payable and what would have been payable for 100 per cent disablement. Paragraph 8 of Part IV of Schedule 1 merely specifies a maximum of £2,653 per year as at April 2006 (the loss of the asterisk indicating a maximum seems to have been a mere slip). In the claimant's case his regular occupation in accordance with paragraph (6)(b) is his “trade or profession as a member of the armed forces” on the date of the termination of his service. According to what was said at the oral hearing by representatives of the Veterans Agency (now the Service Personnel and Veterans Agency) the amount actually awarded as ALSO is the difference between the rate of pay, using current figures, for a claimant's regular occupation and, where he is capable of and engaged in some suitable occupation, the earnings from that occupation.

5. Article 44(2) and (5) of the 2006 Order allows the Secretary of State to review a decision making an award of ALSO to the detriment of a claimant if, among other

grounds, there has been any relevant change of circumstances since the award was made. On such a review the Secretary of State may make whatever award is appropriate having regard to the provisions of the Order (article 44(6)). Article 44(8) provides:

“(8) Where a member has attained the age of 65, paragraph (2)(b) shall not apply so as to enable an award of an allowance under article 15 to be reviewed on the ground that the rate of the member’s earnings has, or would, in his regular occupation, have changed since the date of the award.”

6. The issue in the present case is how to apply the article 15 test of incapacity for following any other suitable occupation with equivalent gross income, in particular how to take account of a London weighting allowance paid to a claimant in his current occupation.

7. The crucial words “equivalent gross income” were not part of the relevant provision until 9 April 2001. Before then the test of entitlement was whether a claimant was incapable etc of following his regular occupation and “any other occupation which is of equivalent standard and suitable in his case”. That was the test that was used for reduced earnings allowance (formerly special hardship allowance) (REA/SHA) under the social security industrial injuries scheme, which benefit had ceased to be available in relation to accidents or the onset of disease occurring from 1 October 1990 onwards. The explanatory note to the amending provision, the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Amendment Order 2001 (SI 2001/409) gives no clue as to the reason for the change. For REA/SHA, the equivalent standard had always been accepted as referring to the standard of remuneration.

The background

8. The claimant (date of birth 16 October 1940) served in the Army from 1 September 1956 to 30 August 1984, finishing as a captain in the Royal Green Jackets. He was awarded a disablement pension on an assessment of disablement at 50 per cent from 28 November 1990. On 27 March 1991 he was awarded ALSO at the maximum rate from 4 January 1991. At that date he had begun employment as an executive officer with the Royal British Legion (RBL). There was a review in March 2001, which resulted in a decision notified on 17 September 2001 that the award of ALSO was to be maintained at the maximum rate. By that date the claimant had been appointed to the post of Head of War Pensions for the RBL. The comparison of earnings used was between £36,548.44 as the annual rate for a captain in the Army and £31,215.00 as his earnings from the RBL.

9. The claimant was sent an ALSO review questionnaire on 26 August 2005. It is apparently standard practice for the Veterans Agency to carry out a review when an ALSO recipient is coming up to the 65th birthday. As requested, the claimant supplied his payslips for July and August 2005, which each showed total pay of £3,668.00, made up of “monthly pay” £3,367.00 and “London WGH” £301.00. In a covering letter, written from the RBL head office in Pall Mall, London, the claimant said that at the day’s rates for his rank and length of service, he would have been receiving £49,498 per year if he had still been in the Army, while his earnings from the RBL were £40,404.

10. The Secretary of State’s decision notified in the letter dated 30 September 2005 was that, following the completion of the review, the ALSO was cancelled (no date was specified) as the claimant’s earnings from his present occupation were now higher than those in his regular service occupation. The former were taken as £44,016.00 per year and the latter as £39,018.50. The claimant immediately challenged both the figure for

the regular service occupation, which he said did not take account of his proper place on the rates of pay as an officer commissioned from having been a warrant officer, and the figure for his current earnings, which he said should not include his London weighting allowance. The claimant also lodged an appeal against the decision. In a letter dated 20 January 2006 the Head of Pensions for the Veterans Agency accepted that the claimant's earnings from his regular service occupation should be taken as £43,858.40, as he had argued, but maintained that as his RBL salary to be taken into account was £44,016.00 there was still an excess and cancellation of ALSO was appropriate. The letter contained this paragraph:

“For ALSO purposes, the Agency's calculation of service pay is based on the existing skill-based conditions necessary to do a particular job. The basic daily rate of service pay may, therefore, be supplemented by additional skill-based increments, i.e. flying pay, diving pay, parachuting pay, etc. However, other additions to the basic rate of service pay are temporary and not skill-based and consequently are disregarded for ALSO calculation purposes. These other factors represent service factors which cannot be taken into account, for example Longer Service at Sea, Longer Separated Service Allowance, Missed Meals Allowance, etc.”

The letter later “confirmed” that London weighting, even if not included in pensionable pay, was classed as earnings for ALSO purposes.

The appeal to the pensions appeal tribunal

11. The Statement of Case took matters no further forward in terms of explanation of the Secretary of State's decision. The claimant attended the hearing before the pensions appeal tribunal (PAT) on 12 May 2006 with a representative from the RBL. His arguments as recorded by the chairman included that London weighting was a temporary payment and should be excluded just as temporary payments were excluded from service pay and referred to dictionary definitions of earnings. The representative of the Veterans Agency appears to have relied mainly on the fact that a London weighting allowance is taxable.

12. The PAT's decision was to disallow the claimant's appeal. It found that the payment of £301 per month London weighting allowance was subject to income tax collected through PAYE, as was agreed by the claimant. Its reasons, described as in summary, were:

- “8.1 Article [15(1)] of the Service Pensions Order refers to occupation with equivalent gross income.
- 8.2 The Tribunal decided the Appellant's gross income was £44,016 pa which exceeded the relevant Army figure of £43,858.40 pa.
- 8.3 The Tribunal decided the payment of £301 per month was part of the Appellant's gross income.”

The appeal to the Commissioner

13. The claimant applied for leave to appeal to the Commissioner, raising a number of complaints about the conduct of the hearing but also the point about the London weighting allowance. The chairman of the PAT granted leave without any further comment. When giving directions as to the submissions to be made on the appeal, I suggested some points of law that could be regarded as arising in the circumstances. I

need not detail the course of the written submissions, but consider directly the way that the case was argued at the oral hearing.

The submissions for the claimant

14. Mr Clifford submitted first that the comparison contemplated by article 15 was a hypothetical one, between what a claimant was actually doing when in service and an occupation that he **could** follow subject to his pensioned disablement, as a claimant might not be working at the date relevant to entitlement to ALSO. Therefore, Mr Clifford argued, a specific actual allowance, personal to the particular claimant rather than to the occupation as such, should not be taken into account as part of “equivalent gross income”. He accepted that the hypothetical nature of the comparison means that a job actually being done by a claimant might not define the upper limit of the occupations of which he is capable, but suggested that it should normally be accepted as doing so unless it is obvious that the claimant is “punching below his weight”. Mr Clifford submitted second that the test of equivalence meant that like had to be compared with like, so that an allowance like a London weighting allowance could not be included on one side of the equation but excluded from the other. Since the range of allowances that might be available in a claimant’s regular occupation was so wide and difficult to identify, given that assumptions would have to be made of that occupation continuing for purposes of comparison, he submitted that the right solution was to exclude such allowances from both sides of the equation. The use of the word “gross” directed decision-makers to income from work before the deduction of income tax and social security contributions, but did not justify comparing income on a non-equivalent basis by requiring all taxable income from the other occupation to be taken into account.

15. Mr Clifford commented on some points made in written observations dated 18 October 2006 on behalf of the Secretary of State. The first was that additional service allowances that were temporary and not skills-based, such as allowances for longer service at sea, longer separated service and missed meals, were not taken into account as they did not reflect an element of the service-member’s permanent remuneration package, merely temporary circumstances during service. It was then said that the claimant’s London weighting allowance was not a temporary allowance and was part of his gross income. Mr Clifford submitted that that was wrong: the London weighting allowance was temporary, as the claimant’s job could have been relocated, and was not skills-based. Further, the Tri Service Regulations for Allowances (JSP 752), available on the Ministry of Defence website, described the recruitment and retention allowance (London) payable to personnel on long-term assignment in London, which was taxable, but which was not taken into account by the Veterans Agency in calculating income from an ALSO claimant’s regular service occupation (as later confirmed by officials present at the oral hearing, even if the claimant had been in receipt of such an allowance immediately before the termination of service).

16. The observations of 18 October 2006 had also stated that a London weighting allowance equated to the service “x” factor:

“payable to all service personnel for working in conditions peculiar to the armed forces and [which] does not rely, for its payment, on the skills an individual may or may not have. The service ‘x’ factor is, from 2000, a 13 per cent increase on the value of an equivalent civilian occupation.”

Mr Clifford submitted, by reference again to information available on the Ministry's website and to the existence of a separate London allowance in JSP 752, that the concept of an overall percentage uplift to pay rates under the "x" factor was an entirely different concept from that of a London weighting allowance, to compensate a worker for the higher costs of working and living (or commuting) in London and to assist in recruitment and retention. He also submitted that income from the regular occupation should take account of a claimant's prospects of promotion if the service disablement had not occurred and that in the present case the claimant might have been expected to convert to a late entry officers commission from a short service commission and to have become a Major (current rates £50,983) or a Lieutenant-Colonel (current rates £66,047).

17. Mr Clifford submitted that the PAT had erred in law by regarding it as decisive that the claimant's London weighting allowance was taxable and by ignoring the necessity for comparison on an equivalent basis, under which the allowance should have been left out of account as reflecting temporary circumstances, not a permanent feature of his occupation. Alternatively, the PAT had failed to give adequate reasons as to why it decided against the claimant and rejected his arguments, particularly about the temporary nature of the London weighting allowance. He asked me to set aside the PAT's decision and suggested that the evidence allowed me to substitute a decision in the claimant's favour.

The submissions for the Secretary of State

18. Mr Wong submitted first that the phrase "gross income" has to be given its natural and ordinary meaning, and that there was nothing in the context to restrict the full width of the meaning as "that which comes in" from the occupation in question. That would plainly cover the claimant's London weighting allowance, as confirmed by its being subject to income tax. He adopted a suggestion made during the hearing, that the word "equivalent" did not in itself add any extra condition, but merely indicated (by using a different word from "equal") that the comparison was to be made as a matter of substance, allowing some leeway. However, it was confirmed that, in practice, if an ALSO claimant's current gross income from an alternative occupation was £1 below the updated level of gross income from the regular occupation, ALSO (of £1) would be awarded. Mr Wong submitted second that it would be administratively unworkable if a London weighting allowance were excluded from the gross income from an alternative occupation. As a matter of fairness, it would be necessary to try to identify, in the cases of claimants working in London whose pay did not include a separately identified weighting allowance, what element of the pay was attributable to being based in London and to extend that approach to all other locations. He stressed the desirability of having a rule that provided sufficient certainty to be applied consistently by non-legally qualified decision-makers.

19. In response to the case made for the claimant, Mr Wong maintained that the true distinction between non-skills-based allowances (not taken into account) and the London weighting allowance was between sums that formed part of a person's permanent remuneration and sums which did not. Since eligibility for non-permanent allowances fluctuated unpredictably there was no sound basis for including them in the hypothetical figure of gross income from the regular service occupation on the assumption that that occupation was continuing at the date relevant to the calculation of ALSO. Paragraph 24.3 of his skeleton argument was as follows:

"In contrast, London Weighting is a permanent part of an employee's remuneration. It is a substantial sum which is not contingent; for the vast

majority of employees in London it is a fixture in their payslips from year to year. It may be withdrawn if an employer relocates an employee outside of London but there is a measure of certainty and predictability about its payment which is wholly missing in the case of, for example, a Missed Meals Allowance.”

20. Mr Wong referred to the decision of the Court of Appeal in *R v Deputy Industrial Injuries Commissioner, ex parte Humphreys* [1966] 2 QB 1 (also reported as appendix to R(I) 2/66) on SHA (not cited in either skeleton argument) in support of the proposition that decisions had to be based on the actual circumstances of the claimant, including in particular his place of employment, at the time relevant to entitlement. Mr Clifford in reply suggested that the views expressed in *Humphreys* did not necessarily support the outcome argued for by the Secretary of State. I shall come back to the Court of Appeal’s decision, which I have found helpful.

21. Mr Wong submitted that the PAT had applied the correct test by asking itself what was the claimant’s gross income in its ordinary meaning and that, even if its reasons had been inadequate in explaining why the claimant’s arguments had been rejected, its decision should not be set aside as it had reached the only legally possible result on the evidence before it. He said that the claimant had conceded before the PAT that the regular income figure to be used in the comparison was £43,858.40 and had not put forward any evidence of his prospects of advancement, so should not be allowed to re-open the issue of prospects of promotion before the Commissioner.

Discussion

22. A very brief look at the law on REA/SHA establishes what in my view is an instructive context. *Humphreys*, followed in this respect by the Court of Appeal in *R v National Insurance Commissioner, ex parte Mellors* [1971] 2 QB 401, also reported as appendix to R(I) 7/69, confirmed that SHA was designed to compensate for loss of earning capacity. That was because the test was the standard of remuneration the claimant could achieve in any suitable occupation that he was capable of following. ALSO, which I understand was itself known as special hardship allowance at earlier stages in its history, seems to me to have the same purpose. The working out of entitlement to REA/SHA created a great deal of administrative work and considerable legal difficulties, as is shown by the number of court and reported Commissioners’ decisions while REA and SHA were active benefits. However, as far as I have been able to establish, the problem of a London weighting allowance was not specifically considered.

23. In *Humphreys*, the claimant had an industrial accident when he was working as a ripper in a colliery near Wrexham, as a result of which he was no longer capable of that occupation. He obtained employment as a welder-burner, for which the earnings were below those of a ripper. He moved with his family to Doncaster, where wages were generally higher, and worked there as a welder-burner. His earnings were less than he would have received as a ripper in Doncaster, but more than he would have received as a ripper in Wrexham. For domestic reasons, the move to Doncaster did not work out and he and his family returned to Wrexham, where he was unable to find work. After their return an insurance officer decided that the claimant was not entitled to SHA because he was capable of following suitable employment (welder-burner in Doncaster) of an equivalent standard to his regular occupation (ripper in Wrexham). That decision was upheld by a deputy Commissioner and by the Divisional Court, but overturned by the Court of Appeal. Lord Denning MR regarded the case as a simple one. The

claimant's regular occupation and what would be suitable employment were simply as a ripper and as a welder-burner, not as a ripper or welder-burner in any particular part of the country. And in all parts of the country employment as a welder-burner was not of an equivalent standard to employment as a ripper. Then in working out the amount of entitlement, which depended on comparing probable standards of remuneration:

“You must compare like with like. If he is living at Wrexham, you must consider what his probable wages would be there as a welder-burner as compared with his wages there as a ripper. If he is living at Doncaster, you must consider what his probable wages would be there as a welder-burner compared with his wages there as a ripper.”

Davies and Salmon LJ agreed that the comparison had to be made in that way and that like had to be compared with like. In areas where the general level of wages was high, the cost of living was likely to be high also. Davies LJ thought that it was significant that the comparison to be made was not one between probable earnings or probable wages, but between probable standards of remuneration.

24. What seems to me particularly instructive about that decision is that the principle of comparing like with like, as applied to the comparison of probable standards of remuneration in the context of varying levels of earnings in different parts of the country, was not found from a close link to any specific rule in the governing legislative provision, but from its more general purpose or perhaps its expression in terms of comparing standards of remuneration. Now, prior to 9 April 2001 the 1983 Service Pensions Order put the test for ALSO in terms of an equivalent standard, ie of remuneration. You could therefore take the approach of the Court of Appeal in *Humphreys* as closely analogous. Was the amendment from 9 April 2001, to put the test in terms of equivalent gross income, intended to make a fundamental change in the nature of the comparison to be made? I would be reluctant to accept that it did have such an effect when no mention of it was made in the explanatory note to the amending Order. I should not speculate too much on why the change was made. It may be that, with the withering away of REA in the industrial injuries scheme and the impending transfer of what was then the War Pensions Agency from the aegis of the Department for Work and Pensions to that of the Ministry of Defence in June 2001, it was thought necessary to spell out that the equivalence was in terms of income from the alternative occupation. It may also have been thought that a test in terms of gross income would make the issues for decision simpler. However, the fundamental purpose of identifying a loss of earning capacity remains, not least because of the need to fill out the stark words of article 15 with assumptions to bring the gross income from the regular occupation up to date for purposes of any rational comparison. The approach in *Humphreys* therefore remains of value.

25. With that introduction, it seems to me that the strongest element of the case for the Secretary of State is the ordinary and natural meaning of gross income. It seems incontrovertible that if anyone had asked in the abstract what the claimant's gross income from his job was as at 30 September 2005 the answer would have been £44,016 per year. But the Secretary of State, inevitably in view of the purpose of the comparison to be made and the many hypothetical elements involved, recognises that that meaning does not supply a simple answer in all circumstances, so that some allowances that would be part of “what comes in” do not count. The distinction drawn in paragraph 24 of Mr Wong's skeleton argument, between sums which form part of an employee's permanent remuneration (such as, it was submitted, service skills-based allowances and

the London weighting allowance paid by the RBL) and sums which do not (such as, it was submitted, service non-skills-based allowances including the recruitment and retention allowance (London)) applies as much to the calculation of gross income from the alternative occupation as to the calculation of gross income from the regular occupation.

26. As explained below, I conclude that the distinction made by Mr Wong is not the right one in the context of article 15. But even if it had been, the Secretary of State's submissions would have broken down in their application to the present case. The considerations set out in paragraph 24.3 of the skeleton argument do not show that a London weighting allowance is always a permanent feature of an employee's remuneration. Sometimes it may be, for instance, if an employee's contract of employment expressly or impliedly specifies the area within which he can be required to work as London (however defined) and then provides for a separate element of remuneration as a London weighting allowance. If the allowance could only be lost if there were a variation or termination of the contract of employment, then there is a good argument for regarding the allowance as a permanent feature of the occupation, so long as that occupation continues. On the other hand, if an employee's contract of employment allows him to be sent anywhere in a larger geographical area, and merely provides for a London weighting allowance so long as his work is in London, the allowance could be regarded as not a permanent part of his remuneration. On that basis, the service recruitment and retention (London) allowance would be classified as not permanent. But the Secretary of State's submissions could not show that the claimant's London weighting allowance was permanent, as there was no evidence of the terms of his contract of employment with the RBL about the area within which he was obliged to work.

27. So far as Mr Clifford's submissions for the claimant are concerned, I accept the proposition that in carrying out the comparison required to establish entitlement to ALSO like must be compared with like. I do not accept that that follows from the use of the word "equivalent" in article 15. I consider that in its context that word merely indicates that the comparison is to be made as a matter of substance, allowing some flexibility, particularly in ignoring trivial differences or very short-term variations. I consider that the requirement to compare like with like stems from general principles of fairness and equity that ought to be applied unless statutory language compels a different conclusion. That is I think the basis of the Court of Appeal's decision in *Humphreys*, which is in itself at least a persuasive authority in support of that position. Indeed, the Secretary of State seems never to have argued against comparing like with like. The difference between Mr Wong's submissions and Mr Clifford's was really over how the London weighting allowance should be categorised in making that comparison. Mr Clifford submitted that the allowance was as temporary as the service non-skills-based allowances that were not counted as part of income from the regular occupation (both applying only so long as the qualifying circumstances continued) and on the same basis was not permanent. His preferred solution was to exclude all allowances from both sides of the equation. I do not accept that solution.

28. In my judgment, the way that the Secretary of State put matters to the PAT and in the written submission to the Commissioner was closer to the correct approach than Mr Wong's submissions at the oral hearing. What should be counted as part of gross income, as would have been counted previously as part of the standard of remuneration, are the payments normally made for the occupation in question. Thus payments made on a temporary basis and not continuing for long enough to become a normal part of

income would be excluded. The distinction is not between temporary and permanent. Not everything that is non-permanent is temporary. There is a large middle ground in between. The distinction is between what is normal and what is not normal. That is in essence the test that was adopted for REA/SHA. See Commissioner's decision R(I) 1/72, holding that overtime payments were to be counted if they had become a normal feature of the claimant's employment. See also the general statements in *Mellors*, including this from Buckley LJ:

"The standard of remuneration in each case must, I think, be taken to be the standard of remuneration which an employee of normal efficiency and industriousness, where efficiency and industriousness are relevant considerations, will be likely to earn working in that employment for such a number of hours in a week or other period which can be regarded as normal for persons employed in that employment, having regard to the conditions of the employment and the circumstances of the trade or industry in the appropriate geographical area under consideration."

29. Applying that approach to the present case, the only possible conclusion can be that the claimant's London weighting allowance had become a normal part of his income from his occupation with the RBL a long time before September 2005, regardless of what his contract of employment said about where he could be required to work. Then, in comparing like with like and with the guidance of the Court of Appeal in *Humphreys* about the proper approach to comparison where pay varies between geographical areas, the service recruitment and retention allowance (London) would have to be counted as part of income from the regular occupation. It is true that that allowance would not be permanent, in the sense discussed in paragraph 26 above, but that does not mean that it could not be a normal part of service income. Although Mr Clifford did not put in this part of the guidance in JSP 752, paragraph 06.1204 states that the allowance is paid where a person is serving at an establishment within the specified area (a five-mile radius of Charing Cross) for a period expected to exceed 182 continuous days. In making the hypothetical comparison of standards of remuneration required by article 15, what matters is what the claimant is to be assumed to have been capable of earning from the regular occupation at the time that the comparison is made and taking into account the geographical location of the occupation with which the comparison is being made. Thus it does not matter whether a recruitment and retention allowance (London) was ever actually paid to the claimant in question. What matters is what the claimant would normally be paid in his regular occupation if carried out in the location of the comparator occupation for as long as the comparator occupation has been carried out there.

30. That approach avoids the unfairness suggested by Mr Wong of differential treatment of London employees who happen to have a separately identified London weighting allowance and those who do not (although I would not have given much weight to his argument about administrative unworkability). It may be that a test in terms of normal income makes it more difficult for the Veterans Agency to give all or nothing administrative guidance to its officers about whether particular service allowances should be counted for ALSO purposes or not, but that is not an immediate concern for me. I have given close consideration to Mr Clifford's submission that the range of service allowances is such that allowances should be excluded on both sides of the equation, but have rejected that solution for several reasons. First, it goes too far in excluding all service allowances, even permanent ones, and, if there was some limitation, offered no secure basis for a distinction. Second, a comparison of earning

capacity and the approach of the Court of Appeal in *Humphreys* points towards an inclusive solution rather than an exclusive solution. Third, so does the use of the phrase “gross income” in article 15.

31. What neither I nor the PAT had evidence about is the rate at which the recruitment and retention allowance (London) was payable in September 2005. Although information is available on the Ministry of Defence website and in annual reports of the Armed Forces Pay Review Body, it is appropriate for the evidence to be put before and considered by a new PAT rather than before me. Thus, I cannot say in the present decision how the approach adopted above will affect the final practical result in the claimant’s case. I suspect that it would leave the claimant qualified for ALSO, but not at the maximum rate, so that the precise calculations would be important.

32. I can deal with the prospects of promotion issue very shortly. The notion of a person’s “trade or profession as a member of the armed forces” is not entirely straightforward. A person’s profession might in many contexts be described by reference to the branch of their service or particular speciality rather than their rank at any particular time. However, even in the case of an officer, the different responsibilities attached to different ranks would justify regarding the trade or profession at the date of termination of service, if that is the relevant date, as being as an officer of the particular rank then enjoyed. I would see no difficulty, if pay within that rank increased by increments within a scale, in assuming a progression up the scale as part of the up-dating of the income from the regular occupation. That would apply if the increments were automatic or (probably, I would reserve a final answer) if the increments were subject only to some sort of negative bar at a particular point. However, a promotion to a higher rank or a shift to a different pay scale that required a positive decision for change could not in my judgment be taken into account in that process. That would in effect be taking a claimant to have a different regular occupation from the one actually followed at the relevant date. Only if the evidence was that promotion to a higher rank was automatic or (possibly) routinely awarded unless something went wrong could the position be assimilated to that of an automatic progress up a pay scale. There is no direct analogy to be drawn from the position for REA/SHA because the industrial injuries legislation (currently paragraph 11(6) of Schedule 7 to the Social Security Contributions and Benefits Act 1992) makes specific provision for taking into account normal prospects of advancement in the regular occupation. There is no such specific provision in article 15 of the 2006 Service Pensions Order.

33. Accordingly, it does not matter whether or not the claimant had in substance raised the question of his prospects of promotion if he had continued in service before the PAT, either in writing or orally (the subject of the further submissions after the oral hearing of 19 April 2007). A failure to deal with that issue, if it had been the sole failure by the PAT, would not have constituted a good reason to set its decision aside.

The Commissioner’s decision on the appeal

34. In the light of my conclusions above, the PAT erred in law in apparently regarding the question of whether the claimant’s London weighting allowance was taxable as decisive of the issue before it. Although the PAT was right in treating the allowance as part of the claimant’s gross income from his occupation with the RBL, it did not carry out a comparison on a like with like basis. That would have involved enquiring as to the payments that would have been made to an officer of the

claimant's rank at the end of his service if assigned to central London in September 2005. I do not think that the claimant's acceptance that the appropriate current salary figure for a captain on the scale that he was on at the termination of service was £43,858.40 absolved the PAT from the duty to apply what I have now held to be the right test. However, if I am wrong about that, I have no doubt that the PAT's reasons for decision were not adequate, contrary to Rule 18(1)(b) of the Pensions Appeal Tribunals (England and Wales) Rules 1980. The matters mentioned in paragraph 8 of the chairman's statement as reasons, as opposed to the findings of fact in paragraph 7, really did no more than restate the conclusion about the amounts of gross income from the claimant's regular occupation and from his occupation with the RBL. The statement gave no reasons for the inclusion of the London weighting allowance in the latter (except by inference from its finding that it was taxable) or for why it rejected the claimant's argument, as recorded in the chairman's record of proceedings, that a London weighting allowance was temporary and that, if temporary allowances were excluded from income from the service regular occupation, they should be excluded from the income from his civilian occupation. Those failures related to issues material to the success or failure of the claimant's appeal. The PAT erred in law on that ground also.

35. Accordingly, I set aside the PAT's decision. For the reasons mentioned in paragraph 31 above and also because there could well be further relevant evidence about the intricacies of service allowances, I am not in a position to substitute a decision on the claimant's appeal against the Secretary of State's decision of 30 September 2005 on the evidence before me. The best qualified body to consider the further evidence that needs to be put forward is a new PAT. I therefore refer the case to a differently constituted PAT for determination in accordance with the following directions.

Directions to the new PAT

36. There must, subject to any exercise by the Secretary of State of a power to review the decision of 30 September 2005 in the claimant's favour and to any directions as to procedure given by a chairman of PATs, be a complete rehearing of the claimant's appeal on the evidence produced and submissions made to the new PAT, which will not be bound by any findings made or conclusions expressed by the PAT of 12 May 2006.

37. Before the rehearing, the Secretary of State must produce a further Statement of Case dealing with the calculation of the income from the claimant's regular occupation on the basis set out in paragraph 29 above, with supporting evidence of the rates as at September 2005 of the recruitment and retention allowance (London) and of any other allowance that would have been payable to an officer of the claimant's rank stationed in central London on a long-term basis. The further Statement must also specify the date when the decision that it is submitted that the new PAT should make would take effect, with reference to the legal provisions that it is submitted support that date. Is Schedule 3 to the 2006 Service Pensions Order (Schedule 4 to the 1983 Order) relevant where the revised decision on review is not to make an award? If it is relevant, is the appropriate date under paragraph 1(5) the date of the revising decision, rather than the date on which the consideration of review by the Secretary of State starts? If it is not relevant, is there any provision as to the effective date of the decision? The further Statement of Case may of course raise any other points considered relevant by the Secretary of State.

38. As the new PAT will be conducting a complete rehearing, the claimant is free to put forward any arguments and evidence on any points relevant to his appeal. In particular, if he wishes to argue, in the light of what I have said in paragraph 32 above,

that the basic salary from his regular occupation should be calculated from some other scale than the one that produced the figure of £43,858.40, he should put that argument forward in writing, with supporting evidence, preferably in an answer to the further Statement of Case directed in the previous paragraph.

39. The new PAT must follow the legal approach set out above in making a like with like comparison of the claimant's earnings capacity from his service regular occupation and from his occupation with the RBL as at September 2005. The burden of proof is on the Secretary of State to show a ground of review of the decision awarding the claimant ALSO and that the revised decision on review should be adverse to the claimant. The new PAT must deal fully with all material points in dispute between the claimant and the Secretary of State and explain its reasoning on those points.

