Neutral Citation Number: [2010] EWCA Civ 1099

Case No: C1/2009/2621

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(MRS JUSTICE COX) CO/6062/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2010

Before :

LORD JUSTICE LAWS
LORD JUSTICE MUNBY
and
LADY JUSTICE BLACK

- -

Between :

Metropolitan Police Authority **Appellant** **- and -** **Belinda Laws** **Respondent** **- and -** **Police Medical Appeals Board** **Additional Party**

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- -

Mr Timothy Pitt-Payne QC (instructed by Metropolitan Police Authority) for the Appellant
Mr Christopher Nugee QC and Mr David Lock (instructed by **Lake Jackson**) for the Respondent
Mr Simon Butler (instructed by **Police Medical Appeals Board**) for the Additional Party

Hearing dates : 10 June 2010

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Approved Judgment

Lord Justice Laws :

INTRODUCTION

1. This is an appeal, with permission granted by Sir Richard Buxton on 13 January 2010, against the decision of Cox J given in the Administrative Court on 12 November 2009 by which she acceded to the claimant's application for judicial review of a decision of the Police Medical Appeal Board dated 17 March 2009. The appellant is the Metropolitan Police Authority, to which I will refer as the Authority. The successful claimant is of course the respondent to the appeal, but it will make for clarity if I refer to her as the claimant. The Police Medical Appeal Board – "the Board" – are named as an additional party.

2. The decision of the Board which was successfully challenged was to reject the claimant's appeal against the determination of the Selected Medical Practitioner to the effect that the degree of the claimant's disablement for the purposes of her police injury pension should be reduced from 85% to 25%.

THE REGULATIONS

3. At the time the claimant's entitlement to a police injury pension arose the governing statutory provisions were contained in the Police Pension Regulations 1987 ("the 1987 Regulations"). At length they were succeeded by the Police (Injury Benefit) Regulations 2006 ("the 2006 Regulations"). We need consider only the 2006 Regulations, since transitional provisions make it clear that injury pension awards made under the 1987 Regulations are to be treated as if made under the 2006 Regulations. The material provisions of the 2006 Regulations are as follows:

> "11(1) This regulation applies to a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received, without his own default, in the execution of his duty (in Schedule 3 referred to as the 'relevant injury').
>
> 11(2) A person to whom this regulation applies shall be entitled to a gratuity, and, in addition, to an injury pension, in both cases calculated in accordance with Schedule 3..."

The meaning of "permanently disabled" is given by Regulation 7:

> "(1)... [A] reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision, and to that disablement, being, at that time, likely to be permanent...
>
> (5) Where it is necessary to determine the degree of a person's disablement, it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force."

4. The remaining material provisions in the Regulations are as follows:

> "30(1) Subject to the provisions of this Part, the question whether a person is entitled to any, and if so what awards under these Regulations, shall be determined in the first instance by the police authority.
>
> (2)... [W]here the police authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them, the following questions: (a) whether the person concerned is disabled; (b) whether the disablement is likely to be permanent...; and, if they are further considering whether to grant an injury pension, shall so refer the following questions: (c) whether the disablement is the result of an injury received in the execution of duty; and (d) the degree of the person's disablement; and, if they are considering whether to revise an injury pension, shall so refer question (d) above.

...

(6) The decision of the Selected Medical Practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and shall, subject to [regulation] 31..., be final."

5. Regulation 31 provides for appeal to the Police Medical Appeal Board. Regulation 31(3) provides that:

> "The decision of the Board of Medical Referees shall, if it disagrees with any part of the report of the Selected Medical Practitioner, be expressed in the form of a report of its decision on any of the questions referred to the Selected Medical Practitioner on which it disagrees with the latter's decision, and the decision of the Board of Medical Referees shall... be final".

Finally, Regulation 37(1) provides:

> "Subject to the provisions of this Part, where an injury pension is payable under these Regulations, the police authority shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered; and if after such consideration the police authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly".

THE FACTS

6. The essential facts may be shortly described. The claimant joined the Metropolitan Police as a uniformed police officer in 1995. She was then aged 27. On 11 October 1997 she was assaulted and injured in the course of an incident in Trafalgar Square in which she was attempting to handcuff a suspected person. Her condition deteriorated. At length she sought an injury award under the 1987 Regulations. Such a claim had to go before the Authority's Selected Medical Practitioner ("SMP"). A Dr Reynolds acted in that capacity. He was a consultant in rehabilitative medicine employed by the Authority. He saw the claimant and reported on her condition on a number of occasions. On 2 December 1998 he signed a certificate for the purposes of Regulation H1 of the 1987 Regulations to the effect that the claimant was permanently disabled from performing the ordinary duties of a member of the Force. She was accordingly retired from service with the Authority on ill health grounds in February 1999.

7. Dr Reynolds assessed the degree of the claimant's disablement, that is to say the degree to which her earning capacity was affected as a result of the injury, at 60%. The claimant was entitled to appeal this assessment to the Medical Referee, and did so. Her appeal was heard on 18 November 1999 by Dr Meanley, a consultant occupational health physician. He allowed the appeal and determined that the claimant's degree of disablement was 85%. It is clear from the Medical Referee's opinion (as the judge noted at paragraph 12 of her judgment) that the claimant was suffering from psychiatric difficulties, but Dr Meanley determined that these flowed directly from her physical injuries.

8. In 2002 the claimant's degree of disablement was maintained on review at 85%. In 2004 she obtained a part time place as a disabled student at University College Northampton to study for a degree in law.

Her next pension review took place in 2005 and was conducted by Dr Porritt, who was by then the SMP. Again, her degree of disablement was maintained at 85%.

9. The claimant's next pension review was to take place in 2008, in which year she also completed her studies and obtained her law degree. (By this time the 2006 Regulations were effective, and as I have said we need consider only those.) Dr Porritt conducted the 2008 review. The learned judge described her findings as follows (paragraph 16):

> "Dr Porritt noted that there were now co-existing conditions of lower back pain, irritable bowel syndrome, and fibromyalgia, or chronic fatigue syndrome. She also noted that the claimant had completed a law degree on a part time basis and she concluded that the claimant was now capable of working 75 per cent of normal hours, that is 30 hours per week. Three comparative jobs were put forward by the MPA which, on a reduced hours basis, led Dr Porritt to assess the claimant's degree of disablement at 25 per cent."

On 1 October 2008 the claimant appealed to the Board against this assessment. The appeal was heard on 4 March 2009. The Board questioned Dr Porritt as to the change in her assessment from 85% (2005) to 25% (2008), and reported her answers as follows:

> "She [sc. Dr Porritt] also mentioned that Ms Laws suffered from multiple pains; other medical factors had been suggested by the consultant neurologist, including chronic fatigue/fibromyalgia syndrome as well as irritable bowel syndrome.
>
> The SMP was challenged over her previous assessment in 2005 when she had left the appellant with a degree of disablement of 85%. She reported that this was early in her career with the Metropolitan Police Service. At that time she had been advised that if the clinical disablement had remained unchanged, there was no need for her to alter the degree of disablement.
>
> Since that time, however, there had been a significant change in the overall review process of all ill-health retirements and degree of disablement assessments. In the review process a much more robust approach is taken and in each and every case a job comparison study is undertaken.
>
> It was pointed out that degree of disablement is fundamentally related to the impact upon earnings capacity, rather than the clinical condition per se."

The Board dismissed the claimant's appeal on 17 March 2009.

THE BOARD'S DECISION

10. The Board described the task it faced as follows (p. 9 of the decision):

> "The task for the Board in this case is to assess the current impact upon earnings of the index event of 11/10/97 and then determine the degree of disablement as defined in the Regulations."

The Board noted that the claimant had not been in paid work since her retirement, and that she had obtained a law degree in July 2008. They described central aspects of the medical case, as the Board saw it, and expressed their conclusions as follows (pp. 9 – 10):

> "In October 1997 the RIDDOR report indicated that she suffered an injury to her right thumb and left shoulder.
>
> When questioned about the index event Ms Laws reported an injury to her left thumb and left shoulder, describing how she suffered the injury, whilst hand-cuffing a suspect, who was being held on the floor by another officer.
>
> The inconsistency between the recorded event and the appellant's current account raises doubt as to the severity of that injury. The Board noted that the contemporaneous records merely indicate a slight soft tissue injury.
>
> The level of reported functioning is inconsistent with the injury. There is evidence of marked illness behaviour, with widespread body pain and symptoms unrelated to the incident and not supported by clinical findings.
>
> The report from a consultant neurologist (October 2008) and that of the SMP, are consistent with the Board's finding of no organic pathology. The Board note the co-existence of unrelated psycho-physical symptoms, in the form of the suggested diagnoses of chronic fatigue syndrome/fibromyalgia/IBS. The presence of these features requires a bio-psycho-social rehabilitation plan be put in place to enable her to return to work.
>
> Functionally, she reports being able to walk, stand, sit and drive for periods of between 15 and 30 minutes. She is able to fully self-care and requires no assistance in this regard. She describes her memory and concentration as good.
>
> From a competency point of view, she has a degree and therefore arguably she is capable of undertaking the roles put forward by the Police Authority, in terms of the administrative tasks required. It is however accepted that she may require adjustments in the work place but these would be in keeping with requirements under disability legislation.
>
> Taking her level of functioning in the round, the Board consider she is capable of at least the 30 hours suggested by the SMP.
>
> ...
>
> From questioning the appellant, it is clear that there has been a significant improvement since 1998, and it is manifestly clear that the argument that her condition has not improved is not sustainable.
>
> ...
>
> Taken in the round the Board conclude that the appellant is capable of working 30 hours per week and has the competencies to carry out the roles put forward. No other roles have been suggested by the appellant."

And so the appeal was dismissed.

THE FIRST GROUND OF APPEAL: CONSTRUCTION OF THE REGULATIONS

11. The learned judge acceded to the judicial review claim primarily because she accepted as correct the construction of the Regulations advanced by Mr Lock for the claimant. The Board failed to adopt this construction, and in consequence (as the judge put it at paragraph 35 of her judgment) they erroneously conducted "an entirely fresh assessment of the claimant's degree of disablement and its causes, rather than directing their minds, as required by the regulations, to whether her degree of disablement had substantially altered since the last review in 2005".

12. The correctness or otherwise of the construction adopted by the judge is the first issue in the appeal. The strict point of interpretation involved depends on the relation between Regulations 30(6) and 31(3) on the one hand, and 37(1) on the other. As I have shown, Regulation 30(6) provides that the decision of the SMP on the question or questions referred to her shall be final (and 31(3) makes like provision in relation to the Board's determination of an appeal from the SMP). Accordingly, so the judge held, the SMP's decision is not to be revisited save on an appeal under Regulation 31 (or, it should be added, on a judicial review, if that were ever appropriate). The Board's determination on a Regulation 31 appeal can only be revisited by judicial review. Regulation 37(1) then provides for periodic reviews at which the authority is to consider "whether the degree of the pensioner's disablement has altered". On the judge's approach this does not allow the SMP or the Board to redetermine the merits of any earlier decision of either. They are only to decide whether there has been an alteration since the last decision before their current consideration of the matter – in this case the 2005 review. As the judge put it:

> "28. It is clear from these provisions that each determination of the SMP, or on appeal by the Board, is to be treated as being final. Thus, where an injury pension has been reassessed under regulation 37 and a decision has been made by the SMP concerning the degree of the recipient's disablement at that date, that decision is final for all purposes, subject to the continuing duty, periodically, to reassess the pension under regulation 37.
>
> 29. While the [Authority] clearly had a duty under regulation 37 to carry out from time to time further reviews of this claimant's injury pension, they could only revise her pension if the SMP on referral, or the Board on appeal, concluded that the claimant's degree of disablement, as defined by regulation 7(5), had substantially altered since the last review."

13. The learned judge's decision was influenced (see paragraphs 42 and 45) by the earlier judgment of Burton J in *Turner* [2009] EWHC Admin 1867, where this was said:

> "21... It is important from the point of view of disputes such as pension entitlement that a decision once made should be final if at all possible, and that is what is provided for by these Regulations... [I]t is clearly fair both for the police force and for the community that someone who starts out on a pension on the basis of a certain medical condition should not continue to draw a pension, or any kind of benefit, which is no longer justified by reason of some improvement in his condition, or, of course, the reverse."

In view of further points in the case, to which I will come, it is convenient also to set out paragraph 23 of the decision in *Turner*:

> "23. [Having referred to the decision of Ouseley J in *Crocker* [2003] EWHC Admin 3115 and Regulation 7(5)] It is apparent, therefore, that in considering questions of disablement earning capacity is important, but... *Crocker*... would not justify starting from scratch in relation to earning capacity, because in the present case what is posed under Regulation 37 is the degree if any to which

> the pensioner's disablement has altered. By virtue of Regulation 7(5) that would include a scenario in which the degree of the pensioner's disablement had altered by virtue of his earning capacity improving... Mr Lock accepts that if there is now some job available which the defendant would be able to take by virtue either of some improvement in his condition or in the sudden onset of availability of such a job then that would be a relevant factor. But it would all hang on the issue of alteration or change after 'such intervals as may be suitable'. There is no question of relitigation and, of course, 'suitable intervals' suggests that this is not a matter which should be revisited every year, nor is it."

14. In relation to the first ground of appeal Mr Pitt-Payne QC for the Authority puts his case two ways. His primary position is to assault the construction of the Regulations adopted by the judge root and branch. Thus he advanced a broad submission to the effect that the starting-point for the Board (or the SMP) was to consider the pensioner's current degree of disablement, and compare it with the previous assessment. But the requirement to treat the previous assessment as "final" does not oblige the Board to accept all the clinical judgments made in or for the purpose of the previous assessment. It means only that the Board has to accept that the pensioner was entitled to whatever pension was then fixed; it is open to them, however, to arrive at their own assessment under Regulation 37(1) by a process of reasoning which may involve a frank departure from earlier clinical judgments.

15. Mr Pitt-Payne's secondary position was to submit that if as the judge held it was necessary to find for the purposes of Regulation 37(1) an actual change in the degree of the pensioner's disablement if the pension was to be revised, that was made out here. The Board identified points of alteration since 2005, such as the claimant's law degree and the fact that she was now applying for jobs herself.

16. I do not accept Mr Pitt-Payne's primary argument. It cannot sit with the language of the Regulations. The requirement of finality in 30(6) does not merely apply to the percentage figure arrived at to represent the pensioner's disability. It applies to the decision of the SMP "on the question or questions referred to him under this regulation". This must include the essential judgment or judgments on which the decision is based. So much is, I think, confirmed by the text of 31(3) which I repeat for convenience:

> "The decision of the Board of Medical Referees shall, if it disagrees with any part of the report of the Selected Medical Practitioner, be expressed in the form of a report of its decision on any of the questions referred to the Selected Medical Practitioner on which it disagrees with the latter's decision, and the decision of the Board of Medical Referees shall, subject to the provisions of regulation 32, be final".

17. It seems to me to be plain that the Board's decision is to be in the form of a reasoned report; and it is that to which the finality requirement applies. The requirement's scope must be the same for Regulation 30(6). Moreover Mr Pitt-Payne's approach is bizarre, or at least eccentric. It means that the SMP/Board would be required to respect an earlier disability percentage finding, say of 85%, while being free to depart root and branch from the reasoning which supported it. Regulations might, I suppose, make such provision, perhaps to offer a special measure of protection for the pensioner; though of course on Mr Pitt-Payne's reasoning the SMP/Board might determine that the earlier clinical position actually justified a *higher* award than had been arrived at. At all events, such a legislative state of affairs would in my judgment require very clear words. It cannot be got out of Regulations 30 and 31 as they stand.

18. So much is surely confirmed by the terms of Regulation 37(1), under which the police authority (*via* the SMP/Board) are to "consider whether the degree of the pensioner's disablement has altered". The

premise is that the earlier decision as to the degree of disablement is taken as a given; and the duty – the *only* duty – is to decide whether, since then, there has been a change: "substantially altered", in the words of the Regulation. The focus is not merely on the outturn figure, but on the *substance* of the degree of disablement.

19. In my judgment, then, the learned judge below was right to construe the Regulations as she did. Burton J's reasoning in paragraph 21 of *Turner*, which encapsulates the same approach, is also correct. The result is to provide a high level of certainty in the assessment of police injury pensions. It is not open to the SMP/Board to reduce a pension on a Regulation 37(1) review by virtue of a conclusion that the clinical basis of an earlier assessment was wrong. Equally, of course, they may not *increase* a pension by reference to such a conclusion; and it is right to note that Mr Butler, appearing for the Board, voiced his client's concern that so confined an approach to earlier clinical findings might in some cases work to the disadvantage of police pensioners. Strictly that is so. But the clear legislative purpose is to achieve a degree of certainty from one review to the next such that the pension awarded does not fall to be reduced or increased by a change of mind as to an earlier clinical finding where the finding was a driver of the pension then awarded.

20. It is worth bearing in mind that there will (as I have foreshadowed) be a residual class of case where the SMP/Board's substantive judgment may be overturned in judicial review proceedings. But one needs to be very guarded about such a possibility. It is not immediately obvious who might be a proper party to launch such proceedings. Moreover a conventional *Wednesbury* ([1948] 1 KB 223) challenge, asserting that there was no legally sufficient evidence to justify the conclusion, will no doubt be very rare. But there might be a case in which it can be definitively shown that a decisive aspect of the medical evidence has been misunderstood. Any material legal error could of course generate a good judicial review. That would no doubt include a case where the decision in question had been procured by fraud.

21. I indicated that Mr Pitt-Payne had a second string to his bow on the first ground of appeal. In truth, however, his argument advanced under this head did not go to the construction of the Regulations so much as the Board's reasons for its decision. He submitted that if (as I would hold in agreement with the judge) it was necessary to find an actual change in the degree of the claimant's disablement, the Board properly so found. The difficulty is that while no doubt the Board had regard to events occurring since 2005, it is clear that they also revisited earlier conclusions. Thus for example: "[t]he inconsistency between the recorded event and the appellant's current account raises doubt as to the severity of [the original] injury... [t]he level of reported functioning is inconsistent with the injury... The report from a consultant neurologist (October 2008) and that of the SMP are consistent with the Board's finding of no organic pathology... From questioning the appellant, it is clear that there has been a significant improvement *since 1998*" (my emphasis).

22. It is in my judgment clear that the decision of the Board cannot survive the application of the correct construction of the Regulations. Whether the antecedent decision of the SMP in 2008 is likewise vulnerable is the subject of the sixth ground of appeal.

23. That disposes of the first ground of appeal. It is accepted that the second ground is adjectival to the first, and I need say no more about it.

THE THIRD GROUND OF APPEAL: RE-OPENING EARLIER FINDINGS

24. The complaint here is that the learned judge was wrong to hold that the Board re-opened earlier findings. Her conclusion (judgment, paragraph 44) that "the Board sought to revisit and reconsider the nature and extent of the original injury" is the focus of criticism.

25. I have in effect already dealt with this in addressing what was put forward as Mr Pitt-Payne's subsidiary argument on the first ground of appeal. The short passages from the Board's decision which I have cited at the end of paragraph 21 show that this ground is misplaced. The Board clearly questioned earlier findings. In addition, it is to be noted, as submitted in Mr Nugee's skeleton argument for the claimant, that there is no acknowledgement on behalf of the Authority of the emphatic findings of Dr Meanley whose report is extensively cited by the learned judge (paragraph 11) and who stated that "the appropriate disability banding should be **Very Severe Disability**..." There is nothing in ground 3.

THE FOURTH GROUND OF APPEAL: THE CLAIMANT'S LAW DEGREE

26. Mr Pitt-Payne submits that the judge erred in holding that the Board should not have had regard to the claimant's law degree in assessing the extent of her disablement. It is plain that the Board did indeed take the law degree into account. The judge held (paragraph 49) that "[a] change in the claimant's skill set because of her law degree is not... a change in the claimant's earning capacity 'as a result of' the duty injury, as required by the regulations". The reference is to Regulation 7(5): "the degree of... disablement... shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default".

27. Here I think the judge was in error. She has approached Regulation 7(5) as if it meant that the pensioner's earning capacity is fixed, unaffected by anything save the duty injury. That would be highly artificial, and is not what the Regulation contemplates. Its terms allow for the obvious possibility that the pensioner's earning capacity may vary from time to time by force of external factors (and of course one pensioner's earning capacity will differ from another's). Objectively, the extent to which a pensioner remains disabled from work by reason of a duty injury must be capable of being affected by the acquisition of new skills. The question under 7(5) then is, what is the impact of the duty injury on the pensioner's earning capacity as the SMP/Board find it on the facts before them. I have some sympathy with the view, forcefully urged by Mr Nugee, that if matters such as his client's law degree were taken into account, there would be a "disincentive to acquiring new skills" (skeleton argument paragraph 7.3). But the regime is designed to meet objective need; and Burton J in *Turner* was surely right to observe at paragraph 23 that "[b]y virtue of Regulation 7(5) that would include a scenario in which the degree of the pensioner's disablement had altered by virtue of his earning capacity improving".

28. If my Lord and my Lady agree in the result with this judgment (including my conclusion on the sixth ground of appeal, which goes to the appropriate form of relief) the appeal will fall to be dismissed and the claimant will enjoy the benefit of the 2005 review until her case is reviewed again under Regulation 37(1). The issue as to the claimant's law degree will not be a determinant of the appeal's result but the impact of her law degree will fall to be considered on any such further review. I would venture the opinion that, unless there are then further facts now unknown to us, its impact is likely to be modest. While of course her gaining the degree demonstrates a level of intellectual ability as well as determination on the claimant's part, unless it has concrete results in terms of actual job prospects

(and the degree is not, of course, a professional qualification) its effect on her earning capacity seems to me to be largely speculative.

THE FIFTH GROUND OF APPEAL: NUMBER OF HOURS WHICH THE CLAIMANT COULD WORK

29. At paragraph 51 the judge held that the Board's conclusion that the claimant would be capable of working on the open labour market for 30 hours per week was irrational. I disagree. This was a matter of judgment, and the Board's conclusion was supported by the SMP. Again, however, the point cannot carry the appeal for the Authority if my Lord and my Lady agree with my conclusions on ground 1.

THE SIXTH GROUND OF APPEAL: REMEDY

30. For the reasons I have given I would uphold the judge's decision to quash the decision of the Board. However she also quashed the 2008 decision of the SMP. There was something of a procedural wrangle, as the claimant had no permission distinctly to challenge the SMP's decision. In the event the judge granted permission out of time. The only question is whether the SMP's decision is itself legally flawed.

31. It is to be noted that in the discussion after judgment below Mr Walsh, then representing the Authority, stated that he accepted "the common sense of the suggestion that if the Board got it wrong for the reasons your Ladyship has decided, then so too must Dr Porritt have got it wrong". With respect to Mr Walsh the logic of that seems very fragile. In my judgment, however, the SMP's decision of 2008 impermissibly revisited past conclusions just as the Board's decision did. She relied on the same points raised by the neurologist as were emphasised by the Board as calling in question (as I read the Board's report) the pre-2008 conclusions. Her reference to a change in the review process of ill-health retirements since her early days in the Service suggests a retrospective criticism. All the indications are that her approach and that of the Board were of a piece. I consider that the judge was right to quash the decision of the SMP.

CONCLUSION

32. I would dismiss the appeal. If my Lord and my Lady agree, the result will be that the claimant's pension stands at 85% on the footing of the 2005 review. When the matter is next reviewed the SMP/Board will have regard to the terms of our judgments on this appeal.

Lord Justice Munby

33. I agree.

Lady Justice Black:

34. I also agree.