Neutral Citation No. [2013] NIQB 76 | *Ref:* **TRE8943**

Judgment: approved by the Court for handing down | *Delivered:* **04/07/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Hawthorne (David)'s Application [2013] NIQB 76

IN THE MATTER OF AN APPLICATION BY DAVID HAWTHORNE FOR JUDICIAL REVIEW

<u>TREACY J</u>

Introduction

[1] The applicant challenged two decisions made under the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2006 ("the 2006 Regulations") relating to the award of an injury on duty pension namely:

(a) A decision of the Northern Ireland Policing Board/Department of Justice whereby they refused to refer a determination by the Independent Medical Referee ("IMR") appointed under the 2006 Regulations, to an Appeal Tribunal, convened under Reg33 of the 2006 Regulations (the "Appeal Decision").

(b) The decision of the IMR dated 28 April 2011 whereby he confirmed that the Applicant remained 100% disabled, but that only 10% of his current disablement and future earning capacity were as a result of the injury on duty (the "Medical Decision").

[2] At the conclusion of the substantive hearing the Court announced its decision. The DoJ had conceded that the applicant does have a right of appeal to an appeal tribunal and that it was a matter for the DoJ under Reg 33 to convene an appeal. The Board took a different view but I accepted the applicant and DoJ's submission that a right of appeal under Reg 33 did exist. As to the second issue, namely the medical decision, I indicated that the applicant must fail. The Court indicated that more detailed reasons would be provided in due course.

Background

[3] The Applicant is a former part time reserve police officer. On 22 December 2001 he sustained injuries to his back when he was involved in a road traffic accident while on duty. He stopped work as a police officer in August 2003 and was medically retired from the police on 30 June 2005. On 6 July 2005, he made an application for a retrospective injury on duty pension based upon his back injury.

[4] The application was referred to Dr Tony McGread, a Special Medical Practitioner ("SMP") appointed under the then applicable police pension Regulations. Dr McGread found that the applicant suffered from chronic lumbar back pain which was likely to be permanent. He also found that the extent of applicant's disablement was 100%, but that the degree of disablement may not be permanent and should be reviewed in three years.

[5] In March 2009, the applicant's condition was reviewed, in accordance with the recommendation of Dr McGread. He was referred to Dr Zubier, a SMP appointed under the 2006 Regulations. On 7 April 2009, Dr Zubier reported that the applicant continued to be permanently unfit for duty as a result of both chronic back pain and also ischaemic heart disease. He also asked that the applicant be examined by Mr Richard Wallace, Consultant Orthopaedic Surgeon. Mr Wallace reported on 18 May 2009, following an MRI scan of the applicant's back, degenerative changes in the lumbar spine. He concluded that the applicant may have suffered symptoms from the accident for a period of one to two years, but that beyond such time, symptoms were most likely to be related to underlying vulnerability or subnormality in the back. It was not the result of any nerve root entrapment.

[6] On foot of Mr Wallace's report, Dr Zubier issued a revised certificate stating that the applicant remained permanently disabled but that the extent of his disability and earning capacity as a result of the injury on duty was 10%.

[7] The applicant appealed the decision and certificate of Dr Zubier to an IMR, appointed under the 2006 Regulations - Mr Cowie, Consultant Orthopaedic Surgeon who provided an initial report and asked for further investigations. On 28 April 2011, following sight of a report from Dr Cochrane, consultant cardiologist, he issued a certificate, confirming the opinion of Dr Zubier. Following the certificate of Mr Cowie the Policing Board reduced the applicant's pension by 90%.

[8] The applicant requested an appeal to the Appeal Tribunal. This was refused by the Policing Board and the DoJ.

Statutory Framework

[9] Reg 10 of the 2006 Regulations states:

> "10. (1) This regulation applies to a person who ceases or has ceased to be a police officer 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").
>
> (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."

[10] The decision is "*in the first instance*" made by the Policing Board, which in the case of an award under Reg 10, is required to refer certain medical questions to a duly qualified medical practitioner (known as the Selected Medical Practitioner or SMP), whose decision on the questions referred is, subject to Regs 30 and 31, final:

> "29.—(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 Board.
>
> (2) Subject to paragraph (3), where <u>the Board</u> is considering whether a person is permanently disabled, it shall refer for decision to a duly qualified medical practitioner selected by it the following questions—
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> (a) whether the person concerned is disabled;
>
> (b) whether the disablement is likely to be permanent,
>
> except that, in a case where the said questions have been referred for decision to a duly qualified medical practitioner under regulation H1(2) of the 1988 Regulations, a final decision of a medical authority on the said questions under Part H of the 1988 Regulations shall be binding for the purposes of these Regulations; and, if it is 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 it is considering whether to *revise* an injury pension, shall so refer question (d) above.

> ...
>
> (5) 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 a certificate and shall, subject to regulations 30 and 31, be final.
>
> (6) A copy of any such report and certificate shall be supplied to the person who is the subject of that report."

[11] A person dissatisfied with a decision of the SMP may lodge an appeal with the Board. Where an appeal is made, the Board notify the DoJ, which in turn refers to an Independent Medical Referee ("IMR"), the same questions which were posed to the SMP. As in the case of the SMP the decision of the IMR is, subject to Reg 31, final.

> "30.—(1) Where a person is dissatisfied with the decision of the selected medical practitioner as set out in a report and certificate under regulation 29(5), he may, within 28 days after he has received a copy of that report and certificate or such longer period as the Board may allow, and subject to and in accordance with the provisions of Schedule 6, give notice to the Board that he appeals against that decision.
>
> (2) In any case where within a further 28 days of that notice being received (or such longer period as the Board may allow) that person has supplied to the Board a statement of the grounds of his appeal, the Board shall notify the Secretary of State accordingly and the Secretary of State shall appoint an independent medical referee to decide.
>
> (3) The decision of the independent medical referee shall, if he disagrees with any part of the report and certificate of the selected medical practitioner, be expressed in the form of a report and certificate of his decision on any of the questions referred to the selected medical practitioner on which he disagrees with the latter's decision, and the decision of the independent medical referee shall, subject to the provisions of regulation 31, be final."

[12] Officers may appeal to an Appeal Tribunal from decisions of the Policing Board. Reg 33 provides in relevant part:

> "33.—(1) Where a police officer, or a person claiming an award in respect of such a police officer, is aggrieved by the refusal of the Board to admit a claim to receive as of right an award or a larger award than that granted, or by a decision of the Board as to whether a refusal to accept medical treatment is reasonable for the purposes of regulation 6(3), or by the forfeiture under regulation 38 by the Board of any award granted to or in respect of such a member, he may, subject to regulation 34, appeal to the Secretary of State.
>
> (2) The Secretary of State, on receiving such notice of appeal, shall appoint an appeal tribunal (in paragraphs (3) to (8) referred to as the tribunal), consisting of three persons……"

[13] In the case of an Injury Pension under Reg10, the Board is required under Reg 6 to refer to the SMP, the question of the "*degree of the person's disablement*". Reg 6, so far as material, provides as follows:

> "Disablement
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> 6.—(1) Subject to paragraph (2), 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.
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> ...
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> (4) Subject to paragraph (5), disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a police officer except that, in relation to the child or to the widower or surviving civil partner of a woman police officer, it means inability, occasioned as aforesaid, to earn a living.
>
> (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 police officer*:

> Provided that a person shall be deemed to be totally disabled if, as a result of such an injury, he is receiving treatment as an in-patient at a hospital.
>
> (6) Notwithstanding paragraph (5), "totally disabled" means incapable by reason of the disablement in question of earning any money in any employment and "total disablement" shall be construed accordingly.
>
> ..."

[14] Where an officer has been awarded an Injury Pension under Reg 10, the degree of disablement may be the subject of review under Reg 35. It provides in relevant part:

> "35.—(1) Subject to the provisions of this Part, where an injury pension is payable under these Regulations, the Board 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 Board find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly."

[15] The ground of challenge relating to the availability of an appeal to the Appeal Tribunal raised an issue of interpretation arising under Reg 31. The relevant provisions are as follows:

> "31.—(1) A tribunal hearing an appeal under regulation 33 may, if they consider that the evidence before the medical authority who has given the final decision was inaccurate or inadequate, refer the decision of that authority to him for reconsideration in the light of such facts as the tribunal may direct, and the medical authority shall accordingly reconsider his decision and, if necessary, issue a fresh report and certificate which, subject to any further reconsideration under this paragraph, shall be final.
>
> (4) In this regulation a medical authority who has given a final decision means the selected medical practitioner, if the time for appeal from his decision has expired without an appeal to an independent medical referee being made, or if, following a notice of appeal to the Board, the Board has not yet notified the Secretary of State of the appeal, if there has been such an appeal."

Submissions on the Medical Issue

[16] The applicant relied on Metropolitan Police Authority v Laws [2010] EWCA Civ 1099 and Turner v Police Medical Appeal Board [2009] EWHC 1867 (Admin). In ***Laws*** the applicant had been awarded an Injury on Duty Pension under the equivalent English Regulations. This was on foot of an initial certification by a selected Medical Practitioner and on appeal by a Medical Referee. Subsequently the applicant's degree of disablement was subject to periodic re-assessment. Eventually the extent of the disablement was reduced. In so doing the question of the cause of the applicant's disablement was re-visited. The court held that the initial certification was final and that the cause of the Applicant's injury could not be re-considered (paras 12–19).

[17] The applicant contended, on the basis of the Regulations and **Laws**, that the Medical Referee and the Policing Board acted unlawfully in re-determining the cause of the applicant's ongoing incapacity since the only matter which had to be considered was the extent of the applicant's ongoing disablement. The Medical Referee confirmed that his disablement remained unchanged ie at 100%. It was not open to the Referee nor the Policing Board to seek to attribute such incapacity to a different cause.

[18] On the basis of Reg35(1) set out above the respondent contended that the IMR and, previously the SMP were doing no more than assessing, on review, whether the degree of the pensioner's disablement had altered and if so, then the question to be decided was whether it had substantially altered.

[19] The respondent submitted that the Board had not 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"* as was found to be erroneous and unlawful in ***Laws*** and therefore it does not assist the applicant.

Discussion

[20] The initial decision of the Board is taken under Regulation 10. It invites the Board to consider whether the officer is *"permanently disabled as a result of an injury received without his own default in the execution of his duty."* In considering whether an officer is *"permanently disabled"* for the purposes of Regulation 10, Regulation 29(2) requires the Board to refer four questions to the SMP. These questions include *"the degree of the person's disablement"* (see Reg 29(2)(d)). Regulation 6(5) provides that the degree of a person's disablement shall be determined by reference to the degree to which his earning capacity has been affected as a result of a relevant injury.

[21] The Board's original award was made following the advice of Dr McGread, in which he determined that the Applicant was permanently disabled as a result of

chronic back pain, which in turn was an injury sustained in the course of his duty and likely to be permanent. He also determined that the degree of disability was 100%, but that this should be reviewed after three years.

[22] The conclusion of the review was that the Applicant remained permanently disabled as a result of two injuries namely chronic back pain and ischemic heart disease. The latter was not related to his duties as a police officer. Dr Zubier (SMP) and Mr Cowie (IMR) both concluded that his disability was 10% related to the back injury and 90% related to natural causes unconnected with his duties as a police officer. This conclusion was reached following consideration of an orthopaedic surgeon's report from Mr Wallace and a cardiologist's report from Dr Cochrane. The DoJ drew attention, in particular, to Mr Wallace's conclusions including the following:

> "One would accept that he could have had symptoms in this area for a year or two but beyond such a period of time any ongoing symptoms would relate to an underlying vulnerability or subnormality…"
>
> "I would find difficulty accepting that any symptoms now described could reasonably be attributed directly to the road traffic accident while on duty in December 2001…."

[23] The review decision was made under Reg 35(1). In conducting a review under this regulation the Board must consider whether the degree of the pensioner's disablement has altered. And (per Reg 29(2)) if considering whether to revise an injury pension the Board must refer the degree of his disablement (question (d)) to an SMP. If after consideration the Board finds that the degree of disablement has "substantially altered" the pension *shall* be revised accordingly. This was the exercise involved in taking the impugned decision in this case.

[24] It is clear from the statutory provisions that decisions of the SMP on the questions referred, or on appeal, the IMR are treated as being final. But this is subject to the continuing duty imposed by Reg 35, at suitable intervals, to consider whether the degree of disablement has substantially altered. If it has the Board are obliged by the terms of Reg 35 to revise the pension accordingly.

[25] The finality of the decisions of the SMP/IMR on the referred questions is subject to the continuing duty of review at suitable intervals under Reg 35. These interlocking statutory provisions are plainly intended to introduce a degree of finality whilst at the same time ensuring that officers are not unjustly enriched by continuing to receive a pension which is no longer justified. Equally if the degree of disablement has substantially altered in the other direction it is only fair and proper that the pension should be revised accordingly. Reg 35 is on any showing a vital

safeguard for police officers and the general community in ensuring fairness and probity in the disbursement of such expenditure.

[26] In the present case and entirely consistently with the case law the reviewing SMP/IMR did not challenge the clinical basis of the earlier assessments which are treated as final. As the Court of Appeal put it in *Laws* at para [18] the premise on review is that the earlier decision is "taken as a given". The only duty under Reg 35 when carrying out the periodic review (in the police and public interest) is whether the degree of disablement has substantially altered. That is what occurred in the present case.

[27] These conclusions are fortified by the decision (relied upon by all the parties in support of their opposing submissions) in MPA v Laws. This involved a challenge to a review decision made under the equivalent English Regulations in which the reviewing medical authority sought to impugn the original clinical findings which had led to the award of a pension in the first place. The Court confirmed that the purpose of the review was simply to determine the extent to which there had been an alteration in the degree of disability.

> "12. ... 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:
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> "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 re-litigation and, of course, 'suitable intervals' suggests that this is not a matter which should be revisited every year, nor is it."

...

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.
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> 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.

[28] Unlike the reviewing medical authority in Laws the reviewing doctors in the present case have not sought to undermine the original clinical findings. On the contrary, as required by Reg 35, they have addressed their minds to the statutory question as to whether the degree of the pensioner's disablement has substantially altered and the extent to which the original back injury is now contributing to his disability. This is in accordance with Reg 6(5) which provides that the degree of a person's disablement must be determined by reference to the degree to which his earning capacity has been affected as a result of a relevant injury.

The Appeal Decision

[29] As to the appeal decision I am quite satisfied that the DoJ were correct to concede that the impugned decision revising the pension was a decision of the Board and accordingly subject to an appeal under Reg 33. The decision was arrived at by the Board after the degree of disablement had been referred to the SMP/IMR. Reg 35 makes it clear that the ultimate decision maker in revising the pension is the

Board. When a medical question has been referred to a medical referee (SMP or IMR) their decisions on the questions referred are final. But the primary decision maker remains the Board notwithstanding the finality of the medical referees decision. As a person aggrieved by a relevant decision of the Board the applicant enjoys a clear right under Reg 33 to appeal the impugned decision in accordance with that provision.

Conclusion

[30] Accordingly, for these reasons I confirm the decision of the court announced at the conclusion of the substantive hearing