The Queen on the Application of Turner v The Police Medical Appeal Board

CO/10892/2008

High Court of Justice Queen's Bench Division The Administrative Court

8 July 2009

[2009] EWHC 1867 (Admin)

2009 WL 2173204

Before: Mr Justice Burton

Wednesday, 8 July 2009

Representation

- Mr Lock (instructed by Lake Jackson) appeared on behalf of the Claimant.
- Mr Waters (instructed by the Metropolitan Police Authority) appeared on behalf of the Defendant.

Judgment

Mr Justice Burton:

1 This has been the hearing of an application for judicial review by Mr Stephen Turner of a decision by the Police Medical Appeal Board, the first defendant, for which the Metropolitan Police Authority naturally accept responsibility and appear by counsel to defend. Counsel for Mr Turner has been Mr Lock and for the second defendant Mr Waters and the matter has been very fully argued out on paper, although, as I will describe, in the end more shortly so far as oral argument was concerned.

2 The claimant, Mr Turner, was a serving police officer in the Metropolitan Police from 24 October 1984 until he retired on grounds of ill health on 24 September 2001. He had served as a police cadet from 1982 until 1984 before joining the police force full-time.

3 When he retired from the police force in 2001 he had lost all effective hearing in his left ear. Indeed, that was the grounds for his retirement. He has worked subsequently as a salesman and as a police intelligence analyst, most recently giving up to work as a full-time carer for his disabled wife.

4 There was a number of potential or speculated causes for the loss of hearing in his left ear. He had engaged in a limited amount of rough shooting as a young man with a rifle on occasions, from about the age of 16 to the age of 25, doing so on occasions without ear protectors, and, of course, so far as that is concerned, if that was the cause of the damage to the left ear then that would not have been in any way the responsibility of the defendant. Mr Lock has pointed out in his skeleton argument that it would be difficult to assert that that was a cause in any way by virtue of the fact that the damage was to the left ear, and the rifle would ordinarily be held up close to and/or possibly cause damage to the right ear.

5 Then the other potential causes of this would all, one way or the other, relate to his employment. He engaged in firearms training as a police officer on some occasions without ear protectors. When a police cadet he was subject to an assault in June 1984 when he was kicked in the head and became unconscious. He was again subject to a less serious assault in 1990 when he was hit on the left side of the head.

6 The only other possible cause of the damage to the ear, not supported by any medical evidence, was possibly some genetic condition or other medical cause unconnected to his work.

7 But whatever were the arguments, they were resolved when, following his retirement, he claimed an injury benefit under the Police Pension Scheme. There were contested positions taken on both sides with the benefit of medical reports. In the event, there was an appeal by the claimant to a medical referee, a Dr Bray. His

decision was by reference to Regulation 30 of the Police (Injury Benefit) Regulations 2006 . By virtue of Regulation 30(6) , his decision on the question or questions referred to him under that regulation were to be expressed in the form of a report and:

> " … shall, subject to Regulations 31 and 32, be final."

8 There was, as I understand it, no further appeal, and thus Dr Bray's decision was final. His decision was that the claimant was entitled to a 100 per cent pension, on the basis that he was resolved the issue of causation favourably to the claimant.

9 Very sensibly there is provision in the Regulations, by reference to Regulation 37 as follows:

> " (1) 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."

10 That express provision for occasional review or reassessment of the pension is obviously intended to look at whether there have been any alterations for the worse or the better since the original final assessment by, in this case, Dr Bray.

11 There was such a reassessment, or review, held before the SMP (Selected Medical Practitioner), Dr Porrit, in 2007. This was an entirely paper exercise and Dr Porrit issued a certificate on 18 October 2007 saying that the claimant's degree of disablement had " substantially altered" . She reached this conclusion by deciding the claimant could do one of three jobs, such that she considered there was a reduction in the potential loss of earnings as a result of the injury.

12 Three jobs were mentioned: police station reception manager, local authority neighbourhood coordinator and junior manager. The job of junior manager was that which in fact he had performed, with minor adjustments, at all times until his retirement and it was not in dispute that the pension could and should be assessed by reference to his earning capacity as a junior manager.

13 The claimant, however, challenged the suggestion that he was able to work in either of the other two capacities, which were jobs which had been available, it is not in dispute, in 2002. He appealed, as was his entitlement, to the Police Medical Appeal Board, the first defendant, saying that he was physically unable to perform those two jobs and supported by a medical report from a Dr Fairley. The PMAB accepted the claimant's case on appeal in respect of the jobs, i.e accepted his case that the SMP had erred in relation to the two other jobs, so that thus it became common ground that the appropriate comparator was the job of junior manager.

14 But the PMAB reopened the whole question by reconsidering the report of Dr Bray from 2001. The PMAB recorded as follows:

> " The Board have considered the report of Dr Bray in his determination of causation for there being an injury on duty but are not convinced by the arguments he put forward that the police firearms training and the physical injuries were necessarily the major causes of the left hearing loss.
>
> …
>
> It therefore seems to the Board that the contribution of any hearing loss directly related to the index incident at the very best could only account for some 50 per cent of his overall disability."

15 They thus reduced the claimant's pension by 50 per cent from 28 per cent reduction in earning capacity, which was the undisputed reduction, to a 14 per cent reduction in earning capacity by virtue of the applicability of the new 50 per cent

divisor, thus reducing him to a lower band award.

16 The challenges by Mr Lock on behalf of the claimant to this decision by the PMAB are very straight forward. First, Mr Lock submits that the PMAB had no business interfering with or reviewing or reconsidering the decision of Dr Bray whose decision in 2001 was final and had not been appealed.

17 Second, and this is really the corollary of that point, insofar as the PMAB were addressing an issue, they were addressing the question as to whether after a suitable interval, i.e the interval in this case since 2001, the " degree of the pensioner's disablement had altered" .

18 Third, and this does not meet any point that was made by the PMAB but meets a point made by Mr Waters for the defendant, insofar as the PMAB would have been entitled to consider (although in the event of overturning the view of the SMP it did not) change in the question of comparable job and/or earning capacity, it would be entitled to consider any such question by reference to alteration since 2001 (accepting the applicability of the decision in R v on the application of South Wales Police Authority v The Medical Referee (Dr Anton) ex parte Crocker [2003] EWHC 3115 per Ouseley J, CO/505/2003, Friday 5 December 2003 , to which I will refer), ie only by reference to an alteration in such condition or earning capacity.

19 Fourthly, Mr Lock submitted that, in any event, the PMAB had no entitlement to allow an appeal from the SMP in favour of the claimant but then substitute an entirely different basis of consideration, in the way that I have described.

20 In the context of these arguments reference was made by Mr Lock to a recent decision of this court by Silber J, The Queen on the application of Pollard v The Police Medical Appeal Board and West Yorkshire Police Authority [2009] EWHC 403 , to which I shall refer. He submitted (and Mr Waters did not disagree, that Silber J had effectively decided the very point that is before me: and therefore, that although it is only a persuasive authority and not binding upon me, I ought to be persuaded and indeed convinced by it and consequently reach the same conclusion.

21 It does appear to me to be fundamental in this case that Regulation 30 and Regulation 37 have an entirely different role. Regulation 30 may well raise questions of great difficulty, such as here in relation to causation. Those are not only questions which arise in medical situations, pension situations and in all kind of similar tribunals, but, of course, in the ordinary courts also where a condition such as, for example, asbestosis may have arisen in any number of different ways and during any number of different employments. 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 by these Regulations. But causation questions having been put aside, it 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.

22 The defendant relies in this area on the decision in Crocker , Ouseley J's decision, to which I have referred, which was under the then regulations, The Police (Injury Benefit) Regulations 2006 , which are in materially the same terms as those today. The equivalent regulation in issue here is Regulation 7(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 fault in the execution of his duty as a member of a police force."

23 It is apparent, therefore, that in considering questions of disablement earning capacity is important, but, of course, Crocker would not apply straightforwardly to the present case. It 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. To that extent, therefore, the approach by the SMP, had it been justifiable, which it was not because it had been overturned on appeal by the PMAB, would have been relevant. 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.

24 In those circumstances, it is clear that reference to Crocker could not possibly justify what the PMAB did in this case, which was jettisoning the thinking of the SMP, not addressing at all, as I see it, the task that was imposed upon them by Regulation 37 , and quite openly revisiting, impermissibly, by reference to Regulation 30 the original decision of Dr Bray.

25 I have no doubt at all that this is a case in which the PMAB impermissibly failed to follow the appropriate test. Had they done so, there is no dispute that they would have found that the degree of the pensioner's disablement has not altered and in the light of the unavailability of any evidence with regard to earning capacity, albeit that they would have been entitled to address the question of Crocker , Crocker has no relevance in this case on the facts.

26 I turn then to the decision of Silber J. I have no need to fortify my conclusion by reference to his views because I have reached the same conclusion as he did. But he said in terms, in addressing and summarising the Regulations, in paragraph 37 of his judgment, that the decision of the SMP on the issues referred to him under Regulation 30 are final, subject to appeal or a review or reference back, none of which arose in case. At paragraph 38 he referred to Regulation 37 and the suitable intervals when the degree of the alteration, if any, of the disablement could be considered. Then finally there is his express conclusion at paragraph 39:

> " Regulation 37 does not enable an authority to reach a different view on the issues specified in Regulation 30 … but only on the matters set out … which relate to the degree of the person's disablement."
>
> Indeed, this is made clear in the closing words of Regulation 32 which I have emphasised.

27 He concluded that the decision of the Board in that case contained an error of law as it sought to go outside the matters which it had jurisdiction to consider.

28 I share that view and apply it to this case. Albeit not bound by Silber J's decision, I agree with it. In the circumstances this application is allowed.

29 MR LOCK: I am very grateful. My Lord, as far as relief is concerned, paragraph 33 of the skeleton argument, if I take your Lordship to it, my Lord, what I seek effectively is two declarations. First of all a declaration that a decision of the SMP on behalf of the Metropolitan Police Authority to review the pension was unlawful. My Lord, I say that because you can only get to that review if you have reached a view that there has been a substantial alteration.

30 MR JUSTICE BURTON: Yes.

31 MR LOCK: Therefore quashing that decision. The decision — a declaration that the decision of the Board was unlawful and an order quashing that decision and a declaration that the claimant remains at all times since 2001 entitled to a band 2 income payment. My Lord, I am sure if my Lord makes that order, the calculation of the back-pay owing to Mr Turner will be done. I don't seek an order in that respect, my Lord. There clearly is back-pay owed to him as a result of that.

32 My Lord, whilst I am on my feet, the only other matter I ask for is costs. In my submission they follow the event. There is a schedule which has been put in.

33 MR JUSTICE BURTON: Yes. I have someone's schedule. I don't know whose it is.

34 MR LOCK: It starts " Schedule of costs incurred by the claimant." It is a sum of about £14,000.

35 MR JUSTICE BURTON: Lake Jackson.

36 MR LOCK: Yes.

37 MR JUSTICE BURTON: Thank you.

38 MR LOCK: Yes, my Lord. Your Lordship will appreciate that as claimant we made the running in this case and — 39 MR JUSTICE BURTON: Is there a rival schedule?

40 MR WATERS: My Lord, there is. If I can hand it up.

(_ **Handed**)

41 MR JUSTICE BURTON: Thank you. (**Pause**). Yes. Is that right, Mr Waters, that your fee for the hearing is £320?

42 MR WATERS: My Lord, it may well be.

43 MR JUSTICE BURTON: Right.

44 MR LOCK: My Lord, £14,000 in the context of a High Court action which is central to what is a point of principle, which will undoubtedly affect a large number of other cases, is not in my submission a disproportionate amount and your Lordship will see that —

45 MR JUSTICE BURTON: When you launched these proceedings you didn't have the benefit, did you, of the decision of Silber J?

46 MR LOCK: My Lord, no, we didn't. And that is why in a sense we had to go through all the way through, work out the answers for ourselves and then we had the benefit of Silber J's decision.

47 MR JUSTICE BURTON: I have not looked incidentally at Cranston J's decision. You referred me to that.

48 MR LOCK: I put it in in case an issue was raised, because, my Lord, at that stage we didn't — I am afraid we didn't get the agreement on the bundle and the skeleton.

49 MR JUSTICE BURTON: There was nothing I needed to look at in Cranston J's decision?

50 MR LOCK: No, my Lord. Silber J's decision of 9 February of this year.

51 MR JUSTICE BURTON: Which post-dated the permission.

52 MR LOCK: Which post-dated the permission.

53 MR JUSTICE BURTON: Yes.

54 MR LOCK: My Lord, I simply invite your Lordship to —

55 MR JUSTICE BURTON: I shall hear what Mr Waters has to say about this. Yes.

56 MR WATERS: My Lord, in respect of the relief sought I don't object or seek to challenge anything my learned friend has said. I accept those orders should be made. Equally, obviously, costs should follow the event. Your Lordship sees the difference in costings. I accept that those on the claimant's side had to make the running. I equally accept that your Lordship may take the view that some of the costs on our side are somewhat lower.

57 MR JUSTICE BURTON: Yes.

58 MR WATERS: I am invited to invite your Lordship to consider reducing the claimant's overall —

59 MR JUSTICE BURTON: I am never very keen on reducing because I may be completely wrong and it does not look terribly excessive. On the other hand, I don't want to shut you out. A possibility is for me to make an interim order of £10,000 and then say that the balance of the fees is to go to detailed assessment. The likelihood is in those circumstances that the solicitors will reach an agreement.

60 MR WATERS: I wouldn't seek to push any further than that, my Lord.

61 MR JUSTICE BURTON: Is that all right?

62 MR LOCK: My Lord, I would not resist that order.

63 MR JUSTICE BURTON: I will make that order. An interim order of £10,000 to be paid within 14 days. The balance of the claimant's costs to be the subject of detailed assessment if not agreed, as I hope it will be. Very good. Thank you both very

much.