

Neutral Citation No: [2013] NIQB 13

Ref: TRE8750

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 8/2/2013

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

DB's Application [2013] NIQB 13

IN THE MATTER OF AN APPLICATION BY DB (Police injury award pensions)
FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant seeks judicial review of a decision by the Northern Ireland Policing Board ("the respondent") whereby they set a start date for his injury award pension of 11 August 2009 instead of the date of his retirement on 23 November 2006 in accordance with Reg 6(7) of the Police Service of Northern Ireland Reserve (Injury Benefit) Regulations (NI) 2006 ("the 2006 Regulations").

Background

[2] The applicant retired from his job as a Police Inspector with the PSNI on 23 November 2006. On 11 August 2009 he made application on a retrospective basis, to the respondent, for injury benefit in accordance with the 2006 Regulations. In this application the applicant confirmed that he was examined by Mr Alan Kerr on the 9 January 2008 and was advised to obtain a hearing aid. The applicant stated that he had been diagnosed with "very severe hearing loss, moderate tinnitus and moderate depression".

[3] A Selected Medical Practitioner ("SMP") was appointed by the respondent to consider the applicant's case which was refused on 29 April 2010. The applicant appealed this decision to the Department of Justice's appointed Independent Medical Referee ("IMR") who found in favour of the applicant on 27 January 2011. The respondent informed the applicant of this decision in its letter dated 11 February 2011.

[4] The letter also informed him that the award was to take effect from the date he made the retrospective application (11 August 2009) as opposed to the date of his

retirement from the PSNI (23 November 2006) in accordance with Reg 6(7) of the 2006 Regulations.

Developments since the grant of leave

[5] After leave had been granted the respondent wrote to the applicant on 25 October 2011 stating that the respondent accepted that it could not simply, and as a matter of policy, impose the date of application for an injury pension award as the date of commencement of the payment of the said injury on duty pension award. The respondent proposed to refer the applicant's case to a "medical expert" in order to obtain an opinion as to *when* the applicant first became disabled.

[6] The applicant objected to this course of action contending that the 2006 regulations properly construed require the injury payment to be paid from the date of retirement from service, that the respondent's intended action would be *ultra vires* the 2006 Regulations and ran contrary to the steps now required of the respondent pursuant to the said 2006 Regulations, properly construed.

Order 53 Statement

[7] The applicant claimed various reliefs including a declaration that the decision of the respondent to set a start date for the applicant's injury award pension of 11 August 2009 was unlawful and mandamus requiring the respondent to set the start date for the injury award pension payable to the Applicant as being the date of his retirement from service in the PSNI.

[8] The grounds upon which the relief was sought, so far as presently relevant, were that the respondent Police Board:

- (a) Misdirected itself in law with reference to Regulations 40(1), read with 10(2) and 6(7) of the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2006.
- (b) Wrongly, and without evidential basis, assumed that the Applicant ceased to serve as a Police Officer before becoming disabled.
- (c) Wrongly, and without evidential basis, assumed that the date upon which the Applicant became disabled cannot be ascertained.

Statutory Framework

[9] The relevant portions of the 2006 Regulations provide as follows:

“Disablement

6. ...

(4) ... disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a police officer ...

...

(7) Where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the Board.”

“Police Officer’s Injury Award

10. (1) ...

(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; but payment of an injury pension shall be subject to the provisions of paragraph 5 of that schedule, and, where the person concerned ceased to serve before becoming disabled, no payment shall be made on account of the pension in respect of any period before he became disabled.”

“Reference of medical questions

29. - ...

(2) ... where the Board 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-

- (a) whether the person concerned is disabled;
- (b) whether the disablement is likely to be permanent,
- ...
- (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;
..."

"Payment and duration of awards

40.(1) Subject to the provisions of these regulations, in particular of Regulation 10 (2) (limitation on payment of an injury pension to a person who ceased to serve before becoming disabled) and Part 5 (revision and withdrawal or forfeiture of awards), the pension of a Police Officer under these regulations shall be payable in respect of each year as from the date of his retirement."

Discussion

[10] Counsel for the applicant, Mr Coll, argued that properly construed the 2006 regulations required injury pension to be paid from the date of retirement. The respondent submitted that this could not be correct since the applicant was serving as a police officer until he retired on 23 November 2006, that he was not medically retired and therefore was not disabled at the date of his retirement in accordance with the definition of disabled set out in Reg 6(4).

[11] The applicant submitted that in his case neither the SMP nor the IMR suggested, nor did they provide any evidence, to the effect that the applicant only became disabled post-retirement. The respondent submitted that the views of the SMP and the IMR were not sought on the date permanent disablement occurred, as that did not form any part of the questions directed to them. The medical evidence available did not permit the date of disablement (as defined) to be assessed.

[12] The applicant referred to the report of the IMR, Dr Adams, who took account of the impact upon the applicant's hearing loss of the normal aging processes and awarded a percentage disablement directly attributable to injury on duty of 22.9%, and found that the injury occurred during police service. Therefore, the applicant argued that the 'default' position in Reg 40(1) applies and should be acted upon by the respondent.

[13] The applicant referred the Court to Part 4 of the 2006 Regulations which makes provision for "*Appeals and Medical Questions*" in which Reg 29 sets out the questions that the respondent must refer to the SMP. Reg 29(5) provides that the SMP's decision on the questions referred pursuant to Reg 29 shall be final, subject to appeal to an IMR appointed by the DOJ pursuant to Reg 30. In accordance with these regulations the applicant contended that it was highly significant that a question relating to the start date of disablement (i.e. that which the Policing Board proposes to refer to what has been referred to as a "medical expert" in the instant case) is outwith the statutory scheme as established to govern decision making by medical practitioners in this context. Furthermore, the

applicant submitted that if the respondent was to proceed with this course of action, the applicant would have no right of appeal against that decision and there is no *vehicle* of appeal in respect of that question.

[14] I agree with the respondent that the first question must be whether the applicant is permanently disabled and, if so, the date when this permanent disablement commenced. This assessment must be made otherwise the respondent could not apply Reg 10(2), which imposes an express limitation on payment of injury pension for any period prior to disablement. Moreover Reg 40(1), upon which the applicant fastens, is expressly 'subject to the provisions of these regulations, *in particular* of Regulation 10(2)'.

[15] Accordingly in my view the respondent must seek to determine the date of disablement and is quite entitled in discharging that task to seek medical evidence to assist in reaching what is essentially a medical question. Fairness dictates that this is a process in which the applicant must be appropriately involved. Upon receipt of all relevant evidence and consideration of the issue, the respondent will either determine the date or, if same cannot be ascertained, rely upon Reg 6(7).

[16] If the applicant refused to submit to medical examination, then the respondent would have to make its decision on the available evidence and may conclude that the actual date of disablement could not be ascertained in which case the date of the claim would become, by default, the relevant date.

[17] Art 29 of the 2006 Regulations makes clear, that 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*”

[18] The entitlement to an injury award is governed by Reg 10 and requires any applicant ceasing, or who has ceased to be a police officer, to have suffered a relevant injury. This means that the officer must be:

“permanently disabled as a result of an injury received without his own default in the execution of his duty”

[19] From Reg 29 it can be seen that the issue of whether an applicant is “permanently disabled” permits the referral of certain questions to a duly qualified medical practitioner (SMP). There are 4 questions to be determined being:

- (a) whether the person concerned is disabled,
- (b) whether the disablement is likely to be permanent,

- (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.

[20] The SMP rejected the applicant's case and the matter was therefore appealed to an IMR in accordance with Reg 30. The IMR granted the Appeal and thus determined that the applicant was permanently disabled. The IMR did not, and is not required to specify, the date when the applicant first became permanently disabled.

[21] I reject the applicant's contention that the Regulations require the injury pension to be paid from the date of retirement from service. He was serving as a police officer until he took severance and retired on the 23 November. He was not medically retired and therefore was not disabled within the meaning of the 2006 Regulations at the date of his retirement. Plainly until he took severance he was not unable, by infirmity of mind or body, from performing the ordinary duties of a police officer. The definition of disabled is set out in Reg 6(4):

"Disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a police officer.."

[22] Reg 6(7) provides:

"Where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the Board."

[23] The respondent board by virtue of Reg 29 is arbiter of what if any award is due under the Regulations. As previously pointed out the first question to be addressed is whether an applicant is, in fact, permanently disabled. If so, the question must be addressed when this permanent disablement commenced? If this assessment were not made the respondent could not apply Art 10(2) which prohibits a payment of pension for any period prior to disablement. The respondent must therefore decide if the person ceased to serve before becoming disabled.

[24] Since the applicant served until he retired an issue for the respondent is *when* he became disabled. The views of the SMP and the IMR were not sought on the date permanent disablement occurred, as that does not form any part of the questions directed to them [see Reg 29(2) & (3)]. The medical evidence which is presently available, does not permit the date of disablement to be assessed and the respondent is entitled to seek expert medical guidance to assist it in determining this question.

Conclusion

[25] Accordingly for the above reasons the judicial review challenge must fail.