SERJEANTS' INN

POLICE PENSIONS:

COMMON MISTAKES AND THEIR CORRECTION

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Police pensions: common mistakes and their correction

1. The principal purpose of this paper is to review the mechanisms under which decisions about police injury awards can be challenged and if appropriate corrected. The focus is on injury awards under the Police (Injury Benefit) Regulations 2006, which have been a fertile ground for litigation, but some of what is said has a wider application. The review will show that the law prioritises getting decisions about pensions right, both as to entitlement and amount, and ensuring that errors are corrected, over other considerations such as finality in decision-making and financial certainty for police pension authorities. The law is in many respects weighted in favour of the claimant, in terms of the range of remedies and the time within which a challenge may be brought.

2. The decision as to the entitlement of an officer to an award, and as to the level of that award, is made in the first instance by the police pension authority: reg.30(1). The 2006 regulations do not contain a statutory definition of police pension authority (PPA), but under reg. 7 of the Police Pensions Regulations 2015 it is, for most purposes and in most circumstances, the chief constable. This can cause difficulties of delegation where, as is usually the case, the decision-maker is not the chief constable him- or herself.

3. Although the decision is ultimately that of the PPA, the PPA is required to refer questions going to entitlement and level of award to a "duly qualified medical practitioner" (the selected medical practitioner or SMP): reg.30(2). Unless it chooses to challenge them, the PPA must act in accordance with the SMP's decisions on the relevant questions. Reg.30 is entitled "Reference of Medical Questions". This is a misnomer. The questions referred to the SMP are not purely medical, but often give rise to complex issues of mixed fact and law. A system which puts legal decision-making in the hands of a doctor is likely to be as prone to error as system which puts medical decision-making in the hands of a lawyer, and so it has proved, but that is the system which we have.

4. In the case of an application for an injury award under reg.11, the SMP must consider whether:

(a) the officer is disabled: disablement is an "inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force": reg.7(4);

(b) whether the disability is likely to be permanent, that question being determined as at the date of the assessment;

(c) whether the disablement is the result of an injury received by the officer in the execution of his duty: under reg.8 disablement is the result of an injury if the injury has caused or substantially contributed to the disablement;

(d) the degree of the officer's disablement: this is assessed by reference to the degree to which his or her earning capacity has been affected as a result of the injury: reg.7(5).

5. The regulations repeatedly emphasise the finality of decisions made under them. So the decisions of the SMP on the questions referred to him or her are final, subject to reg.'s 31 and 32. Reg.31 provides for a right of appeal to board of medical referees, or the Police Medical Appeal Board (PMAB) by any person dissatisfied with the SMP's decision. Such an appeal must be brought within 28 days, although the PPA has a discretion to allow an extension of time. The decision of the PMAB on the appeal is final.

6. Under reg.34 there is a right of appeal in a member of a home police force against a decision of the PPA to refuse "to admit a claim to receive as of right an award or a larger award than that granted". The appeal is to the Crown Court, exercising its little-known civil jurisdiction. Procedure is governed by the Crown Court Rules 1982, under which a notice of appeal must be issued within 21 days of the decision against which the appeal is made, although again there is a power in the court to grant an extension.

7. Under reg.32(1) a court hearing an appeal under regulation 34, if it considers that the evidence before the SMP was inaccurate or inadequate, may refer the decision back to him or her for reconsideration in the light of such facts as the court may direct. Under reg.32(2) "the police pension authority and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to him…for reconsideration, and he…shall reconsider his decision and if necessary issue a fresh

report". This apparently innocuous provision, has, as will be seen, assumed great significance and undermined the principle of finality which had appeared to apply to decisions under the Regulations.

8. Reg.37 is entitled "Reassessment of injury pension", but the reassessment for which it provides is limited. Under reg.37 the PPA has not only a power, but a duty "at such intervals as may be suitable", to consider whether the degree of the pensioner's disablement has altered. If it finds a substantial alteration, it must revise the level of pension payable accordingly. The question of whether there has been a substantial alteration is again one for the SMP under reg.30(2).

9. The scope of the review under reg.37 was considered in a series of cases decided in 2009. In *R(Pollard) v PMAB* [2009] EWHC 403 (Admin) the claimant had been in receipt of an injury award since the 1980s following a decision that her disabling back symptoms were attributable to an injury sustained in the execution of her duty. At a review in 2007 an SMP concluded that her symptoms, although disabling, were due to constitutional degenerative changes and nothing to do with any work injury, whose consequences would only have been transient. Her degree of disablement was reduced to 0% on this basis. The decision was upheld on appeal by the PMAB, but quashed by Silber J, on the ground that in purporting to re-open the issue of the causal link between the duty injury and the disablement the decision-makers had gone outside their powers under regulation 37, which were to re-consider only the degree of disablement. *Pollard* was approved by Burton J in *R(Turner) v PMAB* [2009] EWHC 1867 (Admin) in which on an appeal against a decision by the SMP on a reg.37 review the PMAB had impermissibly reduced the pensioner's degree of disablement on the ground that only 50% of his hearing loss had been caused by injuries at work.

10. The third case in the series is *R(Laws) v PMAB* [2009] EWHC 3135 (Admin). The pensioner's degree of disablement had been reduced from 85% to 25% on a review. The SMP had undertaken an entirely new assessment of the range of work which the pensioner was able to perform, and it had been taken into account that she had recently obtained a law degree. There had been no material change in the extent of her symptoms. Cox J emphasised that the scope of the review was to determine whether there had been a substantial alteration in the degree of disablement due to the injury on duty since the preceding review, and not to conduct a wholly fresh

assessment. Further it was wrong to take into account the pensioner's own efforts in obtaining a law degree. While the degree might have increased her earning capacity, what was in issue was whether there had been a substantial alteration in earning capacity (and therefore degree of disablement) *as a result of the duty injury*.

11. Reg.37 reviews therefore do not provide a mechanism for the correction of errors in the original decision.

12. Until 2012 it had been widely considered that the power of the claimant and the PPA under reg.32(2) to agree to a reconsideration of a decision by a medical authority (that is either the SMP or the PMAB on appeal) was simply a convenient means of avoiding, in the case of an SMP decision, an appeal to the PMAB, and in the case of a PMAB decision, a judicial review. Although not subject to an express time limit, it was not contemplated that this provision might give rise to a free-standing right to correct errors in pension decisions without limit of time. The conventional understanding was reflected in Home Office Guidance on Police Medical Appeals. But in two Administrative Court decisions, *R(Crudace) v Northumbria Police Authority* [2012] EWHC 112 (Admin) and *R (Haworth) v Northumbria Police Authority* [2012] EWHC 1225 (Admin) it was held, in the words of King J in the latter case, that reg.32(2) is "in part a mechanism (and indeed an important mechanism) to correct mistakes either as to fact or as to law which have or may have resulted in an officer being paid less than his full entitlement under the regulations, *which cannot otherwise be put right"*. In other words a reconsideration under reg.32(2) may take place when the time for an appeal or a judicial review has long passed.

13. In *Crudace* the officer's degree of disablement had been reduced to 0% on a regulation 37 review on the sole ground that he had reached state pension age and accordingly his uninjured earning capacity would ordinarily be expected to be nil. His earning capacity would not therefore be affected by his work injury. In reducing the degree of disablement for these reasons the SMP had acted in accordance with HOC 46/2004. The officer had instituted an appeal, but had abandoned it when told by the force solicitor that his case lacked merit and that he was on risk as to costs. Only much later did he request a reconsideration of the decision under reg.32(2). In *Haworth* it was said that the SMP, and on appeal the PMAB, had fallen into the error noted above of reconsidering causation on a reg.37 review. The PMAB decision had been made in

2006, well before the law had been clarified in *Pollard, Turner* and *Laws* in 2009. The request for reconsideration had not been made until 2010.

14. In *Crudace* and *Haworth* it was held that where a request for reconsideration is made under regulation 32(2) the PPA is under a public law duty to consider the request in the light of the statutory purposes of the provision. Delay, even inordinate delay, since the original decision was made is not in itself a sufficient reason for refusing to consent to a reconsideration without regard to the underlying merits of the challenge. Delay can be relevant to the question of whether to consent to a reconsideration, but only where the delay is relevant to the merits of the challenge: an example would be where medical records are no longer available and accordingly it is not possible to reconsider the case fairly. King J stated in *Haworth* that in principle he would agree that "in the absence of good reason to the contrary, consent should be given if the officer can demonstrate a reasonable case capable of being resolved on a reconsideration, that the pension he is being paid is significantly incorrect by virtue of a decision not in accordance with the regulations". He cited with approval observations by HHJ Behrens in *Crudace* that regulation 32(2) could be used to correct a decision of the SMP or the PMAB where that decision has been shown to be wrong by subsequent case law. King J expressly stated that the costs of the reconsideration would be relevant only the context of an application which is frivolous, vexatious or otherwise unmeritorious. The costs to the PPA of meeting an increased pension entitlement are wholly irrelevant to the decision.

15. It is of interest to compare the power to consent to a reconsideration under reg.32(2) with the discretion, familiar to all personal injury lawyers, to disapply the limitation period under section 33 of the Limitation Act 1980. In both cases, a critical question is the effect, if any of the delay on the ability of the decision-maker fairly to determine the issues, so that evidential prejudice may result in the discretion not being exercised in the claimant's favour. Under section 33 however the court is specifically required to consider the length of, and the reasons for, the delay on the part of the claimant and inordinate delay without good reason may itself be a sufficient reason to decline to exercise the discretion in the claimant's favour. There is a formal burden on the claimant, who is seeking the indulgence of the court, of persuading the court to exercise its discretion in his favour. Under reg.32(2) however even inordinate delay

for which there has been no good reason may not justify declining to agree to a reconsideration if the claimant can show that he has a reasonable case on the merits.

16. In *Crudace* the judge if necessary would have quashed the decision not to agree to a reconsideration on the ground that it had been made by an HR manager and there was no evidence that what was then the Police Authority's power had been delegated to her. The Police Pensions Regulations 2015 permit, without express limitation, delegation of the functions of the PPA, and it is important to ensure that any decision-maker acts with appropriate statutory authority.

17. The implications of *Crudace* and *Haworth* are significant. Aggrieved applicants have a mechanism of challenging decisions about entitlement to, or the level of, injury awards which is not subject to the strict time limits applying to appeals and applications for judicial review. The cases raise the spectre of PPAs being required to make back payments of pension going back several, or many, years, although section 9 of the Limitation Act 1980, which imposes a 6-year time limit on claims for money recoverable under a statute, may impose some limit on the extent of such claims.

18. All this emphasises the importance of getting it right first time if at all possible. It may be appropriate to advise the SMP as to the approach to be taken to the determination of the issues before him or her in any case of difficulty. Requests for reconsideration of decisions made long ago should not be dismissed without careful consideration of the merits of the challenge to the original decision.