CO/5057/2004

Neutral Citation Number: [2005] EWHC 1575 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Friday, 24 June 2005

B E F O R E:

MR JUSTICE BEAN

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THE QUEEN ON THE APPLICATION OF ROGER GEOFFREY VICK
(CLAIMANT)

-v-

CRIMINAL INJURIES COMPENSATION APPEALS PANEL
(DEFENDANT)

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Computer-Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)

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MR P JONES appeared on behalf of the CLAIMANT
MR J JOHNSON appeared on behalf of the DEFENDANT

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J U D G M E N T
(As Approved by the Court)

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B 1

1. MR JUSTICE BEAN: This is an application for judicial review by Roger Geoffrey Vick who was injured in the course of his duties as a police officer by what is accepted to have been a criminal injury within the meaning of the Compensation Scheme on 7 February 1998. On 21 November 1998, by which time he was aged 51 years, he was discharged on medical grounds as a consequence of that injury.

2. The decision under review is one of the Criminal Injuries Compensation Appeal Panel. There is no issue as to their finding, after consideration of the medical evidence, that Mr Vick would have retired at the age of 55 (irrespective of the injury) because he had begun to suffer from osteoarthritis in the knee which would have worsened so as to compel his retirement.

3. Mr Vick's loss of earnings to his fifty-fifth birthday, that is 22 August 2002, and ignoring anything receivable after that date, is agreed to have been £40,015. The panel found, and again it is not in dispute, that after the age of 55, in the events which had occurred, he would receive an ill health pension, an enhancement of that pension on account of injury, incapacity benefit and industrial disablement benefit.

4. The total sum which he has been receiving, on the figures before the panel, is £19,822.64 per year. Had he not been injured, but had retired on his fifty-fifth birthday because of the arthritis, he would have received a police pension and, in addition, incapacity benefit in a total of £16,103.98. The difference can be seen to be a little over £3,700 per year. Applying the appropriate multiplier (agreed before the panel) of 9 and adding a very small sum in respect of a particular benefit after age 65, the difference between the two results is agreed to have a capitalised value of £33,761.

5. The issue was whether the panel were correct to hold that certain benefits and pensions payable to the applicant should be taken into account so as to reduce his gross award, not only up to his fifty-fifth birthday (which was not in dispute) but continuing thereafter as well.

6. The relevant paragraphs of the Scheme are as follows:

> "22 Subject to the other provisions of the Scheme, the compensation payable under an award will be:
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> .....
>
> (b) where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury (other than injury leading to his death), an additional amount in respect of such loss of earnings, calculated in accordance with paragraphs 30-34;
>
> .....
>
> 30 Where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury (other than injury leading to his death), no compensation in respect of loss of earning or

earning capacity will be payable for the first 28 weeks of loss. The period of loss for which compensation may be payable will begin 28 weeks after the date of commencement of the applicant's incapacity for work and continue for such period as a claims officer may determine.

31 For a period of loss ending before or continuing to the time the claim is assessed, the net loss of earnings or earning capacity will be calculated on the basis of:

(a) the applicant's emoluments (being any profit or gain accruing from an office or employment) at the time of the injury and what those emoluments would have been during the period of loss; and

(b) any emoluments which have become payable to the applicant in respect of the whole or part of the period of loss, whether or not as a result of the injury; and

(c) any changes in the applicant's pension rights; and

(d) in accordance with paragraphs 45-47 (reductions to take account of other payments), any social security benefits, insurance payments and pension which have become payable to the applicant during the period of loss; and

(e) any other pension which has become payable to the applicant during the period of loss, whether or not as a result of the injury.

32 Where, at the time the claim is assessed, a claims officer considers that the applicant is likely to suffer continuing loss of earnings or earning capacity, an annual rate of net loss (the multiplicand) or, where appropriate, more than one such rate will be calculated on the basis of:

(a) the current rate of net loss calculated in accordance with the preceding paragraph; and

(b) such future rate or rates of net loss (including changes in the applicant's pension rights) as the claims officer may determine; and

(c) the claims officer's assessment of the applicant's future earning capacity; and

(d) in accordance with paragraphs 45-47 (reductions to take account of other payments), any social security benefits, insurance payments and pension which will become payable to the applicant in future; and

(e) any other pension which will become payable to the applicant in future, whether or not as a result of the injury.

The compensation payable in respect of such continuing loss will be a

lump sum which is the product of that multiplicand and an appropriate multiplier. The summary table given in Note 3 illustrates the multipliers applicable to various periods of future loss to allow for the accelerated receipt of compensation. In selecting the multiplier, the claims officer may refer to the Actuarial Tables for use in Personal Injury and Fatal Accident Cases published by the Government Actuary's Department, and take account of any factors and contingencies which appear to him to be relevant.

.....

Effects on awards of other payments

45 All awards payable under this Scheme, except those [in respect of the tariff-based amount of compensation, usually called the general damages award payment supplement] will be subject to a reduction to take account of social security benefits or insurance payments made by way of compensation for the same contingency. The reduction will be applied to those categories or periods of loss or need for which additional or supplementary compensation is payable, including compensation calculated on the basis of a multiplicand or annual cost. The amount of the reduction will be the full value of any relevant payment which the applicant has received, or to which he has any present or future entitlement, by way of:

(a) United Kingdom social security benefits;

.....

In assessing the value of any such benefits and payments, account may be taken of any income tax liability likely to reduce their value.

.....

47 Where the victim is alive, any compensation payable under paragraphs 30-34 (loss of earnings) will be reduced to take account of any pension accruing as a result of the injury. Where the victim has died in consequence of the injury, any compensation payable under paragraphs 40-41 (dependency) will similarly be reduced to take account of any pension payable, as a result of the victim's death, for the benefit of the applicant. Where such pensions are taxable, one half of their value will be deducted, but they will otherwise be deducted in full (where, for example, a lump sum payment not subject to income tax is made). For the purposes of this paragraph, 'pension' means any payment payable as a result of the injury or death in pursuance of pension or any other rights connected with the victim's employment and includes any gratuity of that kind and similar benefits payable under insurance policies paid for by the victim's employers. Pension rights accruing solely as a result of payments

by the victim or a dependant will be disregarded."

7. Both Mr Jones for the claimant and Mr Johnson for the defendant argue - though for different reasons - that paragraph 31 is applicable and paragraph 32 is not.

8. Paragraph 31 begins by stating that it applies to "a period of loss ending before or continuing to the time the claim is assessed". The claim in this case is to be taken as having been assessed when the panel gave its decision on 11 August 2004. Mr Vick had reached the age of 55 years on 22 August 2002. Mr Jones' argument is that the period of loss ends on that date and no benefits or pensions received after that date can be taken into account. It is plain, in my view, that the phrase "period of loss ending before or continuing at the time the claim was assessed" in this case ended on 22 August 2002. The claimant suffered no loss of earnings after that. That is because he would have retired anyway on health grounds. "Loss of earnings" in paragraph 31 also, almost certainly includes loss of pension by reason of paragraph 31 (c). But Mr Vick suffered no loss of pension after that date either. The pension he actually received is at least as good as, and in some respects better than, the pension he would otherwise have received.

9. Consequently in my judgment counsel were right to argue that paragraph 32 is inapplicable. That applies where at the time the claimant is assessed it is considered that the applicant is likely to suffer "continuing loss of earnings or earning capacity", and in this case there is none. Paragraph 31, in other words, refers to past loss, traditionally labelled special damages; and paragraph 32 to future loss. Paragraph 32, in the time-honoured manner of calculation of future loss, does so by means of the application of a multiplier to a multiplicand.

10. The defendant argued that paragraph 31 (d) must be read subject to paragraphs 45 and 47. I think, first, it would be useful to consider what paragraph 31 means on its own before turning to paragraphs 45 and 47.

11. In paragraph 31 (d) the critical phrase is social security benefits, insurance payments and pension "which have become payable to the applicant during the period of loss". Mr Johnson, for the panel, argued that "have become payable", and similarly in paragraph 31 (e) "has become payable", means "have started to be paid during the period of loss". He goes on to argue that provided the benefit or pension has started to be paid during the period of loss, it may then be taken into account indefinitely. This would lead, as I see it, to a curious anomaly. If a relevant benefit started to be paid a week before the assessment, it would be taken into account under paragraph 31 (d) in perpetuity, whereas if it was only to start a week after the assessment it would not be taken into account under paragraph 31 at all.

12. I find the phrase "which have become payable" means "which has been or should have been paid". One can see that the use of the word "payable" is designed to cover the situation where someone has plainly become eligible for pension or benefit but for whatever reason has not yet received payment.

13. I turn to paragraph 45. This applies, apart from insurance payments which are not relevant in the present case, to social security benefits, whereas paragraph 47 deals with occupational pensions. It is clear from the second sentence of paragraph 45 that it permits deductions only against the period of loss of earnings, in this case to age 55. Although Mr Johnson tried to think of an alternative construction of the paragraph which could give some meaning to the reference in the second sentence to "those ..... periods of loss ..... for which additional ..... compensation is payable", he was unable to do so. I cannot myself think of any other construction which gives those words meaning. Further, that construction of paragraph 45 is consistent with my view of paragraph 31 (d).

14. Paragraph 47, dealing with reductions to take account of occupational pensions accruing as a result of the injury, contains no indication either way of the period of time in respect of which it is to apply. I consider it reasonably clear that it, too, is limited to the period for which loss of earnings is claimed. This is for two reasons. First, I see no rational basis, and none has been suggested, for applying different rules to State pensions under paragraph 45 and pensions connected with a victim's employment under paragraph 47. Secondly, the same phrase "become payable" as I have considered in respect of paragraph 31 (d) and (e) ("has become payable") is used in paragraph 32 (d) and (e) ("will become payable ..... in future"). Paragraph 32 (d), like the corresponding sub-paragraph of paragraph 31, makes cross-reference to paragraphs 45 to 47. If one supposes an applicant who at the time of assessment has 2 years' future loss of earnings, after which he would have retired on the grounds of arthritis, but who will now expect to receive an occupational pension for 7 years: the multiplier, by the terms of paragraph 32 and Note 3 which cross-refers, is fixed by the scheme (or almost fixed in that the claims officer may refer to the Government Actuarial Tables). It is only the multiplicand under paragraph 32 which is to be calculated in accordance with the five sub-paragraphs, (a) to (e). It is difficult to see how the multiplicand, that is the annual rate of net loss, could, either by the terms of the scheme or with any sense of fairness, be affected by an applicant's right to receive a pension in respect of future years occurring after the period of loss has ended. That is not of course this case, but it provides a further reason, in addition to the improbability of a discrepancy between paragraph 45 and paragraph 47, for thinking that paragraph 47 is likewise time limited.

15. I therefore conclude that on a proper construction of paragraphs 31, 45 and 47 of the scheme (with the additional illumination, such as it is, provided by paragraph 32) the applicant was entitled to receive his award without deduction for pension and benefits which he has already received or is expected to receive in respect of the periods after his fifty-fifth birthday. It follows that the panel's decision in this case must be quashed.

16. I should refer in conclusion to two other matters. The defendant's written argument suggested that counsel appearing for the applicant before the panel (not Mr Jones) had conceded the point of construction of the scheme argued before me. It is clear to me from the witness statement of counsel who appeared below that he did no such thing. The panel appear to have expressed, through their chairman, a view, possibly using the adjective "provisional", in rather emphatic terms; as a result of which counsel felt that it was either pointless or inappropriate or even discourteous to argue to the contrary. Mr

Johnson, fairly, did not press the point about the concession which, in my judgment, has no validity.

17. Secondly, it appears to be common ground that that expression of view by the chairman altered what had previously been the view of the panel's advocate. That is because the hearing took this form: the panel considered evidence and submissions on medical issues, gave their view of those and then, very sensibly, invited the two advocates representing the parties at the hearing to withdraw and see if they could agree the figures for compensation. It appears that the panel's advocate at that stage - before the panel expressed the contrary view - considered that the claimant's arguments about the time period for deductions were correct. I have not taken this into account in forming my own view of the proper construction of the scheme. But it is reassuring to me that the experienced advocate who appeared for the panel below appears to have had first thoughts along the same lines as my conclusions, and it may be reassuring to him also to know that at least one judge takes the view that his first thoughts were correct.

18. For the reasons I have given this decision must be quashed.

19. MR JONES: My friend has suggested the following. Rather than remit to another hearing, he has suggested that we get together and agree the figures as to which there should not be any problem, subject to ability to apply back to your Lordship if necessary.

20. MR JUSTICE BEAN: If you would write in, say within seven days, with, I hope, a joint view. If there is a difference in view, write in and suggest what I should do about it. One does not want further hearings unless it is necessary.

21. MR JONES: It is difficult to see if there is going to be anything between us.

22. MR JUSTICE BEAN: Is it just a matter of calculating interest?

23. MR JONES: There is no question of interest.

24. MR JOHNSON: Depending on how it is dealth with, it is quite easy because the figure of £40,015 remains. There is no deduction, I do not think. There is to be added the tariff award of £2,700. If you would allow seven days to check with our clients, but I suspect it will be a figure of £42,715.

25. MR JUSTICE BEAN: Shall I say that subject to any representations in writing received by the court clerk by next Friday the panel's decision be quashed and, subject to any such representations, a declaration made in the order that the proper award should be £42,715.

26. MR JONES: Yes. As to the question of costs. Has a schedule made its way to your Lordship? I hand up my copy (Handed).

27. MR JUSTICE BEAN: It is not disputed, in principle, that the claimant is entitled to costs?

28. MR JOHNSON: No.

29. MR JUSTICE BEAN: What would you say about quantum?

30. MR JOHNSON: There are two points. The first is that the claimant has succeeded on the basis of his amended grounds, amended relatively late in the day. The defendant continued to protest the claim. Second, the work done on documents is claimed at just over 21 hours in total. In my submission, it would be reasonable to allow a lesser figure than 20 hours, perhaps 10 hours in total. Other than that I have no observations.

31. MR JUSTICE BEAN: Twenty hours does seem rather a lot.

32. MR JONES: It is still 5 hours less than the defendant spent. Bearing in mind that the claimant is going to have the greater burden on the documents, collating and compiling them, that is hardly surprising and is far from unreasonable. So I ask you to allow that in full. In relation to my friend's point on the amendment, it is not suggested that the defendant has been put to any real additional costs due to the amendment. My learned friend fairly concedes that would have been contested with or without the amendment. I suggest it does not appear as though the amendment had any real effect on the costs of this case.

33. MR JUSTICE BEAN: On both the two points which have been raised, I think the claimant's submissions are right. I am carrying out a summary rather than detailed assessment. Twenty-one hours on documents for the claimant may seem a lot but the defendant had 26 hours down on its schedule. It does not seem to me unreasonable to allow 21 hours. The amendment of the statement of grounds did not, in my judgment, increase the costs or affect the conduct of the case which would have been contested any way.

34. There is no dispute about the hourly rate which, for the partner in the claimant's solicitor's firm, is slightly less than that for the senior representative in the defendant's solicitor's firm. Looking at the claimant's statement of costs either in isolation or by comparison with the defendant, it does not seem to me excessive.

35. Accordingly, I summarily assess costs in the sum of £10,007.50 plus VAT as claimed by the claimant's solicitors.

36. MR JONES: The total is £11,070.73.

37. MR JOHNSON: The defendant will have to consider your Lordship's judgment, including the observations made about paragraph 32. That said, I do seek permission to appeal on both of the grounds on which it is available, namely either the court considers the appeal would have a real prospect of success, or alternatively there is some other compelling reason why the appeal should be heard. As far as the former was concerned, in my submission, the drafting of this scheme and the parts of this scheme do not make its meaning as immediately obviously clear as they might. An alternative interpretation that we urge is that it is at least arguable and, so far as the latter is concerned, compelling that the appeal should be heard. The effect of the dispute about construction has very significant repercussions in the awards likely to be made in the

future depending on who is right or wrong about the construction. Therefore it has wide-ranging effect beyond the confines on this case. For both of those reasons I do ask for permission to appeal.

38. MR JONES: We would rather you did not give permission, but it is entirely a matter for your Lordship.

39. MR JUSTICE BEAN: I think the defendant should have permission to appeal. This is a point of interpretation which is likely to apply to other cases besides that of Mr Vick. The relevant paragraphs of the scheme, as Mr Johnson accepts, are not masterpieces of clarity. It may be that a higher court may take a different view. I think it is a proper case for permission to appeal.

40. MR JOHNSON: The time for us to serve an appellant's notice is, I think, 14 days. Instructions would have to be taken although I am grateful for the grant of permission. It is at least possible, on reflection, that the defendant would decide not to take it further. I would ask for 28 days for service of the appellant's notice of appeal so that can be done.

41. MR JUSTICE BEAN: Yes, certainly.
