



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 53

P875/18

OPINION OF LORD WOOLMAN

In the petition of

BD

Petitioner

for

JUDICIAL REVIEW

of a decision taken by Kenneth Hall, Chief Executive of the Scottish Police Authority

Respondent

Petitioner: Sandison QC and Adams; MacRoberts LLP (for PBW Law Glasgow)

Respondent: Duncan QC and Irvine; DLA Piper Scotland LLP

9 July 2019

Introduction

[1] The petitioner joined Dumfries & Galloway Constabulary in 1993. He worked as a police officer for over 25 years. Latterly he was a sergeant in the community policing team. He was signed off work in April 2017 with various medical problems. He suffers from hypothyroidism, which causes his hormone levels to fluctuate. His symptoms include agitation, anxiety and depression. He has been treated by means of hormone replacement therapy. That has helped to stabilise, but not eradicate, his problems. I have anonymised

this opinion because it contains personal details about the petitioner's physical and mental health.

[2] On 10 August 2018, the Scottish Police Authority ('the SPA') refused the petitioner's application to retire on the grounds of permanent disablement. It decided to defer matters until the conclusion of misconduct proceedings against him. They stem from his 2017 conviction for sexual assault.

[3] The petitioner seeks to set aside the SPA's decision. Mr Sandison QC argued the case on his behalf. He submits that the SPA (a) took into account irrelevant matters, (b) acted irrationally, and (c) fettered its discretion. The decision is therefore fundamentally flawed. Mr Duncan QC on behalf of the SPA maintains that it acted lawfully and rationally. Accordingly, the decision should stand.

Background

[4] On two separate nights in late 2016, the petitioner went out socialising. His behaviour toward two women on those occasions gave rise to concern. The police conducted an investigation and prepared a report. Subsequently, the procurator fiscal served a complaint on the petitioner. It listed five charges of sexual assault against two female complainers under section 3 of the Sexual Offences (Scotland) Act 2009.

[5] The Crown prepared a "summary of evidence". It gives the following information about the allegations.

- i. While travelling home after a night out in November, the petitioner brushed against the breast of the first complainer as they sat together in the rear of a car. She thought nothing of it, but he repeatedly stated "I've touched a boob, I'm so sorry".

- ii. In a nightclub in December, he cupped the first complainer's left breast as she bent over to adjust her boots.
- iii. On the same December night:
 - i. he briefly touched the left breast of the second complainer
 - ii. he placed his hands on her hips from behind
 - iii. he placed his hand on her left leg slightly above the knee and leaned into her going around corners as they walked through the town centre.

[6] The petitioner pled not guilty. Following a summary trial, the sheriff convicted him on all five charges, imposed a £500 fine, and placed his name on the Sex Offenders' Register.

Pension application

[7] In early 2018, the petitioner applied to retire under the Police Pension Regulations 1987 ("the 1987 regulations"), which provide:

"A20 Every regular policeman may be required to retire on the date on which [the SPA] having considered all the relevant circumstances, advice, and information available to them, determine that he ought to retire on the ground that he is permanently disabled for the performance of his duty."

[8] Part H of the 1987 regulations sets out the procedure. A selected medical practitioner ("SMP") examines each applicant and provides a report addressing two key questions: (a) is the applicant disabled? (b) if so, is that likely to be permanent? The SMP's opinion on these points is final and binding.

[9] Dr David Watt, the SMP in this case, issued a report dated 8 May 2018. He concluded:

"I believe [the petitioner] is vulnerable medically. Disturbances of thyroid hormone can be destabilising and insults of a social nature affecting his mental health have on two occasions led to serious mental symptoms requiring mental health support. When I met [the petitioner] he was in a distressed state and it is my impression that he would not be

able to successfully represent himself as a police sergeant again in the future. I believe the mental conflict and the effects of ... hypothyroidism are limiting as far as the ordinary duties of a police officer are concerned. On this basis I believe that there are grounds for him to be considered for Ill Health Retirement and I enclose a Pension Certificate, SMP Report and Capability Checklist. The Capability Checklist emphasises the mental aspects of police duty but there are also some physical limitations due to the risks posed by fluctuating levels of thyroid hormone."

[10] The SMP signed an accompanying certificate, which stated that: (a) the petitioner was disabled from performing the ordinary duties of a member of the police force; and (b) the disablement was likely to be permanent, due to two conditions – hypothyroidism and replacement therapy (ICD 10 E03.9), and depression (ICD 10 F41.1).

[11] On 18 May 2018 the SPA issued its decision. It refused the petitioner's application to retire and instead recommended that he should be redeployed within the police service. That was a surprising outcome, given the terms of the SMP's report.

[12] The petitioner raised an action at Ayr sheriff court to challenge that decision. No steps proceedings took place, however, because on 2 August 2018 the SPA changed tack. Its solicitor wrote to the petitioner's solicitor stating that his redeployment:

"was unrealistic in the circumstances given the terms of the SMP's report and accordingly it would be appropriate for fresh consideration to now be given to your client's case."

Decision letter

[13] The SPA's solicitor wrote again to his counterpart the following week. The key passage in the decision letter of 10 August 2018 states:

"After careful consideration of all the circumstances of your client's case, the Interim Chief Officer decided your client should not be granted a medical discharge from Police Scotland until the misconduct proceedings which he is currently facing have concluded. The basis of that decision was the Interim Chief Officer's view that on public policy grounds police officers should not be granted medical discharges whilst there are live misconduct proceedings against them, as he concluded that there could be a loss of public confidence in the service if police officers were seen to

be evading misconduct proceedings by exiting the service on medical discharges before those proceedings had concluded.”

Further medical information

[14] After the issue of the decision letter, the petitioner obtained an opinion about his mental state from his general practitioner, Dr Joanne Ashcroft. By letter dated 16 October 2018, she stated that he is incapable of taking part in any disciplinary proceedings. Her opinion is buttressed by a report dated 15 March 2019 from Dr Anupam Agnihotri, consultant psychiatrist. He reached the following conclusion.

“Taking account of [the petitioner’s] long history of depressive illness, history of hypothyroidism, and current mental state, it is unlikely that even with continuing treatment, he would reach a mental state in the foreseeable future where he will be able to either instruct his lawyers or take part in misconduct proceedings... it would not be possible for me to identify when he will reach a mental state, where he would be able to either instruct his lawyers or take part in misconduct proceedings.”

Disciplinary proceedings

[15] The petitioner was due to attend a misconduct hearing in August 2018. It was postponed because of his lack of capacity and the disciplinary proceedings against him are currently suspended. Mr Sandison explained that he could only accept instructions to appear because when still fully mentally capable, the petitioner had signed a mandate authorising the Police Federation to act in his best interests.

[16] I reject the submission that a misconduct hearing could take place in the absence of the petitioner. Mr Duncan advanced this argument under reference to the Police Service of Scotland (Conduct) Regulations 2014, which state:

“19(1) The person conducting the misconduct proceedings may permit the constable to participate in those proceedings by video link or other suitable means if satisfied that the constable is unable, on reasonable grounds, to attend those proceedings.”

[17] In my view, that provision deals with the situation where a police officer is unable physically to be present at a hearing. It has no application to an officer who is willing to participate, but is unable to do so because of mental infirmity.

Grounds of challenge

Preliminary

[18] There is a degree of cross-over in the grounds of challenge. That is common in applications for judicial review. But Mr Duncan went a stage further. He maintained that this was a “reasons” case, which turned on a single issue. Would a reasonable reader readily understand the rationale for the decision? He submitted that the answer to that question was yes. The decision letter explained the SPA’s thinking clearly and simply. To avoid any adverse public perception, it believed that the right course was to conclude the disciplinary hearing first and then determine the pension application. In my view, that approach goes too far too fast. I prefer to focus on the validity and lawfulness of the decision, not whether the reasons given are sufficient.

Degree of Scrutiny

[19] Lord Mance traced the development of judicial review in *Kennedy v Charity Commission (Secretary of State for Justice and others intervening)* [2015] AC 455, at paragraphs 51-56. He stated that the level of scrutiny in individual cases varies depending on the context. It is more intense where it involves fundamental rights.

[20] In this case, the dial of intensity must be turned to a high setting, because “decisions leading to compulsory retirement are of a judicial character and must conform to the rules of

natural justice”: *R v Kent Police Authority ex parte Godden* [1971] 2 QB 662, Lord Denning MR at 669.

[21] Mr Duncan suggested that it was not helpful to equate the SPA’s decision with a judicial decision. He accepted, however, that it had to act rationally, reasonably and fairly. In my view, there was no real quarrel between parties on this point. Both counsel agreed that the SPA’s decision-making process warrants close inspection.

Ground I Did the SPA take into account irrelevant material?

[22] All decision-making bodies must proceed only on the basis of relevant material: *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407. The Police Negotiating Board has issued guidance amplifying that duty:

“Where the officer has been assessed as permanently disabled, the police authority should consider all the evidence before it before reaching a decision under A20. The police authority will bear in mind the policy presumption in favour of retaining the officer until normal retirement age wherever that is practicable. Key factors include:

- length of service still to serve, rank etc;
- the SMP’s advice on the officer’s capabilities;
- the chief constable’s advice – the chief constable should have taken due note of the SMP’s findings... and provide an assessment on whether or not the officer can remain in the force; the chief constable’s advice will inform but not determine the police authority’s decision and the authority should consider whether the chief constable’s assessment is robust;
- whether the officer wishes to remain in the force – the officer’s opinion will inform but not determine the authority’s decision, but where the officer does wish to remain, the presumption in favour of retention will arguably be greater still;
- whether the officer faces outstanding or impending misconduct proceedings – in cases where the conduct in question is serious, or whether the completion of disciplinary proceedings is necessary for the maintenance of public confidence, the public interest in completing the proceedings will outweigh the significance of the officer’s condition, except in the most compelling compassionate cases.”

(PNB circular 10/4 para 53, following PNB Circular 03/19 para 50)

[23] Mr Sandison submitted that the SPA erred by assessing the misconduct as serious, ignoring the compassionate circumstances, and implying that the petitioner was trying to evade the disciplinary proceedings.

[24] I disagree. The thrust of Mr Sandison's approach takes the court close to taking the substantive decision itself. The guidelines demonstrate that the SPA has to conduct a complex exercise. The existence of misconduct proceedings is relevant and important.

Failure to evaluate the seriousness of the offending conduct would constitute an obvious flaw in the decision. In *R v Chief Constable of Devon & Cornwall ex p Hay* [1996] 2 All ER 711.

As Sedley J stated, at 724-725:

“in order to take a lawful decision which does not leave relevant matters out of account, a chief officer of police who is invited to require the retirement of one of his officers must consider not only the evidence tendered to him in support of retirement, but also the fact that he is not obliged to accede to it if there is a good reason for refusal, and must go on to consider, for example, whether the interest of the police service in the public and seeing any disciplinary proceedings against the officer to their end outweighs for the time being the case for his retirement.”

Ground II Was the decision irrational?

[25] In *Kennedy* Lord Mance stated that:

“it is inappropriate to treat all cases of judicial review together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation.”

[26] Senior counsel agreed that the test for irrationality was whether the decision is one at which “no sensible person who had applied his mind to the question ... could have arrived”: *HMB Holdings Ltd v Cabinet of Antigua and Barbuda* [2007] UKPC 37, Lord Hope at para 31. As a cross-check, the inquirer should ask if the decision adds up, or if there is an error of reasoning which robs it of logic: *R v Parliamentary Commissioner for Administration ex parte Balchin* [1998] 1 PLR 1, Sedley J at 13E.

[27] Mr Sandison argued that several factors point to the inevitable conclusion that the decision was irrational. I shall deal with the first group together. (A) The petitioner's mental condition renders him unable to face proceedings. (B) He should not be required to remain in the police service when he will never be able to fulfil his duties. (C) His career and pension entitlement should not be left indefinitely in limbo. (D) There was no question of evasion on the part of the petitioner, who is in wretched condition and does not have the mental capacity to exercise a conscious choice in this matter.

[28] Most of these factors are grounded to some extent on the later medical evidence. But the GP and psychiatric reports were not before the SPA and are therefore not relevant. At the decision date, it had no basis to conclude that the petitioner would never be able to participate in misconduct hearings. The opinion of the SMP did not travel that distance. It focussed on his capabilities as a police officer.

[29] Mr Sandison also relied on the seriousness of the offences. He maintained that the petitioner had been convicted of crimes that lie at the lower end of the spectrum. He drew a comparison with pension forfeiture under the 1987 regulations. Officers only risk losing a pension already being paid to them, if they have a very serious criminal conviction, or (ii) committed a crime as a member of the police service which is certified by the Secretary of State either to have been gravely injurious to the interests of the State or to be liable to lead to serious loss of confidence in the public service": regulation K5.

[30] Mr Sandison submitted that if the petitioner had retired immediately after committing the offences, he would have kept his pension. The forfeiture provisions would not have been engaged. It would be inequitable if, by pleading not guilty and standing trial, he risked losing his full pension rights. The proper approach was to construe the 1987

regulations as a single instrument. Seriousness for one regime should mean the same for the other.

[31] This is a powerful argument, persuasively presented. If correct, however, it would trespass into the SPA's exercise of judgement. It requires to consider not only whether the conduct in question is serious, but also "whether the completion of disciplinary proceedings is necessary for the maintenance of public confidence". These are discretionary matters within its province.

[32] I am satisfied that a sensible person could have arrived at the same decision. Like the SPA, he or she could well have thought it logical to deal with disciplinary matters first and pension matters later. As the decision to defer adds up, the test for irrationality is not met.

Ground III Did the SPA fetter its Discretion?

[33] This branch of the case turns on the tension between two statements in the decision letter. First, the SPA took the decision "after careful consideration of all the circumstances of your client's case". Secondly, the decision was taken on "public policy grounds".

[34] Did the SPA truly consider the individual circumstances of the petitioner's case? Or did it apply a blanket policy of refusing to grant a medical discharge to any officer while disciplinary proceedings were outstanding? Mr Duncan urged me to answer the first question yes and the second question no. Mr Sandison invited me to give the reverse answers.

[35] Broad statements that individual circumstances have been taken into account must be treated with caution. They cannot serve as automatic trump cards. Otherwise any decision-making body could easily avoid scrutiny. Equally, however, one must not travel to

the other extreme. It is unhelpful to require lengthy and abstruse decision letters covering every point raised.

[36] I conclude that there is no foundation for holding that the SPA did not consider all the circumstances of the petitioner's case. The text and the surrounding circumstances, including the letter of 2 August, suggest the contrary. Having weighed the competing factors, the SPA saw the public policy as tipping the balance.

[37] I therefore conclude that the SPA did not fetter its discretion. Rather, it properly exercised its jurisdiction.

Conclusion

[38] I uphold the SPA's pleas-in-law, repel the pleas-in-law for, and dismiss the petition.