

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

THE SECRETARY OF STATE FOR SOCIAL SECURITY

(Respondent) Appellant

and

SANDRA McLEAN

(Appellant) Respondent

JUDGMENT

OF

CARSWELL LCJ

CARC3272

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

THE SECRETARY OF STATE FOR SOCIAL SECURITY

(Respondent) Appellant

and

SANDRA McLEAN

(Appellant) Respondent

CARSWELL LCJ

Introduction

The respondent's husband Major Allan Arthur James McLean died at the age of 50 on 14 October 1996, the certified cause of his death being alcoholism. He had served in the Royal Engineers from enlistment in July 1965 until his discharge in June 1994. The respondent claimed to be entitled to a war widow's pension on the basis that the death of the deceased was due to or hastened by the aggravation by service of an injury, viz alcoholism, which existed before or arose during service. The appellant, the Secretary of State for Social Security, refused her claim and she appealed to a Pensions Appeal Tribunal, which sat in Belfast on 18 February 1999. The Tribunal allowed the respondent's appeal and held that she was entitled to a pension as claimed. The appellant sought leave to appeal to this court on the points of law set out in his originating motion, and after an initial refusal and some further consideration the Tribunal granted leave to appeal on 22 May 2000. Counsel for the appellant appeared before us on 27 September 2000 to argue the appeal. The respondent's solicitor

appeared as a matter of courtesy to inform the court that although the respondent was present she did not wish to take any part in the appeal.

The Statutory Provisions

The respondent brought her claim under Article 4(1)(b) of the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1983 (the 1983 Order), which provides:

“(1) Where, not later than 7 years after the termination of the service of a member of the armed forces, a claim is made in respect of a disablement of that member, or the death occurs of that member and a claim is made (at any time) in respect of that death, such disablement or death, as the case may be, shall be accepted as due to service for the purposes of this Order provided it is certified that:-

- (a) ...
- (b) the death was due to or hastened by:-
 - (i) an injury which was attributable to service;
or
 - (ii) the aggravation by service of an injury which existed before or arose during service.”

“Injury” bears a specific meaning for the purposes of this provision, set out in Schedule 4 to the 1983 Order, as amended in 1994. It is provided that the expression “injury” –

“includes wound or disease but excludes any injury due to:-

- (a) the use or effects of tobacco; or
- (b) the consumption of alcohol; except that paragraph (a), in so far as it relates to the use of tobacco and paragraph (b) above shall not apply where the person suffers from a mental condition which is attributable to service if:-
 - (i) the degree of disablement in respect of that condition has been assessed at 50% or more; and
 - (ii) he started or continued to use tobacco or to consume or continue to consume alcohol due to that condition.”

Article 4(2) provides for the onus of proof:

“(2) Subject to the following provisions of this article, in no case shall there be an onus on any claimant under this article to prove the fulfilment

of the conditions set out in paragraph (1) and the benefit of any reasonable doubt shall be given to the claimant.”

It was confirmed in *Minister of Pensions v Greer* [1958] NI 156 that the expression “reasonable doubt” bears the same meaning in this context as in the criminal law. Accordingly it is incumbent upon the Secretary of State to establish beyond reasonable doubt that the claimant has not fulfilled the conditions set out in Article 4(1) of the 1983 Order, and if a reasonable doubt remains the claimant is entitled to the benefit of the doubt. As Black LJ stated in *Minister of Pensions v Greer* at page 164, it is for the tribunal and not for this court to determine whether such a doubt exists, so long as there is evidence on which it could properly reach that conclusion.

The Factual Background

Major McLean served in a number of postings in various parts of the world. He was married to his first wife in 1969 and divorced in 1978. He married the respondent in 1983. She says that she was aware as early as 1984 that he was drinking excessively. Some violent incidents occurred in 1987, in consequence of which Major McLean was ordered by his commanding officer to leave married quarters and live in the mess, away from his wife. She avers that his drinking was the root cause of this trouble, and the basis of her claim is that living in the mess merely exposed him to greater temptation. Not only did it afford him more opportunities to drink excessively, but the culture encouraged drinking. She makes the case that the Army ignored his problem or failed to perceive it, and that the move to living in the mess aggravated it.

We have studied Major McLean’s medical records, which were exhibited to the case stated. They show that although he received medical attention fairly frequently there is no entry bearing any relation to drinking until quite late in his service. In September 1987 he was admitted to hospital suffering from hepatitis, which was diagnosed as “probable acute viral hepatitis”, with a note added “possible alcoholic hepatitis”. The deceased at that time denied having had excessive alcohol on his recent

trip to the Pacific Islands and also denied the suggestion that he had been drinking heavily since his return home. He could not be pinned down to give an accurate estimate of his alcohol intake. In October 1987 he told the specialist that he was abstaining from alcohol and in December 1987 again said that he had avoided alcohol totally. There is no entry related to drink until 1992, when he told a medical board that his alcohol intake was one to twenty one units per week. It was not until February 1994 that there is a reference to abnormal alcohol consumption, whereas in March 1994 he stated that his intake was 28 units per week. The report of the unit medical officer, however, contains a diagnosis of alcohol dependency and states that he “has been noticed drinking heavily and prolonged”. The hospital report of 8 March 1994 contains a diagnosis of non-dependent abuse of alcohol and states that the liver function tests were consistent with his self-reported history of only three months’ heavy drinking, brought on by the stress of a posting away from Leuchars.

The Tribunal’s Findings

Following the hearing the tribunal completed the pro forma decision document allowing the appeal, in the following terms:

“The Tribunal finds that the death of the above-named (deceased) was hastened by the aggravation by service of an injury, wound or disease, namely alcoholism, which existed before or arose during Service.”

It recorded its reasons in the same wording as that which the chairman had read to the parties at the conclusion of the hearing:

“Having heard the oral evidence of Mrs McLean, the Tribunal considered that the death of the Appellant’s husband was hastened by the aggravation of a disease which existed before or arose during service – namely the order for the deceased to live in the Mess.”

When the appellant on 6 May 1999 sought leave to appeal the question of the time limit was raised, but the appellant made the case that written reasons had not been given until 7 April 1999, until which time the appellant could not determine whether to ask for leave to appeal. The chairman of the Tribunal stated through a letter dated

19 October 1999 from the secretary to the Pensions Appeal Tribunals that the full reasons had been given at the hearing and were merely repeated in the written reasons on 7 April, and accordingly the application was out of time. The appellant repeated his request for leave to appeal, on the ground that there were issues of law on which there were decisions in England but which should be dealt with by the courts in this jurisdiction and that the reasons had been insufficient to allow an application for leave to be made earlier. The Tribunal gave further consideration to the application and decided to grant it, on the ground that –

“We consider that a sufficient case has been established that the decision of the Relevant Tribunal was erroneous in law for the following reasons:-

- 4.1 the interpretation of the amendment to the Services Pension Order made by SI 1994/772 and the question of alcohol-related illnesses being attributable to service:
- 4.2 the interpretation of Rule 18 Pension Appeal (NI) Rules 1981 as to the giving of reasons.”

In the case stated the Tribunal expanded a little further on its reasons in the following paragraph:

“THE DECISION

The Tribunal considered the opinion of Medical Division Department of Social Security on pages 22 to 25 of annex B and were not satisfied that the evidence of alcohol abuse that first became manifest in 1987 was appropriately managed and followed up and in view of the known alcoholic tendencies of the Deceased were particularly concerned that the order for the Deceased to live separately from his wife in the Officer’s Mess was a factor which increased his consumption of alcohol and thus aggravated his alcoholism.”

Alcoholism as a Ground of Claim

The Tribunal decision involves findings that (a) the alcohol abuse of the deceased became manifest in 1987 (b) it was not satisfied that it was appropriately managed and followed up (c) the order that he should live separately from his wife in the officers’ mess was a factor which increased his consumption of alcohol and thus aggravated his alcoholism. In our view the Tribunal was entitled on the evidence submitted to it to reach

these conclusions, and Mr Maguire for the appellant did not seek to argue to the contrary.

The issue of law which arises on the interpretation of the 1983 Order is whether the necessary conditions for the award of a pension for a disease due to the consumption of alcohol had been satisfied. This issue had been raised in the detailed written reasons given by the Secretary of State for refusing an award, but no reference to it appears in the Tribunal's decision and there is no discussion of the validity of those reasons.

It was not in dispute that alcoholism is a disease and hence would fall within the definition of an injury contained in the amended Schedule 4 to the 1983 Order. It is, however, excluded by the subsequent wording of the definition as being an injury due to the consumption of alcohol. To bring the case back within the definition it has to be established that the person concerned suffered from

“a mental condition which is attributable to service if –

- (i) the degree of disablement in respect of that condition has been assessed at 50% or more; and
- (ii) he started or continued to use tobacco or to consume or continue to consume alcohol due to that condition.”

The effect of this exclusion is to limit to a considerable extent the cases in which alcoholism can form the ground for the award of a pension. It is clear that the condition required must be a condition other than that of alcoholism, if the provision in (ii) is not to be circular. It has, moreover, to be a mental condition, which must be attributable to service. What is contemplated is some mental affliction caused or aggravated by the member's service, which, in the colloquial phrase, drives him to drink or causes him to continue to drink. The Tribunal has made no finding about the existence of any such mental condition, and on that ground alone its award cannot stand. Nor has there been any assessment of a degree of disablement, which is also a prerequisite for making an

award under this head: cf *Secretary of State for Social Security v Kelly* (1999, unreported) at page 6, per Alliot J.

The Tribunal accordingly fell into error in assuming that its factual findings were sufficient ground for making an award. We have considered whether the matter should be referred back for a Tribunal to make findings about the existence of any mental condition and its attributability to service and about the assessment of the degree of disablement. We have concluded that as there is no evidence whatsoever of the existence of any mental condition which might qualify to bring the case within the definition, no reasonable tribunal properly directed could find in favour for the respondent. Moreover, there was no assessment of the degree of disablement, which seems to us to be an inescapable prerequisite. In any event, an assessment of 50% or more would not have been consistent with the PULHEEMS scores of the deceased on all examinations between 1965 and 1994: cf the remarks of Alliot J in *Secretary of State for Social Security v Bishop* (1999, unreported) at page 6 of his judgment.

The Tribunal's Reasons

This conclusion is sufficient to dispose of the appeal, but since the sufficiency of the Tribunal's reasons was argued before us, and it may assist other tribunals to have guidance about the extent of the reasons which they should give, we shall express our views on the issue. Under Rule 18 of the Pensions Appeal Tribunals (Northern Ireland) Rules 1981 the chairman is to "indicate shortly the Tribunal's reasons for their decision". The purported reasons given by the Tribunal when it gave its decision in the present case were in effect no more than a statement of its conclusion, and we think that something more is required. Some guidance may be obtained from the expression of opinion given by the Court of Appeal in England in relation to the Immigration Appeal Tribunal. In *R v Immigration Appeal Tribunal, ex parte Khan* [1983] 2 All ER 420 at 423 Lord Lane CJ said:

“The important matter which must be borne in mind by tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties, and they should indicate the evidence on which they have come to their conclusions.

Where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis on which it has reached its determination on that issue, then that is a matter which will be very closely regarded by this court, and in normal circumstances will result in the decision of the tribunal being quashed. The reason is this. A party appearing before a tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not. Second, the appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not.”

A similar statement was made by Neill LJ in relation to Medical Appeal Tribunals in *Evans v Secretary of State for Social Services* [1993] BMLR 100, when dealing with the making of a diagnosis by the tribunal, especially when it differs from one reached earlier by another doctor. We agree with the view expressed by Allott J in *Secretary of State for Social Security v Richards* (1996, unreported), when he held that these statements were equally applicable to War Pensions Appeal Tribunals.

We do not wish to prescribe too closely the content of the reasons which tribunals should give, for they will vary as infinitely as the facts of the cases which come before them. In straightforward cases they do not need to be elaborate or lengthy. The guiding principle is that the parties should be able to see why they won or lost, and to do so they need to know what issues were decided and on what ground the tribunal came to its decision on each. Where the tribunal finds that there is a reasonable doubt, which causes it to reject the conclusions of the Secretary of State and to find in favour of the applicant, it should ordinarily indicate the material which causes it to entertain that doubt.

In the present case it would have been of some importance for the Tribunal, assuming that it had dealt with the issue whether the deceased had sustained an “injury”

within the meaning of the definition in Schedule 4 to the 1983 Order, to set out what was the mental condition from which he suffered, how it was attributable to service and when and by whom the degree of his disablement was assessed at 50% or more. It did not do any of these things, and we cannot regard the reasons as sufficient.

If the matter had turned on this issue, we should have remitted the case, but for the reasons which we have given we do not consider it necessary to do so. The appeal will be allowed and the respondent's claim dismissed.