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FROM THE GENERAL SECRETARY'S OFFICE

IR/sg

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JBB CIRCULAR NO : 010/2009

Dear Colleagues

INJURY AWARDS - RECENT CASE LAW

The purpose of this circular is to draw attention to three recent decisions of the High Court in injury award cases arising under the Police (Injury Benefit) Regulations 2006 ("the regulations"). The three cases deal respectively with dog handlers (McGinty), injuries on duty caused by stress (Hudson), and the power of the doctors when the review of an injury award is undertaken (Pollard).

PART ONE: DOG HANDLERS

Merseyside Police Authority v Police Medical Appeal Board and McGinty was heard by the High Court jointly with the Hudson case (see below) and judgment was issued on 23 January 2009.

Transcript: <http://www.bailii.org/ew/cases/EWHC/Admin/2009/88.html>

The officer was a dog handler in Merseyside Police who had the care of two police dogs and who received a Dog Handlers' allowance. He was injured whilst exercising the dogs on a day which was a day of annual leave. His injury resulted in medical retirement. He claimed an injury award on the basis that he was on duty at the time of the injury because it was part of his duty to exercise the dogs.

The claim was rejected by the Selected Medical Practitioner ("SMP") but succeeded before the Police Medical Appeal Board ("PMAB"). The Police Authority challenged the PMAB decision by Judicial Review.

The evidence before the Court included evidence of the "kennel hour" which allowed Officers who have the care of dogs to leave work an hour early and make up that hour by carrying out the care and grooming of those dogs at home. It was accepted by the Police Authority that the kennel hour was an hour of duty. Further, when taking a day of annual leave, the Officer only had to give credit for one hour less than the rostered shift time to reflect the fact that he would be "on duty" for that one hour when looking after the dogs.

The court concluded as follows:

"Thus in taking them out for exercise on his annual leave he was carrying out the same function as he would have on an ordinary duty day and for the same purposes. What he was doing was an integral part of his functions as a dog handler. He was acting in the execution of his duty."

The court also noted that Dog Handlers' Allowance was paid under the Police Regulations for caring for the dogs on rest days and public holidays. It does not cover annual leave.

Injuries incurred in such circumstances may be relatively rare but the McGinty case establishes that they should be regarded as injuries in the execution of duty.

PART TWO: STRESS RELATED INJURIES

Merseyside Police Authority v Police Medical Appeal Board and Hudson was heard by the High Court jointly with the McGinty case.

Transcript: <http://www.bailii.org/ew/cases/EWHC/Admin/2009/88.html>

The issue in the case was whether permanent disablement resulting from a psychiatric condition was a consequence of an injury received in the execution of duty. The factual background was extremely complex, and essentially began with a criminal investigation into the Officer's actions following an allegation of criminal damage whilst off duty which was made by a colleague. There were 21 specific matters identified which had affected his health, and these included the way in which the investigation was conducted, a decision to transfer him and place him on restricted duties, a failure to investigate his own complaints, and the officer finding himself ostracised by colleagues and "sent to Coventry".

As far as the investigation was concerned, the Officer's case was that the fact he was under investigation did not worry him because he knew he had done nothing wrong, and an impartial and thorough investigation would clear him. However, the cause of his stress was the way he was treated by management and colleagues whilst on duty after the investigation had begun.

The SMP found against Mr Hudson but the PMAB found in his favour. The Psychiatrist who sat on the PMAB found that "**it was the drip, drip, drip of a number of non-disciplinary-related events over a period of time which led to the depressive illness**".

The Police Authority sought to challenge this decision by way of Judicial Review. The Court rejected that challenge and upheld the decision of the PMAB.

Paragraph 19 of the decision contains a useful summary of a range of cases in this area. It is clear that a Police Officer's duty relates not just to operational Police duties but to all aspects of the Officer's work or work circumstances. There are certain cases which have established that specified situations fall outside service as a Police Officer. These include stress resulting from disciplinary proceedings (*Stunt - v- Metropolitan Police Commissioner*), disappointment in not gaining promotion (*Clinch - v - Dorset Police Authority*) and stress resulting from financial difficulties experienced during sickness absence and the result of a reduction in pay (*South Wales Police Authority - v- Morgan*). Further, a stress related psychiatric condition developed while an Officer was suspended from duty could not be regarded as an injury received in the execution of duty (*Sussex Police Authority - v - Cooling*).

The conclusion of the Court following a review of the case law was set out in paragraph 27 and reads as follows:

"There is no authority for the proposition that an injury resulting from the application of a management process cannot be received in the execution of duty. Stress related illness caused by failure properly to supervise or support may qualify. Psychiatric injury from stresses at work, bullying or harassment can be treated as an injury in the execution of duty. So too depression brought about by the appraisal process... generally speaking, however, the authorities indicate that psychiatric injury from exposure to the disciplinary or grievance proceedings, or failed promotion attempts, will not [be treated as an injury in the execution of duty]".

Applying this analysis the Court found that a number of events that had impacted on the Officer were injuries in the execution of duty including:

- Restrictions placed on his work, which went to the heart of how the Officer was to execute his duties;
- Failure to pursue the grievance lodged by the Officer properly was part of a pattern of conduct by superior Officers which directly affected the way they dealt with the Officer;
- Injury caused by having to work without the support an Officer is entitled to expect, particularly if there has been deliberate victimisation of an Officer by superiors;
- Attendance at a commendation parade even though the Officer was medically unfit for normal duty at that time.

This decision should help in persuading Police Authorities that applications for an injury award based on stress resulting from circumstances of this kind should be referred to the SMP. The exceptions to the broad interpretation of "work circumstances" such as disciplinary proceedings and concerns about career prospects, should be interpreted narrowly.

However, the decision on what has contributed to the permanent disablement is still a medical one to be made by the SMP or the PMAB. Claims for injury awards in the circumstances are likely to remain difficult unless the medical evidence is very clear on that point. It would be prudent, of course, to draw the attention of the SMP/ PMAB to this decision in any submissions which are made.

This decision may be particularly useful where the Officer's permanent disablement appears to be caused by

- a failure to investigate his or her own grievances or complaints properly, or
- management restrictions or transfers which are perceived by others as indicating culpability on the part of the Officer.

PART THREE: INJURY AWARD REVIEWS

Pollard v Police Medical Appeal Board is a decision of the High Court in a West Yorkshire case issued on 9th February 2009. The formal transcript is not yet available.

The Officer in question had been medically retired due to Lumbar Disc Degeneration and Spondylosis resulting from an injury in the execution of duty. She received an injury award and was originally assessed at 51% disabled. That assessment was confirmed by a second SMP who did not recommend that the degree of disablement be reassessed at any time.

Many years later a review was conducted by an SMP who reduced the degree of disablement to 0%. The retired Officer appealed to the PMAB but they rejected the appeal.

The PMAB found that the injury sustained by the retired Officer whilst on duty would only have resulted in the soft tissue injury from which she should have recovered in a short period of time, and that therefore there was no causal link between her injury and the permanent disablement which resulted in her retirement. Their view on this medical issue was directly contrary to the view taken by the SMP who granted her an injury award at the time of retirement. The Board said that because of this they would reduce the degree of disablement to 0%.

The application for Judicial Review brought on behalf of the retired Officer succeeded. The High Court emphasised that the decision of the SMP as to the causation of an injury was final unless it had been challenged at the time. Where the degree of disablement is reviewed under Regulation 30, neither the SMP nor a PMAB could reopen the question of causation of the original injury. They could only deal with the impairment of earning capacity now affecting the retired Officer as a consequence of the condition which had been originally determined to be the result of an injury received in the execution of duty.

Subject to seeing the official transcript of the judgment, this appears to be a helpful decision because there have been a number of instances recently where the view on causation taken by the original SMP / medical referee has been questioned on a review of the degree of disablement. Where an SMP seeks to reopen the question of causation this case can be utilised.

However, the case does not mean that the current degree of disablement can never be the subject of apportionment. The dividing line between apportionment and reopening causation can be difficult to identify.

- If there is only one medical condition affecting the member which has already been determined to be the consequence of an injury received in the execution of duty, all the current impact on earning capacity of that one medical condition should be reflected in the assessment, even if the current SMP/PMAB would have taken a different view of causation when the original injury award was granted.

- If there are two or more medical conditions affecting the member and some are not due to an injury on duty, there can be a reduction by way of apportionment as long as those conditions not due to an injury on duty would in themselves have caused some reduction in earning capacity.

Further, retired members who consider that an SMP or PMAB has contravened the Pollard principle in a previous assessment cannot automatically reopen it. If they are still within 28 days of an SMP decision an appeal should be lodged; if they are within 3 months of a PMAB decision a judicial review application may be possible. If they are outside those time limits they can ask for the Police Authority to agree to refer the matter back for reconsideration under regulation 32(2) of the regulations. If that is not agreed an application for a fresh review under regulation 37 should be made.

As stated at the beginning of this section, we have yet to see the transcript for the Pollard Judgment and if there is anything arising from the transcript which we consider requires further circulation we will notify you.

I trust that you will find the foregoing helpful and if you have any issues which you wish to raise, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in blue ink that reads "Ian Rennie". The signature is fluid and cursive, with "Ian" on top and "Rennie" below it, slightly overlapping.

IAN RENNIE
General Secretary