



Neutral Citation Number: [2024] EWHC 3187 (Admin)

Claim No: AC-2024-LON-001007

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9/12/2024

Before:

MATTHEW BUTT KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between:

THE KING

on the application of

PAUL SQUIRE

Claimant

-and-

POLICE MEDICAL APPEALS BOARD

CHIEF CONSTABLE OF ESSEX POLICE

Defendant

Interested
Party

Aaron Rathmell (instructed by Taylor Law) for the **Claimant**
Elliot Gold (instructed by **Essex Police Legal Services**) for the **Defendant**

Hearing date: 26 November 2024

Approved Judgment.
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Matthew Butt KC:

1. The Claimant is a police officer serving within Essex Police who currently holds the substantive rank of Inspector. He is a member of the police pension scheme and it is apparent that he considers that he is eligible for compulsory retirement from the police on the grounds of permanent ill health under the Police Pensions Regulations 2015.
2. It is a pre-requisite before an officer is compelled to retire that a selected medical practitioner (SMP) finds that the officer is permanently unfit to perform the ordinary duties of a police officer. An appeal lies from the SMP to the Police Medical Appeals Board (PMAB) the Defendant to this claim. Should a finding of medical unfitness be made then the Police Pension Authority (PPA) for the force in question will have a discretion to require retirement or to require the officer to continue to serve in the force. For these purposes the PPA is the Chief Constable of Essex who is the Interested Party.
3. The Claimant seeks to quash a determination by the PMAB that he is not permanently unfit and an order remitting his case to a freshly constituted PMAB for reconsideration.
4. The Defendant has adopted a neutral stance to the claim. The Interested Party opposes the claim.
5. The Claimant has had problems with his hearing throughout his life. As a child he had grommets inserted in his ears and as an adult he had tympanostomy tubes.
6. The Claimant first served as a Police Constable with Hampshire Police in 1996. He was promoted to the rank of Sergeant in 2004. He transferred to Essex Police in 2008 and was promoted to the rank of Inspector in 2013.
7. From 2017 to 2022, the Claimant worked exclusively on Police Federation business and as such was not deployed operationally. In 2021 he noticed his hearing was deteriorating and was referred to an ear nose and throat (ENT) surgeon.
8. On 30 January 2022, the Claimant returned to operational police work as an Inspector within a custody suite. He found this work difficult to manage with his hearing and after some experimentation with hearing aids, his line manager recorded that he would not be able to continue indefinitely in a custody environment due to problems with his hearing. There is a dispute between the parties as to whether the Claimant worked in custody for days or weeks with his new hearing aids, however, it was on any view a short period of time. On 30 June 2022, the adjusted duties panel recommended the Claimant's transfer. He was then moved, and started a new role at the Performance Improvement

Unit (PIU) on 01 August 2022. This is a non-operational role which is 90% “work from home” with the Claimant working in a quiet office environment when not in the office. As the Claimant is working on adjusted duties he is liable for pay reduction although his pay has not been reduced to date.

9. In April 2023 the Claimant was referred by the PPA for consideration of ill health retirement.
10. It is convenient at this stage to examine the procedure for determining whether a police officer is permanently disabled and if so whether they should be compulsorily retired. This procedure is governed by the Police Pensions Regulations 2015 which for present purposes requires a two-step process in which different roles are played by the SMP (for which read PMAB on appeal) and then the Chief Officer.
11. In the first stage, under Regulation 81 the SMP must (a) decide whether the member is medically unfit for performing the ordinary duties of a member of the police force and (b) whether that medical unfitness is likely to be permanent.
12. The SMP must make an assessment based upon the officer’s condition at the time of his report, see Regulation 75 (1). The officer must be taken to receive normal and appropriate medical treatment in this regard, see Regulation 75 (2).
13. It is agreed that “the ordinary duties of a member of the police force” means any of the duties of someone who holds the office of Constable. It is also agreed that it is helpful to have regard to guidance issued by the (now defunct) Police Negotiating Board (PNB) in Circular 10/4 which provides as follows at 4.9 to 4.11:

“Using the National Competency Framework as a basis, the following are the ordinary duties of a member of the force for the purpose of assessing permanent disablement:

- Patrol/supervising public order;
- Arrest and restraint;
- Managing processes and resources and using IT;
- Dealing with procedures, such as prosecution procedures, managing case papers and giving evidence in court.
- Dealing with crime, such as scene of crime work, interviewing, searching and investigating offences;
- Incident management, such as traffic and traffic accident management;

Taking each of these duties in turn, inability, due to infirmity, as defined by the Regulations (see paragraph 4.3), in respect of any of the following key capabilities renders an officer disabled for the ordinary

duties:

- the ability to run, walk reasonable distances, and stand for reasonable periods;
- the ability to exercise reasonable physical force in restraint and retention in custody;
- the ability to sit for reasonable periods, to write, read, use the telephone and to use (or learn to use) IT;
- the ability to understand, retain and explain facts and procedures.
- the ability to evaluate information and to record details;
- the ability to make decisions and report situations to others;

An officer, who because of infirmity is able to perform the relevant activity only to a very limited degree or with great difficulty, is to be regarded as disabled.”

14. The SMP must therefore under Regulation 81 ask whether the officer is permanently medically unfit including for front line operational duty. If an officer were not capable of such duties but could be usefully deployed in a restricted role then he would still be permanently unfit for the purposes of Regulation 81. Whether or not such an officer must be retired is then a matter for the Chief Officer who has a wide discretion in this regard under Regulation 82.
15. In *R v Sussex Police Authority Ex p. Stewart* [2000] I.C.R. 1122, the Court of Appeal considered the position of an officer who due to a permanent medical condition could play a useful but non-operational role within her police force under the materially similar Police Pensions Regulations 1987. Whilst Simon Brown LJ noted that modern policing had less of a focus on physical fitness with more work done through the use of technology and other office based roles, he held that “ordinary police duties” was still to be interpreted as including operational duties. The words of the Regulations had been chosen for a reason and required more than being fit for any form of employment. The requirement therefore was fitness for any of the essential functions of the office of Constable, including operational duty.
16. The court in *Stewart* went on to note that the above construction was also justified on a policy basis as Regulation A20 of the then 1987 Regulations vests in the police authority a discretion as to whether or not to enforce retirement on the grounds of disability. The court noted that being compulsorily retired under the Regulations brings about an earlier entitlement to a pension. A review of the caselaw demonstrates that it is normally the officer arguing that they should be compulsorily retired or as in *Stewart* that they should be allowed to stay medically retired.

17. Whilst *Stewart* concerned an officer who was being returned to duty (having earlier been medically retired) the principles set out above are equally applicable here and are accepted by both parties.
18. Under the 2015 Regulations therefore a positive decision under Regulation 81(a) and (b) is required before compulsory retirement can be considered by the Chief Officer.
19. It is only if the SMP/PMAB finds that the officer is permanently unfit that the Chief Officer can consider whether or not to require the officer to retire. A positive finding under Regulation 81 thus creates neither a right nor a requirement for this to occur. This underlines the importance that the two questions are not conflated and that the SMP/PMAB making the decision under Regulation 81 addresses only the required questions.
20. Returning to the facts, the SMP in the Claimant's case produced a report on 15 May 2023 stating that the Claimant was unable to work in an operational environment due to his hearing deficit but not permanently so. The SMP did not, however, explain why this unfitness was not permanent or how or when the Claimant might be fit in the future.
21. The Claimant appealed to the PMAB which heard his appeal on 24 November 2023. The board comprised three consultant physicians one of whom (Dr Kelly) was an ENT consultant. The board heard from the SMP and the Claimant who was examined by Dr Kelly. Its decision was promulgated on 22 December 2023.
22. Dr Kelly found that the hearing loss in the Claimant's left ear was within the hearing loss thresholds for those applying to become police officers under national medical standards for police recruitment. He found that the hearing loss in the right ear was also within permitted levels over the first of two ranges but one decibel over the permitted limit in the second range. The Claimant would therefore have passed three of the tests for police recruitment and narrowly failed the fourth. Dr Kelly said that it was expected that experienced police officers would compensate for the effects of ageing by acquiring other skills and so it did not follow that serving officers who narrowly miss these minimum thresholds will be unfit. His diagnosis was of a mild mainly conductive hearing loss.
23. In finding that the Claimant was not unfit to perform normal police duties, the PMAB stated the following (the first two paragraphs refer to Dr Kelly's examination):

“In my view Mr Squire's ENT condition does not make him permanently unfit to fulfil the duties of a serving police, if he were applying now for entry to the police service then he would have borderline hearing abilities...

In my view it cannot be determined that Mr Squire is medically unfit until an assessment of his capability to function with hearing aids has been assessed, it is likely that with support from his police force and an audiologist, he would manage operational duties with his hearing levels, this may involve wearing one or both hearing aids, or a reassessment of his hearing aid provision (such as to use in-the-ear or completely in the canal hearing aids).

The appellant is currently managing in his job without significant difficulties; this is an office job but he works from home 90 % of the time. There are some local issues with remote meetings and using a loudspeaker rather than in-ear aids via Bluetooth. He last undertook an operational role in 2017 when he worked without aids as an Area Inspector. He told the Board that he managed without difficulty, including using a Police radio. The appellant reported difficulties when returning to an operational role in early 2022 in the Custody Area, noting that he had to move closer to people to hear them amidst the general environmental noise. He did not have hearing aids at this time. He was removed from this role on the advice of the FMA.

The Board believes that it is likely that the appellant's hearing has been improved significantly by hearing aids. He has not tried to work in an operational role with hearing aids. There is nothing to prevent him being an Operational Police Officer wearing hearing aids, but there would need to be an assessment of his individual situation. As an example, bomb disposal and Authorised Firearms Officer roles would not be appropriate but the appellant might be able to use a Police radio with the earpiece in the left side while wearing his hearing aid in the right. That would need to be explored if he were posted to such a role. In his current role he appears to be providing regular and effective service to a satisfactory standard without issues, using the hearing aids as necessary, although it is acknowledged that there are some difficulties from time to time.

Overall, the Board considers it premature to determine that the appellant's hearing loss renders him medically unfit for the ordinary duties of a Police Officer. The Board considers that until his ability to function satisfactorily with hearing aids has been assessed properly, with adjustments made and careful consideration of the various environments and how he might overcome them, then any medical unfitness is not clear. The Board does not believe that it would be appropriate to retire an Officer with the skills and experience of the appellant without first assessing how adjustments could be made to his work situation to allow him to work effectively.

The board unanimously considers that the appellant is not currently medically unfit for the ordinary duties of a police officer”.

24. The Claimant submits that the board materially misdirected itself and that the decision was irrational.
25. The misdirection ground can be divided into two arguments.
26. Firstly, it is argued that the board conflated the question it was required to ask under Regulation 81 with the broader question that the Chief Officer had to ask under Regulation 82. The PMAB was concerned solely with whether the Claimant was permanently unfit to perform any of the duties of a police officer. To consider whether it would be “appropriate to retire an Officer with the skills and experience of the appellant” is said to be clear evidence of that conflation or misdirection.
27. Secondly, it is said that the board considered irrelevant matters namely how the Claimant was performing in his current (office-based) role. What the board failed to do was to consider the Claimant’s disability against each of the duties and capabilities set out in the PNB circular (above) including operational duties.
28. Under his second ground the Claimant submits that the decision was irrational or speculative.
29. Under the first limb of this ground, the Claimant submits that normal police duties will require communicating with people amid unpredictable and uncontrollable noise levels. The Claimant’s evidence was that he could not perform such duties. It is agreed that he has not been involved in front line policing since 2017. The evidence is that his hearing aids caused difficulty within the custody suite and that he was transferred to a non-operational role in the PIU in June 2022. The Claimant submits that no or no proper reason has been advanced as to how he could safely be operationally deployed.
30. Secondly, the Claimant submits that the board came to a final decision that the Claimant was not medically unfit based upon speculative or incomplete reasoning. The Claimant points to the fact that the board said that it “cannot be determined” if Mr Squire was medically unfit until an assessment of his capability to function with hearing aids had been assessed and that whilst it was “likely” that he would manage operationally that “may” involve wearing one or both hearing aids or a “reassessment” of his hearing aid provision and that he might need to wear an earpiece in his left ear and a hearing aid in the right but this would “need to be explored”. The board concluded that it was “premature” to determine that he is medically unfit until his ability to function has been assessed.

31. The Claimant submits that reasonable adjustments under the Equality Act 2010 are for the Chief Officer under his Regulation 82 discretion and not for the medical practitioner(s) who are addressing the question of medical fitness under Regulation 81. The Claimant submits that fitness is an objective concept and questions relating to application of the duty to make reasonable adjustments are not suitable for medical practitioners. The Claimant's case therefore is that even basic adjustments which could enable those with minor conditions to perform police duties cannot be considered by the SMP and an officer in this position must be declared medically unfit.
32. In any event the Claimant submits that there was no evidence as to whether hearing aids would work on an operational deployment and thus the board was not on the evidence able to come to a conclusion that the Claimant was not permanently medically unfit.
33. The Interested Party does not accept that the board misdirected itself. It is submitted that as a specialist tribunal, deference should be shown to its decision which should not be subjected to unrealistic scrutiny.
34. The Chief Officer points to the board's analysis of the SMP report and that the board recorded the difficulties the Claimant said that he experienced in the operational environment. It considered all of the medical evidence including the examination by Dr Kelly and correctly directed itself on the law. The board then asked if any further treatment could make the Claimant fit for duty. The board applied the law to the facts and asked if the Claimant could perform all of the ordinary duties of an officer. It concluded on balance that he could.
35. It is said by the Interested Party that the Regulations ought to anticipate that a police force will make basic adjustments to enable officers to perform full duties.
36. As to the reference to whether it was "appropriate to retire" the Claimant, the Interested Party says that when the determination is read as a whole there has been no misdirection. Elsewhere in the determination the board set out the correct test including the relevant caselaw.
37. On ground two, the Interested Party relies upon the board's finding that the impairment was mild and submits that it was entitled to conclude that there was insufficient evidence to show incapacity. The board could not therefore be satisfied on a balance of probabilities that the Claimant was unfit.
38. The Interested Party also differentiates between challenges in performing duties and being incapable to perform such duties and submits that the evidence at its highest falls into the former category. He submits that the board was entitled to make a decision in the knowledge that the matter could be referred back to it in the future should there be a change in circumstance.

39. Finally and to the suggestion that the determination was incomplete or speculative, the Interested Party submits that the board was able to decline to find the Claimant permanently unfit on the evidence presented. Where evidence fell short, it was not required to find further evidence to assist one party or another. In this case it is submitted that the board was not satisfied on a balance of probabilities that the Claimant was unfit and as such dismissed the appeal.
40. Both parties accept that if the board found that the Claimant was permanently medically unfit to perform any ordinary policing duties then he should be declared unfit. This would include safely performing operational duties on the front line (for example arresting violent members of the public and keeping the peace in volatile and dangerous situations). If found to be permanently unfit the Claimant would not then have a right to be compulsorily retired. Rather it would be for the Chief Officer to decide whether in his discretion the officer should be retired or required to continue to serve in the force.
41. The board was therefore asking a primarily medical question: whether the Claimant was permanently medically unfit to perform policing duties. That is consistent with the wording of Regulation 81 which can be contrasted with the wider discretion under Regulation 82. It is also consistent with Regulation 75 which provides that the board shall have regard to the member's condition at the time it decided the question and that the member shall be assumed to have had normal medical treatment. It is consistent with what one would expect of a board formed of three medical professionals.
42. I accept that it would be artificial were the board not to consider basic adjustments which might be made to enable officers to perform normal policing duties. It would be contrary to good sense if officers were found to be permanently medically unfit when this could be remedied by basic adjustments which chief officers would be obliged to make under the Equality Act 2010. Dyslexic or dyspraxic officers who are sometimes provided with screens for computers or other devices is a good example. An officer in this position would not be permanently unfit when such equipment is routinely provided.
43. When it comes to more complicated adjustments such as altering the manner in which police duties could be performed; this is unlikely to be within the normal expertise of medical practitioners. These are matters which fall more naturally within the remit of the chief officer under Regulation 82. Where the dividing line falls will depend upon the facts of each case.
44. When reading the determination as a whole, I do not consider that the board materially misdirected itself. It is correct that the board stated in its conclusion that:

“The board does not believe it would be appropriate to retire an officer with the skills and experience of the appellant without first assessing how adjustments could be made to his work situation to allow him to work effectively”

45. I agree with the Claimant that in this sentence, the board references wider matters than those engaged by Regulation 81. I do not, however, consider that there is any proper basis to conclude that the board misunderstood that its role was to answer only whether the Claimant was permanently medically unfit to perform ordinary police duties. I say this for the following reasons:

- i. the board stated immediately after the sentence complained of (and elsewhere in similar terms) “the board unanimously considers that the appellant is not currently medically unfit for the ordinary duties of a police officer”. This is the correct test;
- ii. the board set out the terms of regulation 81 and referred to both the case of *Stewart* and the PNB guidance cited therein as to the nature of ordinary police duties;
- iii. the board listed what ordinary police duties are and correctly stated that if an officer can perform these to a limited degree or with great difficulty then the officer is to be regarded as disabled;
- iv. the board elsewhere correctly stated that “our remit is to establish where Mr Squire meets the criteria for ill health retirement on the grounds of being permanently disabled”;
- v. The board also stated that it was “likely that with support from his police force and an audiologist, he would manage operational duties with his hearing levels” there was “nothing to prevent [the claimant] from being an [o]perational Police officer” and referred to it being “premature to determine that the appellant’s hearing loss renders him medically unfit for the ordinary duties of a Police Officer.” It was clear therefore that the board was answering the correct medical question and not applying the wider test under Regulation 82. As to whether these extracts show speculation or incomplete reasoning see below.

46. Whilst it is correct that the board made reference to the Claimant’s current work situation where he is non-operational, I do not consider that this shows a misdirection or taking an irrelevant consideration into account. I agree with the Interested Party that consideration of current working conditions is not irrelevant as if he were not fit to perform these duties then that would have been broadly determinative. It would be surprising if the board did not address how the Claimant was coping with his work at the time of the examination. It is clear from the passages cited above that the board well understood that if the

Claimant could not perform any one of the ordinary police duties *per* the PNB Circular and *Stewart* then he would be unfit.

47. The board performed its own examination and compared the hearing deficit to the minimum standards for police recruitment. The board clearly had in mind all of the duties of a Constable as set out in the PNB Circular that it had quoted from.
48. It is correct that in 2022 the Claimant was removed from his role in a custody suite due to problems with his hearing and that he tried hearing aids in this environment for a short period of time before he was moved to adjusted duties. The decision to move the officer and to place him on adjusted duties was not, however, informed by an examination. The procedure under challenge in this case is the means of determining whether an officer is permanently unfit as defined. His employment history including input from the Force Medical Advisor and Human Resources is of course an important consideration but it cannot be determinative and is no substitute for medical examination. I find that the board considered and gave appropriate weight to this evidence.
49. The challenge on ground 1 therefore fails.
50. I do not consider that the Claimant has made out an irrationality challenge. Mr Rathmell realistically accepted that this was the more difficult of his grounds. As set out above a member of the board performed an examination which revealed mild, mainly conductive hearing loss. In the professional judgement of the board it was *likely* that the Claimant would be able to perform operational duties with this hearing loss (though this might require the use of a hearing aid). The board was entitled to reach this conclusion notwithstanding the Claimant's evidence that he did not believe he would be able to do so.
51. I do not consider that the evidence from workplace assessments in 2022 is sufficient to render the decision unreasonable for the same reason as I have given at [48] above. The board considered the evidence from these assessments but was entitled to come to a different opinion having examined the Claimant and considered all of the evidence.
52. I also do not consider that the board's decision was speculative or incomplete. The board made the following finding.

“Mr Squire's ENT condition does not make him permanently unfit to fulfil the duties of a serving police (sic)...Given that he is an experienced police officer I would expect him to be able to perform his duties with his hearing ability. Hearing aids would increase his sound perception to a level where I would expect him to fit well within the acceptable hearing ability for an operational officer.”

53. Whilst the board went on to say that “it cannot be determined that Mr Squire is unfit until an assessment of his capability to function with hearing aids has been assessed” the board then found that it was *likely* that with police and audiologist support he would manage operational duties, possibly with a hearing aid. The only proper interpretation of this is that it was more likely than not that the Claimant was not permanently unfit.
54. Guidance from the Metropolitan Police Service (MPS) was considered which confirmed that from 2004 the MPS had a policy to allow officers to wear in ear hearing aids on duty in operational situations. It was thus clear that it is possible for a police officer to perform the duties of Constable with a hearing aid. The board acknowledged the potential difficulties which an operational officer might none the less face using hearing aids in an individual case. To similar effect, the MPS guidance says that “cases are considered on an individual basis for officers with hearing loss performing general duties.” The board was not satisfied that there was sufficient evidence in the Claimant’s case to conclude that he could not be safely deploy operationally with hearing aids. The board correctly noted that this might change if evidence came to light showing that the Claimant could not function satisfactorily with his hearing aids. This was not to speculate or to fail to reach a clear and final conclusion. There was no need to call for further evidence.
55. Should it be the case that upon being deployed operationally the Claimant cannot function satisfactorily, his hearing aid provision has to be re-assessed, or that his hearing significantly worsens then this does not as the Claimant suggests leave him in limbo. A decision by the SMP / PMAB under Regulation 81 is final subject to referral under Schedule 1 to the Regulations for reconsideration. Such a referral is possible only where the Chief Constable and the officer agree that the matter should be reconsidered. I discussed with Mr Gold who represents the Chief Constable in what circumstances this would happen. The court was assured that if there were evidence that the Claimant could not function satisfactorily with his hearing aids or if his hearing aid provision fell to be reassessed in the manner raised by the board then a reasonable Chief Constable acting in good faith would agree that this case needs to be reconsidered. Mr Gold also stated in writing that if there is evidence of a serious deterioration in the Claimant’s hearing then he should request that his case be reconsidered. I take this to be an indication that such a request would be properly considered by the Chief Constable.
56. The Claimant sought permission to rely on a statement and some supporting evidence that was served late. It is said to be in response to late disclosure from the Interested Party, however, it was not clear what the connection was between the new evidence and disclosure from the Interested Party. The evidence included some medical evidence suggesting a deterioration in the Claimant’s hearing. It was agreed that new medical evidence not before the board could not be relevant to a public law challenge based upon misdirection

/ irrationality. This was not therefore relevant to the claim. I did have regard to the statement where it detailed (i) what the Claimant said about the impact his hearing has on his ability to deploy operationally (ii) difficulties he claims to have using his hearing aids and (iii) the extent to which adjustments could be made by the Chief Officer in his case. None of these matters however alter my conclusions as set out above.

57. I therefore dismiss the claim for judicial review.