Neutral Citation Number: [2019] EWHC 1434 (Admin)

CLAIM NO. CO/3561/2018

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

R (on the application of ROBIN ANDREW MICHAELIDES)

Claimant

and

CHIEF CONSTABLE OF MERSEYSIDE POLICE

Defendant

and

POLICE MEDICAL APPEAL BOARD

Interested Party

Mr David Lock QC (instructed by Haven Solicitors, for the Claimant)

Mr Elliot Gold (instructed by the Force Solicitor, for the Interested Party)

Judgment

(Handed down on 28 June 2019)

HH Judge Kramer

1. By his Claim Form filed on 11 September 2019, the claimant challenges the lawfulness of a decision taken by the Police Medical Appeal Board (PMAB) on 29 November 2016, in which it refused his application for a police injury pension, and a decision of the Chief Constable of Merseyside Police made on 12 June 2018 and 10 August 2018 not to exercise his powers under Regulation 32(2) of the Police Injury and Benefit Regulations 2006 to refer the 2016 decision for reconsideration. The claimant also sought an extension of time to challenge the 2016 decision.

2. Permission to apply for judicial review was granted by Lane J on 29 November 2018 on each of the claimant's grounds. He also extended time to enable the challenge to be made to the 2016 decision with the rider that whilst he had formally extended time to enable permission to be granted with respect to that decision, the issue of delay required

consideration at the hearing and that if the court concluded that a challenge to the original decision was materially affected by the timeliness issue, it could refuse relief on that basis.

3. At the hearing of the claim the Claimant was represented by Mr Lock QC and the Chief Constable by Mr Gold, of counsel. The PMAB was named as an interested party but did not take part in the proceedings. The hearing of the review has proceeded on the basis that the only challenge I need to consider is that to the 2016 decision. I have not heard argument as to the 2018 decision on the basis that if I conclude that the 2016 decision was unlawful it should have been referred under regulation 32 but if it was lawful, so was the decision to refuse to refer it for reconsideration.

Background Facts

4. The claimant was born in South Africa and has a South African accent. He joined the South African police service in 1997. In 2001 he moved to Scotland where he served as a police officer. Whilst there he passed his Sergeant's examinations. He transferred to Merseyside Police in 2007 where he remained for 9 years until his forced retirement from the police on 31 August 2015 on the grounds that he was permanently disabled from continuing in his role as a police officer. He was 42 at the time.

5. The claimant says that during his time with the Merseyside force he was subjected to bullying, harassment, racist abuse and other unfair treatment which caused him mental illness. He was assessed as unfit to work by his GP due to stress on 16 July 2014. A force medical officer assessed him as unfit to work on 30 September 2014 and the claimant was referred by the Force to Dr Britto, a consultant psychiatrist.

6. Dr Britto's report is dated 11 October 2014. He took a history from the claimant, who said that he had hated working for Merseyside Police since he started, he had been given no help with learning English Law, the Force had gone back on an assurance that his Scottish Sergeant's examinations would be recognised, he had been put in a Detective role for which he was unqualified and that there had been many incidents at work where colleagues had a dig at him for being a South African and all this had now got to him. He said that the process of promotion at Merseyside was *"corrupt"*, there was "*loads of incompetence"* and he want to move to another Force but was stuck for another 4 years as he had entered an Individual Voluntary Arrangement two years ago. In his 'Diagnostic Formulation' Dr Britto indicated that the truth of the allegations of bullying and racism was beyond the scope of his report and he could not comment on the conduct of Merseyside Police. He said that Mr Michaelides had developed cognitive dissonance of the organisation and had deep feelings of mistrust and resentment; cognitive dissonance is a mental discomfort associated with psychological stress experienced by a person who holds more than one contradictory idea, attitude of belief.

7. Dr Britto's report set out, under the heading 'Diagnosis',

   "1. F32.1 of ICD-10 Moderate Depressive Episode with Somatic Syndrome

   2. Z56.0 of ICD-10 Problems with employment (perceived racial discrimination)"

   The reference to ICD-10 is to the World Health Organisation publication 'International Statistical Classification of Diseases and the Related Health Problems 10th Revision.

The Z codes under the classification are headed *"Factors influencing health status and contact with health services."* The Note to the code states

"Z codes represent reasons for encounters. A corresponding procedure must accompany a Z code if a procedure is performed. Categories Z00-Z99 are provided for occasions when circumstances other than a disease, injury or external cause classifiable to categories A00 to Y89 are recorded as 'diagnoses' or 'problems'."

The note goes on to state that this may arise if a person encounters the health service to discuss a problem which is not a disease or the problem influencing the person's health but is not in itself a current illness or disease. Z56 is headed *"Persons with potential health hazards related to socioeconomic and psychosocial circumstances."* It lists as potential hazards a number of specific and unspecified problems related to employment.

8. Mr Michaelides returned to work on January 2015 on a part-time basis but this lasted for only one month when he again ceased work on the grounds of stress. The Police Federation arranged for him to be seen by Dr McWilliam, a Consultant Psychiatrist. His report is dated 29th March 2015. He took a history from Mr Michaelides of problems with the Merseyside Force similar to that taken by Dr Britto, to which was added a further complaint that he had been subject to an Unsatisfactory Performance Procedure under the Police Regulations, albeit subsequently withdrawn. The report is more detailed as to the complaints. These are set out over seven pages of particulars of the behaviour to which he alleged he was subject. Eleven of these incidents are complaints of racism. In the 'Opinion' section of his report, Dr McWilliam said he agreed with Dr Britto's assessment. He said that the chronic history of work-related illness and poor response to treatment indicated that Mr Michaelides would be permanently vulnerable to relapse and this risk constituted a permanent disability from undertaking full operational duties as per the Police Pension Regulations.

9. The relevance of the reference to the regulations is that there is procedure under the Police Pension Regulations 1987 ("the 1987 Regulations") under which the Chief Constable can require an officer to retire if the Police Pension Authority ("the Authority"), which is the Chief Constable for these purposes, considers that he ought to retire on the ground that he is permanently disabled for the performance of his duty. Where the Authority is considering whether a person is permanently disabled it must refer the decision to a selected medical practitioner ("SMP") for a decision as to whether the person concerned is disabled and whether the disablement is likely to be permanent; that is regulation H1(2) of the 1987 Regulations. Dr. Coolican, a Consultant Occupational Physician, was appointed by the authority as the SMP and he assessed and produced a report on Mr Michaelides dated 7 July 2015. He recorded that Mr Michaelides reported recurrent episodes at his workplace relating to how he felt he was treated by certain colleagues and the Force. Under the heading 'Opinion' he said:

> *"The evidence supports that Constable Michaelides has a moderate depressive episode with associated problems with his employment. Dr Britto in his assessment in October 2014 was of the opinion that the prognosis for improvement was good, however there would continue to be a risk of deterioration and relapse if the perceived issues with employment continue. Dr McWilliam also confirms the diagnosis and is of the opinion that the chronic*

nature of Constable Michaelides work perceptions and his poor response to treatment to date indicate that if further recovery is achieved, Constable Michaelides would be at risk of relapse of his condition…

Therefore it is likely that Constable Michaelides will continue to experience ongoing difficulties with his mental health and wellbeing whilst continuing to work as a serving Police Officer and therefore his current unfitness is likely to continue on a long term / permanent basis.

Under the heading 'Decision' he said:

"I consider, on the balance of probabilities, that the medical evidence supports that Constable Michaelides is permanently medically unfit to perform the ordinary duties of a Police Officer. He is permanently unfit in relation to his depressive episode and associated problems with employment… I do not find, however, that the medical evidence supports that Constable Michaelides is permanently medically unfit for engaging in any regular employment."

In addition to his report Dr Coolican completed an 'overall assessment and decision form' in which he stated that the claimant was:

"medically unfit for performing the ordinary duties of a member of the police force" … in respect of the following condition(s) Depressive Episode (ICD-10 F32 1) Problems with employment (ICD-10 Z56.0)"

He stated the depressive episode and problems with employment were conditions which were likely to be permanent.

10. On the basis of Dr Coolican's report, the Chief Constable exercised his power under the Police Pension Regulations 1987 to require Mr Michaelides to retire, which he did as from 31 August 2015. By the Police (Injury Benefit) Regulations 2006 ("the 2006 Regulations") it was open to Mr Michaelides, to apply to the Chief Constable for an injury award. He made an application on 5 August 2015; the application was premature but no point was taken on that. The application was supported by a questionnaire completed by Mr Michaelides, to which was attached a statement in which he repeated the complaints of unfair treatment by the force and bullying and racist abuse from colleagues, stated in Dr McWilliam's report.

11. Entitlement to an award is dependent on proof that the applicant has ceased to be a member of the police force and is permanently disabled as a result of an injury received in the execution of his duty. The application was initially refused with the explanation that there was insufficient evidence to support an entitlement to an award. Under the regulations, however, the authority is required to appoint an SMP to make a decisions as to (a) whether the person concerned is disabled, (b) whether the disablement is likely to be permanent, (c) whether the disablement is the result of an injury received in the execution of duty and (d) the degree of the person's disablement. Where questions (a) and (b) have been referred to a SMP under regulation H1(2) of the 1987 Regulations, a final decision of the medical authority on these questions is binding for the purposes of the 2006 Regulations. In this case, the final decision in question is that of Dr Coolican.

12. The Chief Constable appointed Dr Roy as the SMP. He produced a report dated 13 May 2015, although the date is clearly wrong as that would predate the application for the award. It is clear, from his report, that Dr Roy was aware that Mr Michaelides was complaining that his condition had been caused by the large number of events catalogued in Dr McWilliam's report and the questionnaire, but the stance he adopted was that only those events which were corroborated by other evidence could be accepted as proven. As a result, the only incidents which he considered were relevant to his decision were an occasion when a custody sergeant made a remark of a racial nature to Mr Michaelides and the outcome of an investigation into his assessment as a dog handler; both these events were documented. He concluded that the two incidents in isolation could not have caused Mr Michaelides's state of ill health.

13. The 2006 Regulations provide for an appeal from the SMP to the Police Medical Appeal Board (PMAB). The Board operates under Home Office guidance which provides:

> *"The board must reach a decision on any question it is considering on appeal in clear and unambiguous terms. Where there is room for doubt, the board should reach its decision on the balance of probabilities, making clear in which the balance tipped and why.*
>
> *While generally it is to be expected that the medical issues will dominate, it is possible that the board may be called upon to determine issues of fact and law. The role of the board is quasi-judicial, and whether the issue is medical, factual or legal, the board will need to consider and evaluate the evidence and arguments put before it and reflect this approach in the conclusions in its report.*
>
> *If there are disputes about facts the board should ensure that each party provides the clearest possible evidence in support of their case and allows each party to comment on the other's evidence. The board should also test the evidence in the light of their medical knowledge and reasoning, and any advice they seek. The board should come to its decision on these issues as well on the balance of probabilities."*

The appeal is in the nature of a complete rehearing.

14. Mr Michealides chose to appeal and, in order to do so he had to provide a submission in support, to which the Police Pension Authority filed a response. The claimant's submission stated that the appeal was primarily concerned with legal issues and not medical issues, and as a whole it was highly legalistic. It claimed that Dr Roy *"had erred in law in not classing the permanently disabling conditions of the appeal (sic) as being injury(ies) on duty."* The factual background referred to the claimant's disappointment as regards his Scottish sergeant's qualification not being recognised, his lack of training in English Law, posting to the CID when not qualified, bullying by colleagues and a lack of support for promotion and bullying and harassment due to his South African accent and origin. It added that the final straw was that the claimant was subjected to the Unsatisfactory Attendance Procedure (which is a statutory process set out in the Police (Performance) Regulations 2012). As regards Dr Roy not finding facts alleged by the claimant in the absence of corroborative evidence, the submission pointed to a number of documents which recorded that he had expressed his concern as to a lack of knowledge concerning the Police and Criminal Evidence Act 1984 (PACE), had complained about the lack of recognition of his Scottish qualification, supported

his claim that he had been subject to racial abuse and had reported several racist and bullying incidents, in addition to the two incidents relied upon by Dr Roy. The report of Dr McWilliam was attached to the submission.

15. The response from the police authority asserted that the claimant had made an application for an award detailing six events, the racist remarks by a custody sergeant, referred to in Dr Roy's report, a stress questionnaire which was not acted upon, a complaint to Sgt Ndlovu in September 2014 that he had been subject to racism and bullying, the grievance about victimisation in relation to dog handling training, the complaint about a lack of training in English Law and the non-recognition of his Scottish Police Exams and his attachment to a uniformed post. The first three of these events were taken from a part of his application for an injury award where he had been asked whether there were any injury reports associated with his injury rather than a list of incidents. In fact, the application had also relied upon the list of incidents set out in the statement which accompanied the application and those found in the report of Dr McWilliam.

16. The appeal board, which comprised of a Consultant Psychiatrist, designated as a 'Specialist' and two Consultant Occupational Health Physicians, heard the appeal on 10 November 2016. The decision of the Board, which is contained in a report from the members dated 23 November 2016, sets out much of the above history. It recorded the oral submissions of the claimant's representative, Mr Botham, which are not recorded as including the assertion that the claimant was subjected to longstanding bullying and racism. The submissions from the Pension Authority were to the effect that the claimant had been correctly managed.

17. A clinical assessment of the claimant was undertaken by the Consultant Psychiatrist member. He asked the claimant which matters *"he considered amounted to the injuries on duty which led to his permanent disablement"* to which he responded that they were the issues identified by the authority in its response to his submission but there were others in respect of which he could not obtain documentation from the police. He was asked about his complaints of bullying and harassment. The report records that he was vague about the workplace bullying and could not give precise details about this. The psychiatrist made a diagnosis of a Mixed Anxiety and Depressive Disorder.

18. The Board, whilst acknowledging that Dr Coolican had found the claimant to be permanently disabled under the terms of the 1987 Regulations, expressed the view that a diagnosis of a depressive episode would normally result in a full recovery. As to the diagnosis by Dr Britto of codes Z56.0 it said that this was not a medical condition but a descriptive factor relating to the circumstances of a medical condition, and therefore could not lead to permanent disablement. It said that the diagnosis made by Dr Britto and adopted by Dr Coolican was not binding. On a full review of the medical evidence and an examination of the claimant, it was more likely that he was suffering from a mixed anxiety and depressive disorder, which had been waxing and waning since 2014.

19. The Board found that the claimant's permanent disability was not the result of an injury or injuries sustained in his duties as a police officer. The reason for that decision are encapsulated in the last two paragraphs of its report where it said:

> "*The Board has considered carefully the written submissions containing the allegations made by the appellant. It was surprised that the appellant did not*

mention any of these issues during the lengthy psychiatric examination. The Board does not consider that the specific allegations made by the appellant, six in number, are supported by any medical evidence to indicate that any of them were a trigger for a deterioration in his mental health symptoms. In addition the appellant has not rebutted the Police Pension Authority's written submission at any time, which provide in the Board's opinion perfectly reasonable explanations for its management of each of the situations.

Overall the Board was unable to link the six specific allegations made by the appellant with any episodes of ill health and accordingly does not consider that the appellant is eligible for an injury award under the Regulations."

The statutory scheme governing the claimant's retirement and his application for an award

20. The relevant regulations are the 1987 Regulations as regards retirement, and the 2006 Regulations as regards the award. The relevant parts of the regulations were summarised by the Court of Appeal in **R (on the application of Colene Boskovic) v Chief Constable of Staffordshire Police [2019] EWCA Civ 676,** judgment in which was handed down on the second day of this hearing and which has featured in the argument before me. At paragraphs 13 to 23, Baker LJ said:

"*13. The principal regulations governing police pensions in England and Wales are the Police Pensions Regulations 1987 . Under regulation A20 of the 1987 Regulations:*

> *"every regular policeman may be required to retire on the date on which the police pension authority, having considered all the relevant circumstances, advice and information available to them, determine that he ought to retire on the grounds that he is permanently disabled for the performance of his duty:*
>
> *Provided that a retirement under this regulation shall be void if, after the said date, on an appeal against the medical opinion on which the police pension authority acted in determining that he ought to retire, the board of medical referees decides that the appellant is not permanently disabled."*

14. The test to be applied in determining whether a police officer is disabled is set out in regulation A12 of the 1987 Regulations, which provides inter alia:

> *(1) A reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being at that time likely to be permanent.*
>
> *(2) ... disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force ...*

(3) Where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force ...

(5) in this regulation, 'infirmity' means a disease, injury or medical condition, and includes a mental disorder, injury or condition."

15. The decision-making process is prescribed in regulation H1 which, so far as relevant to this case, provides:

"(1) Subject as hereinafter provided, the question whether a person is entitled to any and, if so, what awards under these Regulations shall be determined in the first instance by the police pension authority.

(2) Where the police pension authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions:

(a) whether the person concerned is disabled;

(b) whether the disablement is likely to be permanent

(5) The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and shall, subject to regulations H2 and H3, be final."

Regulations H2 makes provision for an appeal to a board of medical referees, and regulation H3 provides for a further reference to the medical authority. Both regulations are in substantially the same terms as the equivalent regulations 31 and 32 under the 2006 Regulations considered in detail below.

16. Police officers who are required to retire on the grounds of permanent disablement are entitled to a police ill-health pension. A distinction is drawn, however, between an officer whose disablement has been caused by his or her duties as a police officer and an officer whose disablement has no such causal relationship. In the case of the former, the officer is entitled to apply for an additional pension. At the time the appellant left the force, the relevant provisions concerning injury awards were found in the 1987 Regulations. Subsequently, however, those provisions were replaced by the 2006 Regulations. It was agreed before the judge, and before us, that for present purposes, it is only necessary to consider the provisions concerning injury awards set out in the 2006 Regulations.

17. Regulation 11 of the 2006 Regulations, headed "Police officer's injury award", provides:

"(1) This regulation applies to a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received without his own default in the execution of his duty (in Schedule 3 referred to as the 'relevant injury').

(2) A person to whom this regulation applies shall be entitled to a gratuity and, in addition, to an injury pension, in both cases calculated

in accordance with Schedule 3 ; but payment of an injury pension shall be subject to the provisions of paragraph 5 of that Schedule and, where the person concerned ceased to serve before becoming disabled, no payment shall be made on account of the pension in respect of any period before he became disabled."

18. "Injury" is defined in Schedule 1 to the 2006 Regulations as including

> *"any injury or disease whether of body or of mind".*

Under regulation 6(1) of the 2006 Regulations:

> *"a reference in these Regulations to an injury received in the execution of duty by a member of a police force means an injury received in the execution of that person's duty as a constable ...."*

"Disablement" and "infirmity" under the 2006 Regulations are defined respectively in regulation 7(4) and (8) in identical terms to those used in regulation A12(1) and (5) of the 1987 Regulations set out above. Similarly, the process for determining the degree of a person's disablement is defined in regulation 7(5) of the 2006 Regulations in the same terms as in regulation A12(3) of the 1987 Regulations. Under regulation 8 :

> *"For the purposes of these Regulations disablement ... shall be deemed to be the result of an injury if the injury has caused or substantially contributed to the disablement ...."*

19. The decision-making process under the 2006 regulations is set out in Part 4 , headed "Appeals and medical questions". Regulation 30 , headed "Reference of medical questions", provides inter alia :

> *"(1) Subject to the provisions of this Part, the question whether a person is entitled to any, and if so what, awards under these Regulations shall be determined in the first instance by the police pension authority.*
>
> *(2) Subject to paragraph (3), where the police pension authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions:*
>
> *(a) whether the person concerned is disabled;*
>
> *(b) whether the disablement is likely to be permanent*
>
> *except that, in the case where the said questions have been referred for decision to a duly qualified medical practitioner under regulation H1(2) of the 1987 regulations ... a final decision of a medical authority on the said questions under Part H of the 1987 Regulations ... shall be binding for the purposes of these Regulations;*
>
> *and, if they are further considering whether to grant an injury pension, shall so refer the following questions:*

(c) whether the disablement is the result of an injury received in the execution of duty, and

(d) the degree of the person's disablement;

and, if they are considering whether to revise an injury pension, shall so refer question (d) above.

(6) The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and shall, subject to regulations 31 and 32 , be final."

20. Regulation 31 , headed "Appeal to board of medical referees", makes provision for an appeal to a board of medical referees against a decision of a SMP under regulation 30(6) . Under regulation 31(2) , on receipt of grounds of appeal, the police pension authority must notify the Secretary of State and refer the appeal to a board of medical referees. Under regulation 31(3) , the decision of the board thereafter shall be final, subject to regulation 32

21. Regulation 32 is headed "Further reference to medical authority". It provides as follows:

"(1)…

(2) The police pension authority and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to him, or as the case may be it, for reconsideration, and he, or as the case may be it, shall accordingly reconsider his, or as the case may be its, decision and, if necessary, issue a fresh report which, subject to any further reconsideration under this paragraph or paragraph (1) or an appeal, where the claimant requests that an appeal of which he has given notice (before referral of the decision under this paragraph) be notified to the Secretary of State, under regulation 31 , shall be final.

(3)…

(4) …"

The claimant's case

21. The decision of the PMAB is challenged on three grounds:

a. The PMAB failed to consider itself bound by the diagnosis and reasoning in the final and binding SMP report, that of Dr Coolican. (Ground 1)

b. There were multiple errors made by the PMAB in assessing the evidence. (Ground 2)

c. The PMAB failed to give proper reasons. (Ground 3)

The claimant's case on Ground 1

22. Mr Lock points to the fact that the PMAB said that the diagnoses of Dr Britto and Dr Coolican were not binding upon them. On the authority of **R (Evans) v Chief Constable of Cheshire [2018] EWHC 952 (Admin)**, he says that they were bound by Dr Coolican's diagnosis, which had incorporated that of Dr Britto, and further that it was bound, by what was said in Dr Coolican's report, to accept that the claimant's psychiatric condition was a reaction to events at work, or, as Mr Lock put it, that the claimant's mental health condition was caused by problems he experienced at work. Thus, the PMAB acted unlawfully when it directed itself that it was not bound by the diagnosis, concluded that the claimant had a mixed anxiety and depression which waxed and waned since mid-2014 and that ICD-10 Z56.0 was not a medical condition but a descriptive factor relating to the circumstances of a medical condition which, therefore, could not lead to permanent disablement within the regulations.

23. I am asked to reach such a conclusion because the wording of regulation H1(5) of the 1987 Regulations provides that the decision of the SMP on the questions referred, i.e. whether the person concerned is disabled and whether the disablement is likely to be permanent, shall be expressed in the form of a report and shall be final. Regulation 30 of the 2006 regulations carries over the finality of the H1(5) determination into an application for an injury award. Mr Lock's argument, which was accepted in **Evans**, is that as a matter of statutory construction, the fact that the regulations require that the decisions on the two questions are to be *'expressed in the form of a report'* indicates that the answer to the questions and the reasons for that answer are indivisible. Further, such a result is consistent with the need for police officers to have the certainty that where they have been retired due to a decision that they have a permanent disability caused in the line of duty, such decision will not be overturned on a subsequent assessment: see **Evans per Lane J at [37]-[38].**

24 **Evans** was considered in **Boskovic** where the Court of Appeal disagreed with Lane J on his interpretation of regulations H1(5) of the 1987 Regulations. It held that the SMP's decision on the two questions under regulation H1(2) (a) and (b) were binding on an SMP or PMAB at the injury award but that the diagnosis underpinning that answer was not binding. Mr Lock says that I should nevertheless follow **Evans.** He submits the decision in **Boskovic** was *obiter* as it concerned regulation 32 and not regulation 30 of the of the 2016 Regulations, and conflicts with **Metropolitan Police Authority v Laws and Anor [2010] EWCA Civ 1099,** a decision of the Court of Appeal, relied upon in **Evans,** and which he says should be given precedence in any event as it was a three judge court whereas there were but two judges in the court in **Boskovic.**

25. Mr Lock says that the effect of **Evans** has a significance which goes beyond the ambit of the binding effect of the SMP's report because of its interplay with Regulation 6 of the 2006 Regulations. Regulation 6 deems that for the purposes of the 2006 Regulations, an injury is to be treated as received in the execution of duty as a constable if it is received when on duty. Accordingly, in the face of an SMP report which finds that the permanent disability is due to a psychiatric injury which is a reaction to events at work, there is no room for the PMAB to find other than the officer qualifies for an award.

The Defendant's case on Ground 1

26. The defendant denies that the PMAB acted unlawfully in its approach to Dr Coolican's report. Mr Gold makes three points. First, as a matter of fact, Dr Coolican's report does not purport to find that the events at work of which the claimant complained had actually happened. Secondly, the Board did not depart from Dr Coolican's diagnosis. Thirdly, in the light of **Boskovic,** the Board was not bound by Dr Coolican's diagnosis or any view he expressed as to causation.

27. Starting with the report of Dr Britto, Mr Gold points out that he made it clear that he made no finding as to whether Mr Michaealides had been subjected to bullying or racism or as to the conduct of the Force. He talked of *"perceived stress"* and in relation to Z56.0 of ICD-10 Problems with employment, he added the comment *"perceived racial discrimination"*. Dr McWilliam's report, which was next in time, catalogued the claimant's complaints but expressed no opinion as to whether they were objectively established as opposed to being a subjective perception.

28. Moving to the report of Dr Coolican, the SMP, he too made no finding as to the complaints of mistreatment by the Force and its employees. When referring to these matters he writes in terms of the way in which Mr Michaelides *"feels he was treated"* and *"his perceived issues"*. Under the heading 'Opinion', Dr Coolican said "*The evidence supports that Constable Michaelides has a moderate depressive episode with associated problems with employment.* He made no finding as to what the problems were or whether they were perceived or real. He went on to consider Dr Britto's prognosis which referred to the effect of "*perceived issues with employment"* and Dr McWilliam's prognosis, which referred to the impact of *"work perceptions"* causing the claimant further stress putting him at risk of relapse. On this basis he concluded that he would continue to experience ongoing difficulties with his mental health as a serving police officer. Thus, taken in the context of the report, when Dr Coolican refers to "*problems with employment"* in his decision and the pro forma decision form, he is referring to the perceived problems which were dealt with in his report.

29. Mr Gold's second point is that the difference between Dr Coolican's diagnosis of *"Depressive Episode"* and that of the PMAB of a *"mixed anxiety and depressive disorder which has been waxing and waning since mid-2014"* is not so different that it can be said that the latter is a departure from the former. Furthermore, the result is the same ongoing, albeit fluctuating, symptoms as opposed to full recovery. As to the Board's observations on code Z56.0, a reading of ICD-10 shows they are correct in stating that it does not amount to a medical condition.

30. As to his third point, Mr Gold says that far from being inconsistent with **Laws, Boskovic** resolves two conflicting first instance decisions, **R (Doubtfire) v Police Medical Appeal Board [2010] EWHC 980 (Admin),** where it was held that the SMP and PMAB dealing with an application for an award were not bound by the diagnosis underlying the decision at the retirement stage, and **Evans.** It overruled **Evans** and explains how this is consistent with the decision in **Laws**. On the basis of **Boskovic** there is no merit in Ground 1.

Analysis and decision

31. The short answer to Ground 1 is that I am bound by the decision in **Boskovic** and it cannot, therefore succeed. I do not accept Mr Lock's argument that what was said in that case about regulation 30 of the 2006 Regulations and H1 of the 1987 Regulation is

obiter because it was a decision on regulation 32 of the 2006 Regulations. Neither is **Boskovic** inconsistent with **Laws.**

32. In **Boskovic,** the claimant was a serving police officer who had suffered a series of assaults whilst on duty as a result of which she was off work. An attempted return to work was not successful and she was retired in June 2001 under regulation A20 of the 1987 Regulations following an SMP report, which concluded that she was disabled from performing her duties and that this was likely to be permanent. The report contained a diagnosis of acute anxiety/depression and PTSD, based on the conclusion of a consultant psychiatrist who had examined the claimant. On her application for a police pension, the same SMP obtained the report of a clinical psychologist who did not agree with diagnosis of PTSD. He considered that the claimant was suffering from a depressive episode which was multi-factorial in origin, there having been a relationship break up and a family history of mental illness. On the basis of that report, on 22 August 2002 the SMP certified that the claimant's disability was moderate to severe depression which had not been caused or materially contributed to by an injury received in the execution of her duty.

33. Ms Boskovic appealed this decision to the PMAB in September 2002 but in April 2003, withdrew her appeal explaining that her mental health could not cope with reminders of the past. In 2016 the claimant asked the Chief Constable to refer the 2002 decision for reconsideration under regulation 32(2) of the 2006 Regulations. This was met with a refusal on the grounds that the delay of 14 years since the original assessment made a fair consideration of the pension application impossible. It was pointed out that both the SMP who decided not to make the award and the psychiatrist upon whose report he had relied were no longer licensed to practice in the UK. In a later letter, solicitors for the Chief Constable indicated that in considering the application it was noted that there was conflicting medical evidence as to the claimant's disabling condition and that the issue of causation was never clear cut.

34. In her application to challenge the decision of the Chief Constable by way of judicial review, Ms Boskovic alleged, amongst other matters, that the decision was unlawful on its face for inadequate reasons and/or a failure to address the primary purpose of a regulation 32(2) consideration. Her claim was dismissed by Kerr J who concluded that the Chief Constable's reliance on delay was legitimate as it was open to her to weigh the length of the delay and unavailability of the SMP and psychiatrist against the less than clear cut case on causation as a rational foundation for the proposition that no fair reconsideration was possible. Ms Boskovic appealed.

35. Mr Lock, who appeared for Ms Boskovic, argued on her behalf that Kerr J had overlooked the effect of **Laws** which was that the later medical authority was bound by the decision of the SMP at the retirement stage. He formulated 5 challenges to the judgment, 2 of which depended on this proposition. In essence he argued that since **Laws,** it was not open to reconsider the diagnosis at the pension stage so the fact that, since the SMP report, inconsistent medical evidence became available was irrelevant. Further, by that stage there was only a very narrow issue of causation left to be determined. For the Chief Constable, it was argued that if this argument were correct, **Doubtfire** was wrongly decided and she invited the court to overrule **Evans.**

36. The Court of Appeal rejected Mr Lock's arguments as to the effect of the first SMP report. It concluded that the Chief Constable had all relevant matters in mind and

balanced them appropriately when she refused the review. The court gave as one of its reasons in coming to this view that:

"In assessing the questions under regulation 30(2)(c) and (d), the SMP is bound by the answers of an earlier SMP who carried out an assessment of the questions under regulation H1(2)(a) and (b) of the 1987 Regulations, but not by any diagnosis underpinning those answers." Per Baker LJ at [68].

Thus, far from being *obiter dicta* in a case concerning a different regulation, the overruling of **Evans** on this issue was central to the decision, as is apparent from paragraphs [65] and [66] of the judgment.

37. As to Mr Lock's argument in this case that the decision is inconsistent with **Laws,** this is dealt with in **Boskovic** where Baker LJ said, at [61]-[62]:

"*At the heart of Mr Lock's argument is his assertion that the fundamental principle, derived from the Laws judgment, is that, once a medical authority has reached a decision under the regulations, a later medical authority is bound by what Laws LJ described as the "essential judgment or judgments" on which the earlier decision is based. It is therefore important to understand the context of the decision in that case. Laws concerned a reassessment under regulation 37 of the level of an injury pension already in payment under the regulations. Regulation 37 requires the police pension authority at intervals to consider whether the degree of the pensioner's disablement has altered. If it finds that the degree of disablement has substantially altered, the level of pension must be revised. The only duty on the authority carrying out the review is to decide whether there has been any substantial alteration in the degree of the pensioner's disablement. In all other respects, the requirement of finality which underpins the regulations prevents the authority carrying out the review from conducting any re-evaluation. It was in that context, therefore, that the Court of Appeal held that it was not open to a SMP, on a periodic review of an injury pension under regulation 37 , to revise the level of pension on the grounds that the clinical basis of an earlier assessment of the pension's degree of disablement had been wrong.*

Regulation 32(2) is crafted in very different terms. Unlike regulation 37 , which relates to periodic reviews of a pension already in payment, the option of a further reference to the medical authority is unrestricted in time. Furthermore, unlike a regulation 37 review, which only authorises reconsideration of whether the degree of the pensioner's disablement has altered, a further reference under regulation 32(2) may, by agreement, be made in respect of any final decision of a medical authority. In my judgment, the words "any final decision" manifestly incorporates not only the decision itself but also evidence on which the decision is based. There is no reason in language, logic or policy to restrict the scope of the reference in the way in which review under regulation 37 is limited. On the contrary, the purpose of regulation 32(2) is to allow the claimant and police pension authority, by agreement, to avoid an unfair outcome which the finality of decisions might otherwise create.

Laws and **Boskovic** are consistent. In the former, there is a purpose behind restricting the scope of the reference. In the latter, there is none.

38. In the light of my decision in relation to the application of **Boskovic,** the other points raised by the claimant become academic and can be dealt with shortly. As a matter of

objective fact, the reports of Dr Britto, Dr McWilliam's and Dr Coolican do not treat the behaviour of which the claimant complains as proven. The Z56.0 reference, described as problems with employment does not identify what the problems were, whether they were real or simply perceived or whether they consist of events which took place at work. Mr Lock's reliance on the reports to suggest that the PMAB had to accept that causation was made out, whether directly, or by triggering the deeming provision in regulation 6 of the 2006 Regulations, is misplaced

39. Absent the force of **Boskovic**, it was nevertheless open to the PMAB to treat the reference to Z56.0 as they did. It is not a diagnosis of a medical condition and there was no requirement for them to treat it as such. It is to be remembered that it is a code which cross-references to the ICD-10. Thus, where the SMP deploys the reference, they are not departing from his diagnosis by proceeding on the basis that he is referring to the part of ICD-10 to which the code refers. Nor are they departing from his diagnosis in concluding that, because what the SMP has referenced is not a medical condition, it cannot be a 'medical condition' which causes a permanent disability. The change in descriptor of the condition itself from 'a depressive episode' to mixed anxiety and depressive disorder is not, on the fact of this case, material and would not in itself justify quashing the decision of the PMAB even if it were bound by the SMP's diagnosis. Clearly Dr Coolican regarded the claimant's condition as one which would wax and wane, as it was the risk of relapse which he regarded as rendering the claimant unfit to continue to work as a police officer and that this disability was permanent.

40. It follows that there is no proper criticism to be made of the Board in the significance they attributed to the SMPs report beyond his answer to the 2 questions as to the existence and permanence of his disability. Whilst not determinative of the challenge to Ground 1, but in fairness to the Board, it is notable that not only were they correct in their approach but it was one the claimant had asked them to adopt at the hearing, even supplying them with a copy of **Doubtfire** to reinforce the point.

Grounds 2 and 3

The claimant's case

41. Mr Lock identified three broad errors in assessing the evidence. The first is that the Board neglected to be bound by the findings of the SMP as to the existence of problems with the claimant's employment. The argument is, in effect, a repeat of Ground 1 and is dealt with under that challenge. The second is that whilst that the Board focused on six allegations, it did not make any finding as to the numerous allegations of bullying, racism and misconduct set out in the report of Dr McWilliam (referred to as Professor McWilliam in the PMAB report). He said there was evidence from the claimant about these events. If the police authority doubted that they had occurred, they should have investigated the matter. Indeed they might have done so, although the evidence of such investigation was not produced; he pointed to a small number of e-mails which supported the contention that the claimant's complaints of bullying and racism were

known by the police authority long before his forced retirement. Mr Lock argues that what the Board has done is to decline to resolve factual disputes on the basis that they were not documented, mirroring the approach of Dr Roy, which, following **R (Williams) v PMAB and Merseyside Police Authority [2011] EWHC 1119 (Admin),** is not permissible.

42. I have taken Grounds 2 and 3 together as part of Mr Lock's argument is that the Board's report does not explain its decision in relation to the allegations in Dr McWilliam's report. Thus, it either did not consider the allegations or, if it did but found them not proven, did not explain this part of its decision in the reasons or why it did not find them proven.

43. The third error identified by Mr Lock is that the PMAB regarded the fact that six allegations were properly managed established that they did not cause his medical condition. Indeed, they placed a burden on the claimant to respond to the Police Pension Authority's case on this point. He argues that this approach fails to appreciate that this is a no-fault regime. The key questions are whether the six allegations arise from events which occurred in the course of the claimant's duties and, if so, whether they are a substantial cause of his medical condition. For example, it does not matter whether the investigation of the incident involving the custody sergeant's untoward comments about the claimant's national origin was managed well or not. If the claimant's medical condition was caused by the happening of this incident, provided it occurred in the course of his duties, which it did, he would qualify for an injury award.

The defendant's case

44. Mr Gold, in reliance on **Fuller v London Borough of Brent [2011] EWCA Civ 267**, reminds the court that it should not strain to find errors in a decision at first instance and it should not be hypercritical of the way in which a decision is written or focus too much on a particular passage. Read as a whole, I should conclude from the Board's reasons that it was not satisfied, on balance, of the Claimant's account of his complaints of harassment, bullying and racism. The Board did not fall into the **Williams** error of declining to reach a conclusion in the absence of corroborative evidence, on the contrary, they concluded that on the evidence he had provided, his case was not proved. That is an outcome which was open to it on the light of **Rhesa Shipping Co S.A. v Edmunds [1985] 1 WLR 948.** The Chief Constable had investigated such allegations as he could but was hampered by the fact that the claimant declined to raise a grievance. No further investigation was required by the Board. In those circumstances, that left the six allegations. Where the Board was not satisfied that any one of the events underlying the six allegations substantially contributed to his condition it could, and in this case did, decline to make a positive finding of causation, which was a medical, rather than a legal, decision.

45. The defendant's case on the absence of reasons is that the Board was entitled to rely upon and adopt the reasons of the SMP. The statutory requirement to provide reasons was only required where it departed from the decision of the SMP.

<u>Analysis and decision</u>

46. The argument concerning the Board's misunderstanding of the relevance of the six allegations would be a good point if the Board had concluded that the incidents

underlying the allegations were not causative of the injury because they were managed properly by the Force, but that is not a correct reading of the decision. The observation as to the management of these matters comes after the Board's conclusion that there was no medical evidence to support a causative connection between the claimant's medical condition and those incidents. It is that conclusion which was fatal to the claimant's appeal as regards the six allegations. Whilst Mr Lock has characterised this part of the decision as an inaccurate recitation of the medical materials placed before the Board, it cannot be read in this way. The Board was made up of medical practitioners, one of whom was identified as the specialist, i.e. in the area of medicine relevant to the appeal. The specialist conducted an examination of the claimant in the course of the hearing. The decision which the Board produced was its medical conclusion as to case on causation in this case; under the heading 'Detailed Case Discussion', the Board indicated that it had considered the evidence provided before and during the hearing and the results of the examination. The subsequent comment upon the adequacy of the Force's response when dealing with these complaints is an additional observation which is not said to have a bearing on causation. To focus on that passage on the decision would be to subject it to the unrealistic scrutiny which is discouraged by **Fuller**. Its presence can be explained by the fact that the claimant's representative at the hearing had disputed that the Force's management processes had been fair and reasonable.

47. Mr Gold's argument that the Board was only required to give reasons if they disagreed with the SMP, otherwise it could adopt his reasons, can also be dealt with shortly. Regulation 31(3) of the 2006 regulations provides that if the appeal board disagrees with any part of the report of the SMP it shall express its decision in the form of a report. That requirement does not absolve the Board of giving reasons for its decision as to why it accepted or rejected the SMP's report if that is what is required by procedural fairness.

48. I was not addressed on the fundamental point as to in what circumstances a body such as the Board should be required to give reasons as a matter of procedural fairness. There are a number of features of the appeal process which lead me to conclude that it should. First, the Board is acting in a quasi-judicial capacity in an adversarial process. Second it has to make findings of fact, often on contested evidence, and direct itself on the law in order to reach a conclusion. Third it was making a decision which was determinative of the claimant's rights. Fourth, under regulation 32, there is provision for a reference of a decision for reconsideration. Put simply, under this appeal regime, justice cannot be done if the decision does not explain why one party won and the other lost by reference to the factual and legal issues they raised. Furthermore, the provision for a regulation 32 reference is undermined if it is not possible to determine why a redetermination is merited. Finally, there is the Home Office guidance set out above, which requires the board to make clear when making a decision as to which way the balance tips and <u>why</u>. The guidance echoes the common law requirement that proper adequate reasons must be given dealing with the substantial points in dispute between the parties; see **R (H) v Mental Health Review Tribunal [2001] EWHC Admin 901** per Stanley Burnton J (as he then was) at [77].

49. The key issue under these grounds relates to the way in which the Board dealt with the allegations set out in the report from Dr McWilliam. Mr Lock has advanced the case before me on the basis that there were in the order of 26 allegations, listed in the report

from Dr McWilliam. It was the task of the Board to evaluate the evidence in relation to those allegations and reach a conclusion as to which, if any, they found proved. both because these were matters which bore on the decision that it was required to make and because of the Home Office guidance. Thus, they have failed to reach a decision on facts central to the outcome of the appeal.

50. On one view, that is not the way in which the case was put to the Board. Their Report records the claimant's representative at the hearing, Mr Botham, referring to the drip-drip effect of a catalogue of events, but the events to which he appears to be referring seems to be those in the following paragraph in the Report which set out some of the six allegations which were in the Force's response to the appeal. He did not appear to draw the Board's attention to the list of incidents set out in Dr McWilliam's report. The appellant's written submissions start with the assertion that the appeal is primarily concerned with legal issues and the complaint concerning bullying and harassment due to his accent and origin is confined to a two line paragraph under the heading 'Factual Background', two short paragraphs, numbers 157/8 under the heading 'Non-Medical Evidence' medical evidence and 4 paragraphs, numbers 164, 165, 168 and 185, which are said to provide corroborative evidence of these events.

51. If it was the case that the claimant ran a different case before the Board to that in his original application for an award, a copy of which does not appear to have been before the Board but provides considerable details as to bullying and racism, he could not complain if the Board did not deal with these matters. The Board was aware, however, that these issues formed part of the claimant's case as it notes that Mr Michaelides had raised a number of complaints of bullying and racism about which he had not submitted a grievance. Furthermore, when examined at the hearing he had said that apart from the events referred to in the Force's response there were many more for which he could not get documentation and it is recorded that when interviewed, he was vague about his workplace bullying and was not able to give precise details. There is also a reference in the examination to other officers talking about the use of a cricket bat to open a door at the time the Oscar Pistorius trial was being reported, which he took as a reference to his South African heritage.

52. It is difficult to reconcile the references in the Report to Mr Michaelides saying that there were many other incidents and what he said, albeit in vague terms, as to bullying, with the expressed surprise of the Board that as regards the written allegations, which is where some detail of these matters is set out, i.e. Dr McWilliam's report, he had not mentioned any of these during his examination. At all events, the assertion that the claimant had been subject to bullying and racist behaviour and that these were causative of his condition were allegations which were part of the claimant's case and Mr Gold did not suggest otherwise. Whilst it is easy to see that the Board could be distracted by the highly legalistic way in which the claimant's submissions were structured and the lack of emphasis given to the bullying/racism allegations, the Board had a list of allegations in the report of Dr McWilliam and the nature of these complaints was raised on the appeal as causative factors in the claimant's condition. In order to decide whether he was entitled to an award, the Board first had to come to conclusion as to whether he had been subjected to this behaviour.

53. Mr Gold's argument that the Board decided that the other incidents were not proved is not explicit from Board's report. It may be that in the Board expressing the view that it was surprised that they were not mentioned in the examination, this was intended to be

an explanation as to why they did not find them proved, but they do not say so. Ultimately, it is impossible to tell from the report whether the Board took the view that it did not need to make a decision in relation to the complaints of bullying and harassment as the oral evidence on the subject was vague and the specific allegations in Dr McWilliam's report were not investigated, which would be to repeat the error identified in **Williams,** or that these factors led it to hold that the allegations were not, on balance, proved. If it is the latter, the lack of explanation as to this being the decision and why it had been reached contravenes the Home Office Guidance to the Board and the common law requirements as to the adequacy of reasons. Either way, Mr Lock's criticism that the Board failed to reach decisions on key factual issues in the case, or alternatively did not give adequate reasons as to how it dealt with these issues is made out.

Delay

54. The defendant seeks to rely upon the delay in the bringing of this challenge as a reason to refuse relief. Lane J, when granting permission indicated that delay was an issue which needed to be considered at the substantive hearing and that the court would be able to refuse relief if it concluded that a direct challenge to the original decision was materially affected by timeliness issues.

55. Mr Gold argues that all the complaints about a lack of reasons or an absence of a decision as to the bullying and racism complaints were known to the claimant when the Board's report was promulgated in November 2016. He did not challenge the decision until September 2018. He said that the catalyst for the challenge seems to have been the decision in **Evans,** but the claimant does not explain the delay. He contrasts the time taken to launch this challenge to the 3 month time limit in which to issue claims of discrimination in the Employment Tribunal. Delay will have a material effect, he says, for in relation to the majority of his complaints, the claimant has yet to identify the other individuals involved and the locations and dates at which they occurred. In view of the fact that the claimant's case before the Board was that the chain of events started on his transfer to Merseyside Police in 2007, the chances of being able to investigate the allegations is negligible. Furthermore, even if the claimant now chose to identify individuals who misbehaved towards him, memories of what was said will have been dulled by the passage of time. The issue of the importance of afinality did not arise in view of the terms under which leave and the challenge to the regulation 32 decision were treated.

56. Mr Lock stance is that the starting point is that where there has been an unlawful decision it should be quashed unless there is some compelling reason not to do so. The extension of time for bringing the challenge has been dealt with by Lane J. It is only if I was satisfied that it would be unjust to the defendant due to its difficulties in investigation that I should decline relief. The reality is that the Force is in no worse position now than it was in 2016. Its case as to complaints of bullying and racial harassment made to Sgt Ndlovu on a welfare visit is that they could not comment on them as they were not formally documented as a grievance and thus not investigated.

57. I agree with Mr Lock. The defendant is in no worse position to contest the appeal before the Board now than it was in 2016. His stance has been that aside from the 6 events which it addressed in his submissions to the Board, he has been unable to investigate Mr Michaelides's allegations with the result that the outcome of the appeal on this

aspect was dependent upon what the Board made of his evidence. In those circumstances it is not unjust to the defendant to quash the decision.

Conclusion

58. The decision of the Board must be quashed. I have not heard argument as to whether the decision should be of a fresh Board. Subject to any submissions on the point, my view is that given the lapse of time there should be a new Board which can start afresh rather than running the risk of remitting the matter to the original Board, if they are still available, with the difficulty this would pose for them in comparing what they remember from the 2016 hearing with what is said now. For completeness, I have considered section 31(2A) of the Senior Courts Act 1981 but as this was not argued before me and it is difficult to apply in what is, on one view, a 'no reasons' case I am not satisfied that it is highly likely that the outcome of the Board's decision would not have been substantially different if the conduct complained of had not occurred.

59. Finally, by way of post script, it does seem that a PMAB would be much assisted if the Form C Appellant's Submission required the appellant to set out a list of the facts underpinning the appeal which it was inviting the Board to find proved and the Form D, Authority's Submissions, required that it set out which of the listed facts it admitted and which it did not admit or denied, or lacked relevance, giving reasons. In that way, the fact finding element of the Board's task could be more focussed and the difficulty which arose in this case may be avoided.