Appeal No. UKEAT/0576/11/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 22 November 2012
Judgment handed down on 17 December 2012

Before

THE HONOURABLE MR JUSTICE KEITH

MR T HAYWOOD

MR D J JENKINS OBE

MS A DOYLE — APPELLANT

(1) CHIEF CONSTABLE OF NORTHUMBRIA POLICE
(2) NORTHUMBRIA POLICE AUTHORITY — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MRS JANE CALLAN (of Counsel) Instructed by: Pattinson & Brewer Albert House 1-4 Singer Street London EC2A 4BQ
For the Respondents	MR ROBERT GIBSON (Solicitor) Northumbria Police Legal Services Ponteland Newcastle NE20 0BL

SUMMARY

DISABILITY DISCRIMINATION – Compensation

Causation – whether decision not to award employee sick pay was a consequence of the act found to have been an act of disability discrimination.

THE HONOURABLE MR JUSTICE KEITH

Introduction

1. This appeal is the latest twist in the long-running saga concerning the employment of the Claimant, Ms Alison Doyle, by the Northumbria Police. She made a series of claims relating to various forms of disability discrimination. All those claims were dismissed by an employment tribunal at Newcastle-upon-Tyne, with the exception of one which was upheld. The current appeal relates to the tribunal's refusal to award the Claimant compensation for one particular head of loss relating to sick pay. In order to understand how that head of loss arises and the tribunal's reasons for rejecting any compensation relating to that head of loss, an understanding of the underlying facts is necessary.

2. We should add that there were two respondents to the claim: the Chief Constable of Northumbria Police and the Northumbria Police Authority. The Chief Constable was the appropriate respondent for claims relating to Ms Doyle's employment. The Northumbria Police Authority was the appropriate respondent for claims relating to the consideration of the question whether she should be retired on medical grounds. It is common ground that in the light of the issue to which this appeal relates, the only proper respondent to the appeal is the Northumbria Police Authority.

The facts

3. *Ms Doyle's disability*. Ms Doyle joined the Northumbria Police Force ("the Force") as a police officer on 22 July 1985. On 9 January 1997 she was injured in a road traffic accident while she was on duty. There were issues over whether her injury was a straightforward whiplash injury or whether her spine was affected, but it was never disputed that she was eventually to suffer from a psychiatric disorder. She returned to work within a few weeks,

though it was some years before she returned to operational duties. But she was injured again on 25 October 2001 when she and other officers were arresting a violent and abusive woman. She went on sick leave, and never returned to work again. Although her pay was twice reduced to half pay over the next couple of years, her full pay was restored and backdated, and she therefore remained on full pay though still on sick leave by the time the **Police Regulations 2003** (SI No 527 of 2003) ("the 2003 Regulations") came into force on 1 April 2003.

4. *The withdrawal of sick pay*. Reg 28 of the 2003 Regulations relates to sick pay. It provides:

> **"The Secretary of State shall determine the entitlement of members of police forces to pay during periods of sick leave …, and in making such a determination the Secretary of State may confer on the chief officer a discretion to allow a member of a police force to receive more pay than that specified in the determination."**

Annex K to the 2003 Regulations sets out the determination which the Secretary of State made under reg 28. Paras 1) and 3) of the determination are relevant for present purposes. They provide:

> **"1) … a member of a police force who is absent on sick leave … shall be entitled to full pay for six months in any one year period. Thereafter, the member becomes entitled to half pay for six months in any one year period.**
>
> **3) The chief officer of police may, in a particular case determine that for a specified period**
>
> **a) a member who is entitled to half pay while on sick leave is to receive full pay, or**
>
> **b) a member who is not entitled to any pay while on sick leave is to receive either full pay or half pay,**
>
> **and may from time to time determine to extend the period."**

5. Following the coming into force of the 2003 Regulations, the Force's Health Management Group considered Ms Doyle's case. On 14 October 2003, it concluded that her circumstances were such that the Chief Constable could extend her sick pay because her condition was directly attributable to an injury sustained in the course of her duties. But its

recommendation was that she should not continue to receive full pay if she had not returned to work on "recuperative" duties by 27 October 2003, since her condition had become "psychological" rather than physical. The Chief Constable adopted that recommendation. Since Ms Doyle had not returned to work on recuperative duties by 27 October 2003, she went on to half pay then, and onto nil pay on 28 April 2004. The provisions of the **Disability Discrimination Act 1995** ("the 1995 Act") did not apply to police officers until 1 October 2004, and the decisions to reduce her pay to half pay and then to nil pay were not amenable to challenge under the 1995 Act.

6. *Ms Doyle's retirement on medical grounds*. The circumstances in which an officer may be compulsorily retired on medical grounds are governed by the **Police Pensions Regulations 1987** (SI No 257 of 1987) ("the 1987 Regulations"). The core regulation is reg A20 which provides:

> **"Every regular policeman may be required to retire on the date on which the police authority determine that he ought to retire on the ground that he is permanently disabled for the performance of his duty …"**

Reg A12(2) defines disablement as meaning an "inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a male or female member of the force, as the case may be …", and reg A12(5) defines infirmity as meaning "a disease, injury or medical condition, and includes a mental disorder, injury or condition." Whether an officer is disabled, and whether that disablement is likely to be permanent, are medical questions, and regs H1(2) and H1(4) of the 1987 Regulations provide:

> **"(2) Where the police 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 …**

> **(4) The decision of the selected medical practitioner on the questions referred to him under this Regulation shall be expressed in the form of a certificate and shall … be final."**

But what if the officer declines to be medically examined? That is catered for by reg H4 of the 1987 Regulations, which provides:

> **"If a question is referred to a medical authority under Regulation H1 … and the person concerned wilfully or negligently fails to submit himself to such medical examination or to attend such interviews as the medical authority may consider necessary in order to enable him to make his decision, then … the police authority may make their determination on such evidence and medical advice as they in their discretion think necessary …"**

7. One other factor should be added here. Guidance had been provided in 2002 by the Police Negotiating Board on how "the key areas … of ill-health retirement" should be managed. That guidance included what the Force Medical Adviser should do when referring a case of possible retirement on medical grounds to the Selected Medical Practitioner. The Force Medical Adviser is required to express an opinion on whether the officer concerned is disabled, whether the disablement is permanent, and the extent to which the officer's disablement impacts on their capabilities. The guidance also contained in Annex B information about how the question of disablement should be approached, namely that the courts had said that to be able to perform "the ordinary duties" of a police officer, the officer had to be able to perform any of the essential functions of the office of constable, including operational duties.

8. The question of Ms Doyle's retirement on medical grounds was first raised on 6 July 2004 by Dr Wollaston, the Force Medical Adviser. The trigger for that being considered was a report on Ms Doyle by a consultant psychiatrist, Dr Mumford, who had examined her at the request of the Force's advisers on occupational health. His report referred to "her profoundly negative feelings towards the organisation and her colleagues as well as the level of her psychological vulnerability". He could not see her returning to work as a police officer in the future, whether to full operational duties or to more restricted ones. In the light of Annex B of

the guidance issued by the Police Negotiating Board, he regarded what he described as Ms Doyle's "psychological disablement" as permanent.

9. In the light of this report, Dr Wollaston decided to refer Ms Doyle's case to the Selected Medical Practitioner under reg H1(2). The Selected Medical Practitioner was Dr Broome. In his report to Dr Broome dated 12 August 2004, Dr Wollaston noted the problems with her neck and back, but thought that it was "the psychological factors" which were preventing her from returning to work, coupled with a deep resentment over the way she had been treated by, and her distrust of, the Force. He said that he agreed with Dr Mumford that Ms Doyle was unlikely to be able to return to work as a police officer, whether on full operational duties or on more restricted ones, but he added that "once the uncertainty over her future employment is resolved, in my opinion neither the physical nor the psychological problems would be an obstacle to alternative employment outwith the Police Force". In due course, Dr Broome examined Ms Doyle, and on 3 November 2004 he certified that Ms Doyle was disabled and that her disablement was likely to be permanent, due to "vulnerability to anxiety/adjustment disorder, vulnerability to aggravation of mechanical spinal pain, enmity towards Northumbria Police", though he qualified that by querying whether these were "valid diagnoses" within the 1987 Regulations. His reservations were justified because his certificate was quashed on 25 November 2005 on a claim for judicial review brought by the Northumbria Police Authority ("the Authority"). Bennett J sitting in the Administrative Court took the view that the conditions which Dr Broome had said Ms Doyle's disablement was due to did not amount to an "infirmity of mind or body" within the meaning of reg A12(2). The judgment is reported at [2006] ICR 555.

10. Following the quashing of Dr Broome's certificate, Dr Wollaston referred Ms Doyle's case to Dr Broome once more for a fresh consideration of whether she was disabled and

whether her disablement was likely to be permanent. That was on 21 February 2006. His report said that there was "no new medical evidence" in her case. That was wrong, though he was not to know that at the time. Reports from two consultant psychiatrists, Prof. Ecclestone and Dr Lough, had been prepared on Ms Doyle dated 13 July 2004 and 6 February 2005. Prof. Ecclestone had diagnosed Ms Doyle as suffering from a generalised anxiety disorder, and had expressed the view that Ms Doyle was "permanently disabled for psychological reasons" from being employed in the future as a police officer. Dr Lough had diagnosed Ms Doyle as suffering from a recurrent depressive disorder, and he did not believe that she was capable of returning to work as a police officer for the foreseeable future. These reports were not disclosed by Ms Doyle or the Police Federation who had been acting for her until they were sent to the Force towards the end of January 2006, and even then Dr Wollaston knew nothing of them. Dr Wollaston's report did not express any fresh opinion on whether Ms Doyle should be retired on medical grounds or whether she could be retained in some capacity, and he was not well enough to give evidence, but he attached his original report of 12 August 2004, and since he did not say otherwise, we can assume, we think, that the opinion he had expressed in his original report still stood.

11. For the purpose of assessing Ms Doyle again, Dr Broome said that he wished to examine her again. Ms Doyle had not wanted her case to be referred to Dr Broome again, but the view which an in-house solicitor with the Authority took was that once a Selected Medical Practitioner had been chosen, there was no power to appoint someone else in their place – in the absence, presumably, of compelling reasons why they should be replaced. Dr Broome therefore remained the Selected Medical Practitioner, and eventually Ms Doyle agreed, albeit very reluctantly, to be examined by him. Her reservations about being examined by him caused Dr Broome to rethink the question whether he needed to examine her, and having sought advice from the Ethics Committee of the Faculty of Occupational Health, he concluded that "a paper

based approach would be the best way forward". He had by then been provided by Ms Doyle's GP with recent reports on her "psychological" health, but he wanted Ms Doyle's agreement for a report on her "back symptoms" to be obtained from a spinal specialist.

12. For reasons which it is unnecessary to explain, it took a long time for Ms Doyle to be examined by the consultant neurosurgeon, Mr Todd, and it then took quite a time for his reports on Ms Doyle to be released to the Authority. They were eventually released on 19 March 2008. Mr Todd diagnosed widespread degenerative disease in Ms Doyle's spine, and he did not doubt that she had back pain. Although it was outside his area of expertise, he thought that there was "a significant psychiatric illness here", though he could not comment on whether her psychiatric illness was capable of treatment to the point where she would be capable of returning to work.

13. On receipt of Mr Todd's report, Dr Broome took the view that Ms Doyle should be assessed by Dr Mumford. That assessment did not take place because of what the tribunal described as "disputes about the disclosure" to Ms Doyle of Dr Broome's letter of referral to Dr Mumford, and her refusal to consent to an appointment with Dr Mumford until those disputes had been resolved. That culminated in the Acting Chief Officer's decision, notified to Ms Doyle on 10 December 2008, to treat her unwillingness to see Dr Mumford as a wilful refusal to submit herself to a medical examination. It was in those circumstances that on 27 March 2009 Dr Broome recommended that Ms Doyle be retained on the workforce in a number of possible roles with reasonable adjustments being made to take account of her disability. However, in a subsequent report dated 15 July 2009, Dr Broome recommended that Ms Doyle *should* be retired on medical grounds. The Acting Chief Officer took a "holistic" view of her case, namely that her psychiatric condition, which in his view did not on its own amount to a

permanent disability, should be taken into account. Accordingly, on 21 August 2009 Ms Doyle was retired on medical grounds on the basis of her combined psychiatric and spinal problems.

14. *The impact of Ms Doyle's possible retirement on medical grounds on her sick pay*. Guidance as to how the Chief Constable was to determine whether an officer's sick pay should be extended under the 2003 Regulations was given by the Force's Personnel Service Division. The document in which that guidance was given was the Attendance Management Procedure dated 19 January 2010, but we were told that this had been the guidance given since the 2003 Regulations came into force. The guidance explained how sick pay might be affected by the possibility of someone being retired on medical grounds. The guidance states (and we have numbered the paragraphs to make subsequent references to the guidance easier):

> **"(1) Where an officer being considered for permanent disability in accordance with Regulation H1(2) …, Police Pension Regulations 1987 and it is likely that the officer will be medically retired, the officer *will* be maintained on full pay. The likelihood of a medical retirement will be assessed in the light of the FMA's report to the Selected Medical Practitioner (SMP). The FMA should normally complete the report to the SMP within 28 days of being formally asked to consider the issue of permanent disability.**
>
> **(2) An officer being considered for permanent disability will not be returned to full pay where the FMA considers that an officer may be permanently disabled, but there is a strong likelihood of retention or where they have self-referred to the SMP. However, where such an officer is subsequently deemed to be permanently disabled and is to be medically retired, they *may* receive a retrospective payment to the date of their referral.**
>
> **(3) The Chief Constable may refuse to extend sick pay, even where the criteria would normally indicate the contrary. In particular, discretion will not be exercised:**
>
> - **When there is evidence of default or neglect on the officer's part.**
> - **The officer's actions are delaying the process of recovery.**
> - **When the officer is failing to co-operate with a recuperative plan or comply with requests to attend medical examinations or supply medical information.**
> - **When the officer is actively engaged in a business interest during the period of absence.**
>
> **(4) In the case of an officer in respect of whom the Chief Constable has exercised his discretion, continued full or half pay will be subject to regular review by the [Health Management Group] and a recommendation as to further extensions referred by the Chair to the Chief Constable.**
>
> **(5) Following a determination made by the Chief Constable to reduce an officer to nil or half pay who is then subsequently medically retired from the Force, a payment of no less than twenty eight days salary paid to the date of medical retirement *will* be made."** (Emphasis supplied)

15. The effect of this guidance is to create four routes by which an officer who is being considered for retirement on medical grounds can receive full pay in the meantime, or an officer who has been retired on medical grounds can receive following his retirement a retrospective payment equivalent to what their full pay would have been in the meantime. The first, which is in para (1), arises at the time when the officer is first being considered for retirement on medical grounds. If it is "likely" that the officer will be retired on medical grounds, the officer will receive their full pay in the meantime. Such a payment is mandatory (subject to an important reservation to which we shall come shortly) since that is the effect of the word "will". What is important is that the likelihood of the officer's retirement on medical grounds has to be assessed by reference to the Force Medical Adviser's report to the Selected Medical Practitioner.

16. The second route, which is in para (2), does not arise when the officer is being considered for retirement on medical grounds. It arises only when the decision to retire the officer on medical grounds has been made. A retrospective payment can be made at that stage if the officer has not been receiving full pay in the meantime. We were originally inclined to the view that such a retrospective payment could only be made if at the time of the report to the Selected Medical Practitioner, the Force Medical Adviser considered that (a) the officer "may be permanently disabled", but (b) there was a strong likelihood that the officer would be retained on the workforce in some capacity. However, the better view is that in this passage the guidance was just spelling out some of the circumstances in which a payment would not be made under para (1). It is important to note that such a retrospective payment does not have to be made. That is the effect of the word "may".

17. The third route, which is also in para (2), is another situation in which a retrospective payment may, not must, be made. That is where the officer refers himself to the Selected Medical Practitioner – in other words, otherwise than by a report to the Selected Medical

Practitioner by the Force Medical Adviser. If the officer is eventually retired on medical grounds, a similar retrospective payment may be made to him. Since this was not a case of self-referral, no more needs to be said about that. The final route, which is in para (5), provides for a minimum payment of 28 days full pay for any officer who has had his sick pay reduced to half pay or nil pay and who is subsequently retired on medical grounds. The question whether a payment greater than that should be made is, no doubt, a matter for the Chief Constable's discretion.

18. In the event, the Force did not reinstate Ms Doyle's sick pay under para (1) of the guidance when her case was referred to the Selected Medical Practitioner in August 2004. The tribunal rejected any liability under the 1995 Act on that score, and there is no appeal against that finding. Nor was it reinstated under para (1) of the guidance when her case was referred again to Dr Broome in February 2006. Nor was a retrospective payment made to her under paras (2) or (5) of the guidance when she was eventually retired on medical grounds in August 2009.

The tribunal's finding of disability discrimination

19. The tribunal's finding of disability discrimination relates to the view taken by the in-house solicitor with the Authority that there was no power to appoint a new Selected Medical Practitioner in place of Dr Broome. The tribunal found that that view of the Authority's powers was incorrect. A new Selected Medical Practitioner could have been appointed. The tribunal went on to hold that in giving effect to that view, the Authority was applying a provision, criterion or practice which placed Ms Doyle at a substantial disadvantage in comparison with persons who were not disabled. The step which the Authority should have taken to prevent that provision, criterion or practice having that effect was to appoint a new Selected Medical Practitioner in place of Dr Broome. The failure to take that step amounted to a failure to

comply with its duty to make reasonable adjustments to cater for Ms Doyle's disability. There is no appeal by the Authority against that finding.

The tribunal's assessment of compensation

20. The tribunal assessed Ms Doyle's compensation for her discrimination by considering what the course of events would have been if the Authority had appointed a new Selected Medical Practitioner in place of Dr Broome. Having made various findings on that issue, the tribunal then reserved to a subsequent hearing the quantification of three heads of loss which it identified. It also reserved to that hearing the question whether Ms Doyle would have received, to use the language of para (2) of the guidance, "a retrospective payment to the date of" the referral of her case to the Selected Medical Practitioner. This appeal relates only to the tribunal's conclusion on that single issue, though as we shall see the tribunal considered Ms Doyle's entitlement to sick pay under para (1) of the guidance as well as under para (2).

21. The tribunal approached this issue as well by considering what was likely to have happened if Dr Wollaston had referred Ms Doyle's case to a new Selected Medical Practitioner. The tribunal found that that would have happened by the end of May 2006, but that even if the new Selected Medical Practitioner had been provided with the reports of Prof. Ecclestone and Dr Lough as well as that of Dr Mumford, it would not have been likely at that time that Ms Doyle would in due course have been retired on medical grounds. The tribunal's reasoning at para 8.9 of its reasons was as follows:

> **"… we consider that even if [the reports of Prof. Ecclestone and Dr Lough] had been referred together with Dr Mumford's report to the new [Selected Medical Practitioner], they would still not have satisfied the test of permanent disability under [reg A12(2) of the 1987 Regulations] and accordingly it would not have been the case that it was 'likely' that [Ms Doyle] would be medically retired. We were invited by Mrs Callan to conclude that the [Force Medical Adviser's] first report still stood, but in our view the foundation stone, namely Dr Mumford's report, relied upon by Dr Broome in his certificate, had been completely destroyed by the Administrative Court Judgment. As we have recognised, at the time of the second reference by the [Force Medical Adviser] in 2006 the prospects of [Ms Doyle] being ill-**

> **health retired on the basis only of a psychiatric condition was highly unlikely even taking into account the additional reports from Prof. Ecclestone and [Dr Lough].”**

Ms Doyle would then not have been eligible for sick pay under para (1) of the guidance.

22. Nor would she have been eligible for sick pay under para (2) of the guidance. The reason the tribunal gave for that was that it was only when Mr Todd’s report had been received that there was scope for Ms Doyle to be retired on medical grounds. As the tribunal said, again in para 8.9 of its reasons:

> **“It was not until both sets of reports (orthopaedic and psychiatric) that the primary issue of permanent disability was established.”**

And even if the discretion of the Chief Constable to pay sick leave had been triggered under paras (1) or (2) of the guidance, the tribunal said that it had

> **“… very grave doubts about whether the Chief Constable would have exercised a discretion in her favour in the light of the evidence of default or neglect and/or a failure to co-operate with the disclosure of medical reports on [Ms Doyle’s] part.”**

23. That at any rate was the majority view of the tribunal. The view of one of the lay members was that if Dr Wollaston had been provided with the reports of Prof. Ecclestone and Dr Lough as well as that of Dr Mumford, it would have been likely at the time of his referral of Ms Doyle’s case to the new Selected Medical Practitioner that she would in due course have been retired on medical grounds. In his view, that was decisive because para (3) of the guidance, which gave the Chief Constable the power to refuse to extend sick pay even when “the criteria would normally indicate the contrary”, did not apply to para (1) of the guidance. Once the obligation to pay sick pay had been triggered by para (1), it had to be paid.

The grounds of appeal

24. *Para (1) of the guidance*. As we have said, para (1) of the guidance required the likelihood of the officer's retirement on medical grounds to be assessed by reference to the Force Medical Adviser's report to the Selected Medical Practitioner. The argument advanced on behalf of Ms Doyle is that the need to refer her case again to a new Selected Medical Practitioner would have given Dr Wollaston the opportunity to reconsider such advice as he should give the new Selected Medical Practitioner. For that purpose, he would (or at least should) have been provided with the reports of Prof. Ecclestone and Dr Lough. Had he reconsidered such advice with the benefit of those reports, his advice to the new Selected Medical Practitioner would have been couched in such terms that the Chief Constable would have concluded that Ms Doyle's retirement on medical grounds in due course was likely. Accordingly, to the extent that the majority of the tribunal found otherwise in para 8.9 of its reasons, the tribunal fell into error.

25. We think that there is a good deal of force in that argument. There was, of course, no basis at that stage for the Chief Constable to have concluded that Ms Doyle's retirement on medical grounds in due course was likely on the basis of her orthopaedic problems. But the likelihood of her retirement on medical grounds in due course on the basis of her psychiatric problems was another matter entirely. We have not seen the reports of Dr Mumford, Prof. Ecclestone and Dr Lough, and we can therefore only go on the extracts from their reports quoted by (a) the tribunal and (b) Dr Vincenti, a consultant psychiatrist jointly instructed by Ms Doyle's solicitors and the Force to prepare a report for use in the current claim as to whether Ms Doyle was suffering from a disability within the meaning of the 1995 Act. Both Prof. Ecclestone and Dr Lough had diagnosed specific disorders which they believed Ms Doyle was suffering from, and that was what distinguished their reports from that of Dr Mumford, since there is nothing to suggest that he had diagnosed her as suffering from a psychiatric disorder.

He had merely noted her symptoms of lack of self-esteem, and her "negative feelings" towards the Force. In those circumstances, it is not surprising that Dr Wollaston's report to Dr Broome in August 2004 led Dr Broome to describe the conditions which Ms Doyle's disablement was due to in such a way that they did not amount to an "infirmity of mind or body". But we do not think that that can be said of the reports of Prof. Ecclestone and Dr Lough. In our view, it was not open to the majority of the tribunal to conclude that the Chief Constable would not have concluded, at the time when Dr Wollaston would have referred Ms Doyle's case to a new Selected Medical Practitioner, that it was likely that Ms Doyle would in due course have been retired on medical grounds. In this respect, we agree with the minority member of the tribunal.

26. But that is by no means the end of the story. We accept that the need to refer Ms Doyle's case to a new Selected Medical Practitioner would have given Dr Wollaston the opportunity to reconsider such advice as he should give the new Selected Medical Practitioner. But that opportunity arose because of the need to refer Ms Doyle's case to a Selected Medical Practitioner for a second time. That need arose – not because a new Selected Medical Practitioner had to be brought in – but because there had to be a fresh referral to the Selected Medical Practitioner, *whoever he happened to be*, because Dr Broome's certificate had been quashed. In other words, the opportunity for Dr Wollaston to reconsider such advice as he should give arose, not because of the discriminatory act in failing to appoint a new Selected Medical Practitioner, but because the judgment of the Administrative Court had made a new referral necessary, irrespective of who the new Selected Medical Practitioner was to be. There was therefore no causal link between the discriminatory act on the one hand and what the Chief Constable would have concluded on the other about the likelihood of Ms Doyle's eventual retirement on medical grounds. It is this break in the chain of causation which in our view made it impossible for Ms Doyle to recover her sick pay under para (1) of the guidance *as part of her compensation for her discrimination.* In the circumstances, it is unnecessary for us to

reach our own conclusion on whether para (3) of the guidance applied to para (1) of the guidance as well as to para (2).

27. *Para (2) of the guidance*. In view of our initial thinking about para (2) of the guidance, we had some difficulty seeing how the tribunal's conclusion on para (2) of the guidance could be faulted. After all, there could not be said to have been at the end of May 2006 "a strong likelihood" that Ms Doyle would be retained on the workforce in some capacity. But once that is no longer regarded as a condition for the making of a retrospective payment to Ms Doyle, the tribunal's approach to para (2) of the guidance becomes difficult to justify. The discretion under para (2) of the guidance to make a retrospective payment is triggered simply by the decision to retire the officer on medical grounds. That is what happened here. The fact that it was Mr Todd's report about the true extent of her spinal problems which clinched it is beside the point. It was simply the fact of her retirement on medical grounds which triggered the discretion to make a retrospective payment to her.

28. Again, that is not the end of the story. Causation is an insuperable problem for Ms Doyle here as well. What triggered the discretion to make a retrospective payment to her was not the discriminatory act in failing to appoint a new Selected Medical Practitioner, but the fact of her retirement on medical grounds. This break in the chain of causation made it impossible for Ms Doyle to recover a retrospective payment equivalent to her sick pay under para (2) of the guidance *as part of her compensation for her discrimination.*

29. Leaving aside the absence of a causative link between the discriminatory act and the discretion to make a retrospective payment, Ms Doyle still had to get over para (3) of the guidance, which set out a number of circumstances in which the discretion to make a retrospective payment under para (2) of the guidance (and if the majority of the tribunal was

right, sick pay under para (1) of the guidance as well) would not be exercised in favour of the officer. In its judgment on liability, the tribunal expressed concerns about, amongst other things, Ms Doyle's conduct in delaying her consent for the disclosure to any new Selected Medical Practitioner of (a) her medical records and (b) Mr Todd's reports on her, which was, no doubt, what the tribunal was referring to in its judgment on remedies when it talked of its "very grave doubts" about whether the Chief Constable would have exercised his discretion to make a retrospective payment to her. But for our view on the issue of causation, it would have been necessary for us to determine whether this was a finding that he would not have exercised his discretion in her favour, or a finding that the likelihood of his doing so was remote, in which case the tribunal might have had to consider whether the chance of him doing so was so small that it could be discounted for all practical purposes or whether Ms Doyle should be compensated for at least the loss of that chance. But our view on the issue of causation makes that unnecessary.

30. *Para (5) of the guidance*. The obligation to pay Ms Doyle at least 28 days' full pay was unquestionably triggered by her retirement on medical grounds. The possibility of an award under para (5) of the guidance was not considered by the tribunal, but Mrs Callan candidly accepted that she did not draw para (5) of the guidance to the tribunal's attention. Had she done so, though, it would not have made any difference – for precisely the same reasons as the break in the chain of causation prevented any retrospective payment under para (2) of the guidance being awarded *as part of Ms Doyle's compensation for her discrimination.*

A claim under her contract?

31. Although Ms Doyle's claims for sick pay or a retrospective payment under the guidance had to fail as part of her compensation for her discrimination, that does not necessarily mean that she did not have a valid claim for them as part of her contractual entitlement – not against

the Authority, but against the Chief Constable in his capacity as the appropriate defendant to a claim relating to Ms Doyle's employment. That would have turned on whether the part of the Attendance Management Procedure in which the guidance was contained had been incorporated into her contract of employment. But even if it had been, Ms Doyle would still have faced the problem of para (3) of the guidance, and the issue whether it applied to para (1) of the guidance as well as to para (2) – an issue which it has not been necessary for us to resolve. That reservation would not, of course, have applied to her entitlement to a retrospective payment equivalent to at least 28 days full pay under para (5) of the guidance. On the face of it, the only thing which would have prevented a successful claim under her contract for that would have been if the Attendance Management Procedure had not been incorporated into her contract of employment.

Conclusion

32. For these reasons, this appeal must be dismissed.