SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 20
XA40/21

Lord Justice Clerk
Lord Turnbull
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the Appeal by Stated Case under section 151(4) of the Pension Schemes Act 1993 and Rule 41.12 of the Rules of the Court of Session 1994 by

H

Appellant

against

(1) MYCSP; (2) SCOTTISH PRISON SERVICE; (3) ADVOCATE GENERAL FOR SCOTLAND, for and on behalf of the CABINET OFFICE

Respondents

Appellant: Allison; BTO Solicitors LLP
Respondents: Roxburgh; Office of the Advocate General

26 April 2022

Introduction

[1] This is an appeal by stated case by the appellant against a final written determination of the Pensions Ombudsman (the "PO") dated 21 December 2020. That determination did not uphold a complaint by the appellant of maladministration on the part of the first respondent.

Background

[2] Until 16 September 2016 the appellant was employed by the second respondent as a residential prison officer. That employment brought him within the scope of the Civil Service Injury Benefit Scheme ("the Scheme") made under section 1 of the Superannuation Act 1972. The Scheme is administered by the first respondent on behalf of the third respondent. Prior to his employment ceasing the appellant had been absent from work for a lengthy period because of depression, and it had been determined that he had suffered a qualifying injury in terms of the Scheme. After his employment ended he applied to the Scheme for an award of permanent injury benefit ("PIB").

The Scheme and the Guide

[3] In terms of the Scheme (rule 1.3(i)) PIB may be paid to an employee who suffers an injury in the course of official duty, provided that such injury is mainly or wholly attributable to the nature of that duty. PIB is a discretionary benefit. A person is eligible for PIB when they suffer a qualifying injury that impairs their general earning capacity by more than 10%. A person whose earning capacity is impaired through injury may be paid an annual allowance and lump sum in accordance with the Scheme Medical Adviser's medical assessment of the impairment to his earning capacity (rule 1.6(i)). The amount of the benefits depend, *inter alia*, on the degree of impairment (rule 1.7, and paragraph 7.2 of the Scheme Medical Reviews and Appeals Guide ("the Guide")). More than 10% but not more than 25% is "slight impairment"; more than 25% but not more than 50% is "impairment"; more than 50% but not more than 75% is "material impairment"; and more than 75% is "total impairment".

[4] If the Scheme Medical Adviser ("the SMA") assesses that a person's earning capacity has been impaired by more than 10%, the first respondent asks the SMA to advise if the impairment is 'mainly or wholly attributable' to a person's duty (rules 1.7 and 1.9). If it is mainly attributable the SMA proceeds to apportion the PIB award in accordance with the provisions set out in paragraph 8.3 of the Guide.

[5] The Guide provides:

> "**8 Apportionment**
>
> 8.1 In addition to an impairment of earnings assessment, for qualifying injuries sustained on or after 1 April 2003, the Scheme Administrator or the employer must ask the SMA to advise on whether the illness is 'wholly' (more than 90%) or 'mainly' (more than 50% but less than 90%) attributable to the nature of the duty.
>
> …
>
> 8.3 Where a person meets the mainly attributable test then the SMA will go on to apportion the extent to which their duties caused their injury.
>
> Apportionment is assessed in three bands:
>
> | | |
> |---|---|
> | Low | 50 – 70% attributable to duty |
> | Medium | 71 – 90% attributable to duty |
> | High | above 90% attributable to duty |
>
> **9 Process**
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> The formal injury benefit appeal procedure has only one stage; however, two separate appeals can be made within the appropriate period (12 months of the initial award decision). Any appeal should be made within 12 months of the initial Award decision. The second appeal may be notified up to and including the day the 12-month period ends. Under these circumstances, the appeal process may go beyond 12 months in its entire duration.
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> **Action by the Member**
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> 9.1.1 All appeals must be made in writing. The letter of appeal should set out the basis for the appeal (for example, against the level of apportionment/or impairment of earnings capacity). 9.1.2 New medical evidence must be presented with the appeal…
>
> …
>
> **Action by the SMA**
>
> 9.1.7 Whether considering a first or second appeal there are three different options open to the SMA.

- Uphold the appeal returning the case to MyCSP or the employer for a final decision.
- Reject the appeal (it goes no further) remitting the case back to the authorising authority/ employer for a final decision.
- Referring a borderline case to a physician independent of the medical adviser for a further paper-based assessment. Either the chief medical adviser or deputy chief medical adviser to the contract would only [*sic*] make such a referral. The independent physician may uphold or reject the case at this final stage, remitting it back to the authorising authority/employer for a final decision.

9.2 A first appeal

9.2.1 A senior physician will consider the appeal in the light of the new medical evidence provided by the member. The senior physician who considers the first appeal will be different from the one who made the original decision.

9.2.2 The appeal is normally considered based on the information submitted. However, a consultation may be required if the physician considers it necessary.

9.2.3 The first appeal may uphold the original decision or result in an increase to the level of award.

9.3 A second appeal

9.3.1 Any second appeal is considered by a SMA physician different from either the one who gave the original advice and/or who considered the first appeal. In most cases, the physician considering the second appeal will be a senior physician.

9.3.2 Any second appeal may do as the first appeal but can, in addition, lower the level of apportionment and/or earnings impairment if the new medical evidence justifies it.

9.3.3 This completes the formal injury benefit appeal arrangement…"

The SMA

[6] At the material times the SMA services were provided to the first respondent by Health Management Limited ("HM").

The appellant's application for PIB

[7] The SMA doctor who first considered the appellant's application was Dr Saravolac. On 13 September 2017 Dr Saravolac concluded that the appellant's earning capacity had

been impaired by less than 10%. Thereafter, the appellant's application was further considered by another of the SMA's doctors, Dr Pamela Collins. On 29 November 2017 Dr Collins reached the same conclusion as Dr Saravolac. On 9 January 2018 the first respondent advised the appellant that his application had been rejected as the degree of impairment of his earning capacity had been assessed as less than 10%.

The PIB appeals

The first appeal

[8] On 11 June 2018 the appellant appealed against the determination of 9 January 2018. He challenged the assessment of impairment of his earning capacity. He did not challenge the apportionment. The SMA senior physician appointed to conduct the appeal was Dr Lisa Birrell, a consultant occupational physician. She issued a report on 4 April 2019 and an amended report on 23 April 2019. She assessed the degree of apportionment as in the 71% to 90% "medium band" and the degree of general earnings capacity impairment as 10% to 25%, "slight impairment".

The second appeal

[9] On 28 April 2019 the appellant made a second appeal. Although that was more than 12 months after the determination of 9 January 2018 the first respondent concluded that there were good reasons to allow the second appeal to proceed. In particular, it was made only 5 days after Dr Birrell's amended report was issued.

[10] By the time of the second appeal all of the SMA's senior physicians had been involved in the appellant's case. There was no senior physician on the staff of the SMA who satisfied the requirement of paragraph 9.3.1 of the Guide that they be "different from either

the one who gave the original advice and/or who considered the first appeal". In late September 2019 the SMA advised the appellant of that fact and that it would appoint an external senior physician to consider the appeal. It appointed Dr Mark Groom, consultant occupational physician, and the medical file was sent to him on 7 November 2019.

[11] Dr Groom's report was dated 12 February 2020. The first page contained four *pro forma* sections. Section 1 contained formal details relating to the appellant and it recorded that his injury, depression, had been sustained prior to 12 June 2014. Section 2 was designed to list the material the physician considered – but all that was inserted was "As previously listed and included in text". Section 3 set out the different possible degrees of impairment of general earning capacity, and box 3, "3. 25% - 50% Impairment" had been ticked. Section 4 set out the different possible degrees of apportionment, and box 2, "2. The illness is 71 – 90% attributable Medium band" had been ticked. Section 5 of the report contained the reasons for Dr Groom's recommendation. It began:

> "Thank you for asking me to consider [the appellant's] second appeal under the provisions of the Civil Service Injury Benefit Scheme. I confirm that I have not had any previous involvement in this case. I am an independent specialist occupational physician and a Fellow of the Faculty of Occupational Medicine. I confirm that I have received a considerable bundle of documents for this appeal. I have considered all the medical evidence in the bundle and note the outcome from the first appeal, considered by Dr Birrell and submitted to the employer in revised form on 23 April 2019. In addition to that evidence I have noted [the appellant's] written submission dated 7 August 2019 and the new medical evidence that he submitted to support his second appeal."

The report listed all the material which Dr Groom had available to him. In a passage headed "Opinion – Degree of Apportionment" Dr Groom concluded:

> "Given the foregoing consideration of the available medical evidence I consider that it is not unreasonable to attribute up to 90% of the illness [the appellant] suffers to the agreed qualifying injury… Whilst it is clear that the majority of the attribution of his current mental health problems lies with the agreed qualifying injury sustained at work, I consider that it is reasonable to apportion up to 10% as being the result of pre-existing mental health problems and personality traits. I therefore agree with the

> previous decisions that 71-90% of the illness should be considered attributable to the qualifying injury, which were accepted by [the appellant] until this appeal."

In a later passage headed "Earnings Impairment" Dr Groom stated:

> "Despite [the appellant] not identifying this is as a matter for appeal I will deal with it… I consider that [the appellant] continues to retain capacity for work. I believe that it is not unreasonable to conclude that if [the appellant] focussed on recovery rather than his sense of injustice, then a capacity for work would very much be in his best interests… I therefore consider that with further treatment, as identified by Dr Wylie in late 2018, and commitment from [the appellant] to move on and recover, that he could undertake useful and beneficial work well before his state retirement age… I do not believe that the evidence available to me supports the contention that [the appellant's] earnings capacity equates to more than 75% earnings impairment."

[12] It appears that at the time of completion of his report Dr Groom did not have access to HM's online HMLO system to check and complete the report. It was common ground that, in order to assist Dr Groom, Dr Birrell accessed HMLO for him and completed sections 1-4 of the report using the information which Dr Groom had provided in section 5. Dr Birrell's email of 12.36 on 10 February 2020 confirmed that she proposed to do that. It is also noteworthy that at that time Dr Birrell was HM's Pensions Medical Director.

The Pension Schemes Act 1993

[13] Part X of the Pensions Schemes Act 1993 ("the 1993 Act") provides:

> "**146 Functions of the Pensions Ombudsman.**
>
> (1) The Pensions Ombudsman may investigate and determine the following matters
>
> > (a) a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational or personal pension scheme who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme,…
>
> …
>
> **149 Procedure on an investigation.**
>
> …

> (2) The Secretary of State may make rules with respect to the procedure which is to be adopted in connection with the making of complaints, the reference of disputes, and the investigation of complaints made and disputes referred, under this Part.
>
> …
>
> (4) Subject to any provision made by the rules, the procedure for conducting such an investigation shall be such as the Pensions Ombudsman considers appropriate in the circumstances of the case; and he may, in particular, obtain information from such persons and in such manner, and make such inquiries, as he thinks fit.
>
> …
>
> **151 Determinations of the Pensions Ombudsman.**
>
> …
>
> (4) An appeal on a point of law shall lie to the High Court or, in Scotland, the Court of Session from a determination or direction of the Pensions Ombudsman at the instance of any person falling within paragraphs (a) to (c) of subsection (3)."

The appellant's complaint to the PO

[14] On 10 August 2020 the appellant made a complaint to the PO of maladministration by the first respondent. The complaint contained five parts. One of them was not accepted for investigation because it was a complaint about HM and it was not within the PO's jurisdiction. It is only necessary to refer to two of the other heads, which concerned the appointment of Dr Groom and his decision on apportionment.

[15] The complaint which the appellant made about Dr Groom's appointment was that the first respondent indicated that an independent external physician would consider the second appeal; but that, notwithstanding the appellant's request, the SMA did not disclose the identity of the external physician, his post, or for whom he worked. The complaint continued:

> "Dr Groom is the Medical Director of the SMA Health Management. He has a working relationship with Dr Birrell, Dr Collins and Dr Saralavac. He is therefore not external or independent. It is clear why the SMA were so reluctant to disclose his position. I appeal to the Ombudsman that Dr Groom had a bias towards his colleagues… I was assured by the SMA that this report would be compiled and

> decided on by an Independent External clinician of the SMA Health Management. This clearly (*sic*) a premeditated action to mislead me."

[16] The complaint which the appellant made about the apportionment decision was that his injury ought to have been determined to be wholly attributable to his work duties. He maintained that Dr Groom was wrong to attribute 10% of the impairment to pre-existing mental health issues; and that such an attribution was not supported by the entries in the appellant's medical records or by the fact he had not had to take time off work for anxiety or depression before the work injury was sustained.

[17] The complaint of 10 August 2020 was considered in the first instance by a senior adjudicator in the PO's office. In his Opinion of 26 November 2020 the adjudicator concluded (paragraph 169) that the evidence did not support upholding the appellant's complaint. In his view (paragraph 144) the appointment of Dr Groom had been reasonable in the circumstances. Moreover, the appellant had not had a right to have the appeal considered by an external clinician independent of HM. The adjudicator continued:

> "145. [The appellant] says Dr Groom's opinion was biased towards his former colleagues. My view is that Dr Groom considered the available medical, and other, evidence and reached his own opinion. As a medical professional, Dr Groom could be expected to offer an unbiased opinion based on the facts of the case. [The appellant] has offered no evidence of bias on Dr Groom's part."

In relation to apportionment, the adjudicator observed:

> "147. It was for Dr Groom to weigh up all the evidence and reach a conclusion. Dr Groom attached most weight to Dr Wylie's 2017 report on the grounds that Dr Wylie had spent considerable time with [the appellant} and had access to all the GP records, the occupational health notes, and hospital records. Dr Wylie gave his opinion that [the appellant] had a recurrent depressive disorder. Dr Wylie said this was based on the medical records indicating that [the appellant] had previously suffered from depressive episodes sufficiently severe for the GP to treat him with antidepressant medications. Dr Wylie maintained his position in his 2018 supplementary report."

In the adjudicator's view there was no reason why the first respondent should not have accepted Dr Groom's opinion on apportionment (paragraph 150).

The final determination

[18] The appellant did not accept the adjudicator's Opinion and the complaint was passed to the PO for determination. On 21 December 2020 the PO issued his final determination. He did not uphold the complaint. He agreed with the Opinion of the adjudicator.

[19] In relation to the use of Dr Groom the PO stated (the emphasis is ours):

> "120. … I agree with the Adjudicator that procedurally there was no requirement for [the appellant's] appeal to be considered by an external physician independent of HM. Nevertheless, Dr Groom *had left* HM and confirmed that he was an independent specialist. I do not consider that Dr Groom's opinion has been shown to have been biased by *his past association* with HM. As the Adjudicator said, as a medical professional, Dr Groom can be expected to give a medical opinion based on the facts of the case. The onus is on [the appellant] to show any bias and he has failed to do so. Unsubstantiated allegations of bias should not and do not form a basis for finding that MyCSP should not have relied on Dr Groom's advice."

Accordingly, while at one point there was some dispute between the appellant and the first and second respondents as to Dr Groom's circumstances at the time of his appointment, it is clear that the PO accepted the evidence (which he narrated in paragraph 103 of the determination) that Dr Groom ceased to be HM's Medical Director in July 2016 and that he ceased to do occasional consultancy work for HM in September 2019.

[20] So far as Dr Birrell's involvement in the completion of sections 1 to 4 of Dr Groom's report are concerned, the PO observed (paragraph 124) that the information contained in sections 1, 3 and 4 is contained in section 5. He continued:

> "125. There is no suggestion that Dr Groom colluded with Dr Birrell in the completion of section five of the Form, or that the text from Dr Groom's "Dr to Dr report" was not correctly transferred to section 5 of the Form.

> 126. I do not find that the sections of the Form completed by HM changed the outcome of Dr Groom's opinion causing [the appellant] injustice."

[21] The PO dealt with the question of apportionment at paragraphs 127-145 of his determination. He was not satisfied that there were any good grounds for concluding that the first respondent was not entitled to accept Dr Groom's opinion.

[22] In concluding his determination the PO observed (in relation to the whole of the complaint which had been investigated):

> "146. [The appellant] has been at pains to highlight points at which the processing of his PIB application may have been less than ideal. However, for me to uphold a complaint, it is not simply the case that I must identify maladministration; I must also be satisfied that the individual has also, as a result, sustained injustice. [The appellant] appears to have lost sight of this fact. The outcome of his case had not been affected by the sometimes less than perfect approach taken by MyCSP (or HM) and consequently he has not sustained injustice.
>
> 147. I do not uphold [the appellant's] complaint."

The Stated Case

[23] On 8 January 2021 the appellant requested the PO to state a case for appeal to the Court of Session. The PO issued the stated case on 22 July 2021. It contained four questions of law. However, the appellant does not insist upon two of the questions being answered. The remaining questions are:

> "**Question 6.3**
>
> Did the Ombudsman err in law by finding that it was reasonable, in the circumstances in which [it] was produced and Dr Groom's professional involvement with HM, for MyCSP to rely on Dr Groom's report?
>
> **Question 6.4**
>
> Did the Ombudsman err in law by not finding that the medical evidence presented to and considered by MyCSP and its conduct throughout the process, taken in the round, amounted to maladministration after May 2018?"

[24] We find it unnecessary to rehearse the findings in fact made in the stated case. In large part they reflect the findings made by the adjudicator in his opinion and by the PO in his determination. However, we draw attention to a finding at paragraph 1.97 because it is relevant to the argument relating to apportionment which counsel for the appellant sought to advance:

> "On 19 February 2020, [the appellant] received the completed report signed by Dr Groom from HM ("Dr Groom's Report"). In section five, Dr Groom assessed [the appellant's] degree of apportionment as in the 71% to 90% 'medium' band..."

Part 3 of the Stated Case is headed "Conclusions found in fact and in law". Paragraphs 3.3 and 3.4 state:

> "3.3 On Dr Groom's appointment to review [the appellant's] second PIB appeal, and Dr Groom's independence from HM:
>
> 3.3.1 For the reasons set out below in paragraphs 5.2.1 to 5.2.12, it was reasonable for Dr Groom to provide his medical opinion on [the appellant's] second PIB appeal. Procedurally there was no requirement for [the appellant's] appeal to be considered by an external clinician independent of HM, the appointed SMA.
>
> 3.3.2 Dr Groom could reasonably be expected to offer an unbiased opinion based on the facts of the case.
>
> 3.4 On apportionment:
>
> 3.4.1 For the reasons set out below in paragraphs 5.3.1 to 5.3.4, it was for Dr Groom to weigh all the evidence and reach a conclusion.
>
> 3.4.2 It was for Dr Groom to decide whether he required a face to face consultation with [the appellant].
>
> 3.4.3 It was reasonable for HM, after referring the medical evidence file to Dr Groom on 7 November 2019, to refuse to refer the additional medical evidence sent by [the appellant] to MyCSP after 7 November 2019.
>
> 3.4.4 There was no reason why MyCSP should not have accepted Dr Groom's opinion on apportionment."

Part 4 of the Stated Case is headed "Conclusions not found in fact and in law".

Paragraphs 4.4, 4.5 4.11 and 4.12 state:

> "4.4 I do not find that there is evidence of bias by Dr Groom towards his former colleagues at HM.

> 4.5 I do not find that there is evidence that Dr Groom colluded with Dr Birrell in the completion of section five of the Form completed in February 2020.
>
> …
>
> 4.11 I do not find that the sections of Dr Groom's Report completed by HM changed the outcome of Dr Groom's opinion causing [the appellant] injustice.
>
> 4.12 I do not find that [the appellant] has, as a result of maladministration by MyCSP after May 2018, sustained injustice."

Paragraphs 5.2.3 and 5.2.10 state:

> "5.2.3 [The appellant] said Dr Groom's opinion was biased towards his former colleagues, but Dr Groom's Report shows that he had considered the available medical, and other, evidence and had reached his own opinion.
>
> …
>
> 5.2.10 [The appellant] has offered no evidence of bias on Dr Groom's part, or of collusion between Dr Birrell and Dr Groom."

Paragraphs 5.3.1 to 5.3.3 narrate Dr Wylie's opinion that the appellant had a recurrent depressive disorder and that Dr Wylie was able to identify relevant entries in the medical records which supported that conclusion. Dr Groom had attached most weight to Dr Wylie's diagnosis because he had spent a considerable time with the appellant and had access to all of his medical records. Paragraph 5.3.4 stated:

> "5.3.4 Based on the medical evidence, Dr Groom gave his opinion that it was not unreasonable to attribute up to 90% of [the appellant's] illness to the agreed qualifying injury."

Submissions for the appellant

[25] Counsel for the appellant invited the court to answer Questions 6.3 and 6.4 in the affirmative, to recall the determination of the PO, and to substitute a determination that the matter be remitted to the first respondent for (i) the appointment of a new, external clinician and (ii) reconsideration of the appellant's second appeal. He submitted that each of the grounds of appeal identified an error of law by the PO in the application of legal principle to

the facts of the appellant's case (*Anderson* v *Imrie* 2018 S.C. 328, Lord Brodie at para 35). Where, as here, the decision appealed did not involve the evaluation of credibility or reliability, the appellate court is generally in as good a position as the first instance decision-maker to form its own view, subject to appropriate weight being given to the latter's judgement (*Benmax* v *Austin Motor Co Ltd* [1955] AC 370, Viscount Simonds at p 374, and Lord Reid at p 376).

Question 6.3

[26] The submission was that Dr Groom's appointment was tainted by apparent bias, and that the first and third respondents' reliance upon Dr Groom's report constituted maladministration which had resulted in injustice to the appellant. The PO had erred in law in failing to recognise that. On a fair reading, the appellant's complaint of 10 August 2020 had raised not just the issue of actual bias, but also an issue of apparent bias. Even if the latter issue had not been expressly raised, in the circumstances the PO ought to have considered it (*cf. Pearson* v *J Ray McDermott Diving International plc* 2006 SLT 725, Opinion of the Court delivered by Lord Osborne at paragraphs [5] and [9]). He had not done so. He had only addressed the issue of actual bias. That omission was an error of law. Had he addressed the question of apparent bias he would have found that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that Dr Groom was biased (*Porter* v *Magill* [2002] 2 AC 357, Lord Hope of Craighead at paragraph 103; *Helow* v *Secretary of State for the Home Department* 2009 SC (HL) 1, Lord Mance at paragraph 39). The fair-minded and informed observer will be "neither complacent nor unduly sensitive or suspicious" (*Johnston* v *Johnston* (2000) 201 CLR 488, Kirky J at paragraph 53; *Helow,* paragraph 39). Here there were a number of circumstances

which, taken cumulatively, would have led the observer to conclude that there was a real possibility that Dr Groom was biased. First, on 29 October 2019 the appellant was given, and relied upon, HM's assurance that his second appeal would be decided by an independent senior clinician, and after Dr Groom's appointment HM and/or the first respondent referred variously to Dr Groom being "external", "independent" and a "third party". Second, that at the time of the second appeal Dr Groom may have been HM's Medical Director. There had been conflicting information about whether that was the case. The PO ought to have investigated the issue and made findings in fact in relation to it. It was relevant that the appellant had made a number of complaints against HM. As Medical Director Dr Groom "would have been involved" in handling complaints. Third, Dr Groom's connection with HM was not disclosed by him or by HM (*cf. Davidson* v *Scottish Ministers (No. 2)* 2005 1 SC (HL) 7, Lord Bingham of Cornhill at paragraph [19]). Fourth, HM did not disclose Dr Groom's identity when the appellant inquired who had been appointed. Fifth, as Medical Director Dr Groom would have had "direct management responsibility" for Dr Birrell. Sixth, the fact that Dr Birrell completed sections 1 to 4 of Dr Groom's report suggested that there had been contact between those doctors in relation to the report. Seventh, Dr Groom was not a judge, and accordingly the assumptions of impartiality and of ability to disregard the views of others which applied in the case of judges were not in play (*Helow,* Lord Hope of Craighead at paragraph [8], Lord Cullen of Whitekirk at paragraph [30]).

Question 6.4

[27] Question at 6.4 was only insisted upon in one narrow respect. It was submitted that Dr Groom's statement on page 6 of his report that "it is reasonable to apportion up to 10% as

being the result of pre-existing mental health problems…" was materially inconsistent with his decision on apportionment, and did not support the first respondent's decision on apportionment. That had been maladministration by the first respondent which had caused injustice to the appellant. The PO had erred in law in not recognising that.

[28] Counsel accepted that this point had not been raised by the appellant before the PO. However, he maintained that Question 6.4 was wide enough to encompass it. If the court disagreed, counsel invited it to exercise the power in rule 41.22(a) to allow the following question to be substituted for Question 6.4:

> "6.4 Did the Ombudsman err in law in finding that the decision on apportionment by the First Respondent in March 2020, based upon Dr Groom's report of 12 February 2020, did not involve maladministration which caused the Appellant injustice."

[29] In any case, the court had a discretion to allow a new point to be raised (*Notting Hill Finance Ltd* v *Sheikh* [2019] EWCA Civ 1337, Snowden J at paragraph 21). It ought to exercise that discretion in the appellant's favour. The appellant had been unrepresented before the PO and the respondents would not be prejudiced by the introduction of the point at this stage.

Submissions for the third respondent

[30] Counsel for the third respondent invited the court to answer Questions 6.3 and 6.4 in the negative.

[31] The decision of specialist bodies, such as the PO, should be respected unless there was clear error of law (*cf*. *Proctor & Gamble UK Limited* v *HMRC* [2009] STC 1990, at paragraphs 11, 48 and 74 in respect of specialist tribunals). As Mummery LJ observed in *Wakelin* v *Read* [2000] Pensions Law Reports 319 at paragraphs 39-40:

> "39. Under section 151(4) there is an appeal to the High Court from a determination or direction of the Ombudsman 'on a point of law'. There is no appeal on fact … It is irrelevant that the High Court or the Court of Appeal would have taken a different view from him on the evidence revealed in his investigation. The Ombudsman is the sole judge of fact and he can only be corrected on errors of law.
>
> 40. The only question for the High Court and for this court, on appeal from the High Court, is this: is there an error of law in the determination or direction of the Ombudsman? In answering that restricted question the appellate court should be astute not to entertain appeals on points of fact dressed up as points of law … In this exercise the written statement of the determination must be read broadly and fairly. The findings of fact and the reasons for the determination should not be subjected to minute, meticulous or over-elaborate critical analysis in an attempt to find a point of law on which the disappointed party to the reference can appeal."

Four different categories of errors of law had been identified in the Opinion of the Court delivered by Lord Drummond Young in *Advocate General for Scotland* v *Murray Group Holdings plc* 2016 SC 201 at paragraphs 42-43. In the present case there had been no real analysis as to why the circumstances relating to either of the appellant's grounds of appeal were said to have given rise to maladministration on the part of the first respondent in consequence of which the appellant had sustained injustice.

Question 6.3

[32] It was clear that the appellant's complaint to the PO had been one of actual bias by Dr Groom. At no point had he advanced a complaint of apparent bias. In those circumstances the PO could not be criticised for not addressing a case which was not advanced before him. It was not open to the appellant to seek to advance to the court a case which he had not advanced to the PO. *Pearson* v *J Ray McDermott Diving International plc* was not authority for the proposition that where a case of actual bias is advanced a court ought also generally to consider the question of apparent bias. In *Pearson* the court had concluded that some of the allegations in the pursuer's grounds of appeal were in fact allegations of actual bias.

[33] Besides, the matters upon which the appellant relied did not indicate the existence of apparent bias. The fair-minded and informed observer would be aware that in the normal course the senior physician considering a second appeal would be a Scheme Medical Adviser physician in HM's employment with no previous involvement in the case, and that that senior physician could be depended upon to perform his professional duties objectively and impartially. They would be aware that Dr Groom is a medical professional subject to professional standards and obligations, and that he could be expected to adhere to those standards and obligations when considering the second appeal. They would assume that physicians like Dr Groom are intelligent and capable of forming their own views on medical issues and would be astute to the importance of doing so. It was plain that Dr Groom had formed his own view. He had disagreed with Dr Birrell on the issue of the extent of impairment to general earning capacity. In that regard, his finding had been more favourable to the appellant than Dr Birrell's finding. It was clear that the PO accepted that Dr Groom's association with HM ceased prior to his appointment to consider the second appeal. There were no findings in fact which supported the appellant's assertions (i) that Dr Groom was the HM's Medical Director at the material time; (ii) that he was Dr Birrell's "line manager" and "supervised" the preparation of her report in the first appeal; (iii) that he would have dealt with the appellant's complaints about HM. Nor was there a finding that the appellant was given "an assurance" that the senior physician considering the second appeal would be external. He was told that was happening, and why, but there had been nothing in the nature of an "assurance". Counsel for the appellant had been unable to specify how it was said that the information provided had been acted upon, and he had made clear that he did not seek to suggest that its provision gave rise to a legitimate expectation upon which the appellant had relied to his detriment. There had been no

requirement for Dr Groom to declare his previous employment by HM. HM had been well aware of it, and in the circumstances it was not a matter which might have given rise to a reasonable apprehension of lack of impartiality. Non-disclosure was not relevant because a fair-minded and informed observer would not have thought that there was anything even to consider disclosing. They would be much more likely to conclude that it never crossed Dr Groom's mind that his previous connection with HM was something which was relevant for him to disclose (*cf*. *Helow*, Lord Mance at paragraph 58).

Question 6.4

[34] Even if the appellant ought to be permitted to argue this ground for the first time on appeal, it was ill-founded. The insuperable problem for the appellant was the clear finding of fact at paragraph 1.97:

> "…In section five, Dr Groom assessed [the appellant's] degree of apportionment as in the 71% to 90% "medium" band..."

In order to succeed on this ground the appellant required to satisfy the Court that the PO erred in law in making that finding. Contrary to the appellant's suggestion, this was not a case where it may be said that the PO erred in applying the general law to the particular facts (the second category identified in *Advocate General* v *Murray Holdings Limited* at paragraph [42]). Rather, to succeed he must show that there was an error of law within the third or fourth categories identified at paragraph [43]:

> "[43] The third category of appeal on a point of law is where the tribunal has made a finding 'for which there is no evidence or which is inconsistent with the evidence and contradictory of it.' (*Inland Revenue Commissioners* v *Fraser*, per Lord President Normand, pp 497, 498.) This runs into a fourth category, comprising cases where the First-tier Tribunal has made a fundamental error in its approach to the case: for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tax tribunal could properly reach. In such cases we conceive that the Court of Session and the Upper

> Tribunal have power to interfere with the decision of the First-tier Tribunal as disclosing an error on a point of law (*Edwards* v *Bairstow*, per Lord Radcliffe, p 36)."

However, the appellant had made no attempt to demonstrate that the stringent requirements of either the third or fourth categories were met. He had not shown that it was not open to the PO to make the finding which he made.

[35] In construing Dr Groom's report, it must be recalled that it was written by a doctor and not a lawyer. It should be read against the background in which it was written with the aim of identifying its intended meaning (see by analogy *R (Macdonald)* v *Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, Lord Dyson JSC at paragraph 53). It should not be subjected to a minute, meticulous or over-elaborate critical analysis in an attempt to find a ground of challenge (*Wakelin* v *Read,* Mummery LJ at paragraph 40). The appellant highlighted the statement "I consider that it is reasonable to apportion up to 10% as being the result of pre-existing mental health problems and personality traits." and suggested that it was incongruent with Dr Groom's decision that the apportionment band be the medium band (71%-90%), rather than the high band (above 90%), because if "up to" 10% is attributed to the appellant's pre-existing condition then 90% *or more* relates to the qualifying injury. There were two difficulties with that argument. First, the high band applies where *over* 90% is apportionable to the qualifying injury sustained at work. Accordingly, if 10% of the injury relates to pre-existing problems, the figure is only 90%. Second, the passage required to be read in context. The sentence that follows it reads:

> "I therefore agree with the previous decisions that 71-90% of the illness should be considered attributable to the qualifying injury, which were accepted by [the appellant] until this appeal."

Moreover, Dr Groom had already stated his conclusion, at the start of section 5 of his report, that:

> "Given the foregoing consideration of the available medical evidence I consider that it is not unreasonable to attribute up to 90% of the illness [the appellant] suffers to the agreed qualifying injury."

[36] The PO was entitled to interpret Dr Groom's report as reaching a conclusion that it was not unreasonable to attribute up to 90% of the appellant's illness to the qualifying injury. That interpretation was not inconsistent with the evidence nor was it contradictory of it. There was no basis for interfering with the finding in fact made by the PO.

Decision and reasons

[37] We are grateful to counsel for their clear and able submissions. They have greatly assisted us. However, ultimately, we have had no difficulty in reaching our conclusions.

[38] We are not satisfied that the PO erred in law in deciding as he did. In our view his decision was one which was open to him (*cf*. *Anderson* v *Imrie*, Lord Brodie at paragraph [36]; Lord Malcolm at paragraphs [87], [92], [93], [99]-[115]).

Question 6.3

[39] We agree with counsel for the third respondent that the appellant's complaint about Dr Groom was one of actual bias, not of apparent bias. Accordingly, we require to consider whether the court ought to allow the new argument to be advanced. In *Advocate General* v *Murray Holdings Limited* the court opined:

> "[39] We are of opinion that in a statutory appeal of this nature it is competent for the court to entertain a ground of appeal that has not been argued in the First-tier or Upper Tribunals, although it should be slow to do so in any case where additional findings of fact are required, and should not do so if unfairness results. The law on this matter is in our opinion correctly stated by Sedley LJ in *Miskovic and anr* v *Secretary of State for Work and Pensions* (para 124), where he referred to a number of earlier cases and continued:

> 'None of these cases sets out a golden rule for the admission of new issues on appeal, but all proceed on the assumption that there is no jurisdictional bar to their being entertained in proper cases. It is an assumption which in my judgment can be made good on a simple constitutional basis. The Court of Appeal exists, like every court, to do justice according to law. If justice both requires a new point of law to be entertained and permits this to be done without unfairness, the court can and should entertain it unless forbidden to do so by statute.'

We are in full agreement with that statement of the law, and for this reason we consider that we should entertain HMRC's first ground of appeal, even though it was not argued directly before the tribunals. We are satisfied that it requires no new findings of fact; it proceeds on the First-tier Tribunal's findings of fact and the accompanying documents. Indeed aspects of the ground appear to have been canvassed to some extent before the First-tier and Upper Tribunals. We do not think that allowing this ground gives rise to any unfairness to the respondents; detailed notice of it was given in the grounds of appeal and the notes of argument, and counsel for the respondent was able to present a full argument in response…"

[40] In *Notting Hill Finance* v *Sheikh* the court observed:

"26 … Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

27. At one end of the spectrum are cases such as *Jones* in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in *Jones* (at [38]), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at [52]), there might nonetheless be exceptional cases in which the appeal court could properly exercise its discretion to do so.

28. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e.g. *Preedy* v *Dunne* [2016] EWCA Civ 805 at [43]-[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

The court noted (paragraphs 17 and 30) that the first instance hearing in the case before it had been for an order for possession made on a summary basis. It had lasted 7 minutes. Given the very limited nature of the hearing and the binary decision to be made at it, the most weighty reason identified in the authorities as to why a new point should not be permitted to be advanced on appeal – that it would subvert an evidential process which has already taken place at a full trial in the lower court – was not present (paragraph 32). The claimant had suffered no prejudice (paragraph 33). The first instance hearing would not be wasted (paragraph 34). The weight to be given to the policy of finality in litigation was diminished in a case in which the litigation process had been very short-lived and summary in nature, so that the time and resources that had been committed to the case by the parties or the court had been very limited (paragraph 35). The fact that the defendant had been a litigant in person at the hearing carried little weight:

> "36. … As Lord Sumption said in *Barton v Wright Hassell LLP* [2018] UKSC 12 at [18], the rules and procedures of court apply equally to represented and unrepresented parties, and the fact that a party is unrepresented can at most have a limited effect in increasing the weight to be given to some other, directly relevant, factor. In this case, the CPR 55 procedure and the defence forms to which I have referred are designed to be straightforward and accessible to litigants in person, and the other factors to which I have referred have sufficient weight on their own. Accordingly, I do not consider that the Defendant's arguments are materially enhanced by the fact that he was effectively unrepresented before the District Judge."

[41] In the present case had the apparent bias argument been advanced to the PO he may well have carried out other investigations and made additional findings in fact. This is not a case where it may be said with confidence that the procedure and findings would certainly have been the same, and that the question which arises is a pure question of law which may fairly be determined on the basis of the findings which the PO made. Moreover, there has been significant procedure before the PO in relation to the complaint, some of which may be

subverted if the new argument is permitted. The fact there has been significant procedure also suggests that significant weight ought to be given to the policy of finality in litigation. The appellant's arguments are not materially enhanced by the fact that he was unrepresented. On balance, we do not consider that the court ought to exercise its discretion to allow the apparent bias argument to be advanced on appeal.

[42] In any case, we are not persuaded that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that Dr Groom was biased. In our view the factors relied upon by the appellant would not have that result. We concur with counsel for the third respondent's analysis. Whether or not a physician was employed by HM, the fair-minded and informed observer would expect him or her to act properly in accordance with their professional ethics and obligations. The observer would not be apprehensive that a senior physician would fail to make appropriate and independent medical assessments. If they read Dr Groom's report it would be likely to strike them as being objective and well-reasoned, and they would note that on the issue of the extent of impairment to general earning capacity Dr Groom's finding is more favourable to the appellant than Dr Birrell's finding. There are no findings in fact to support the appellant's assertions (i) that Dr Groom was HM's Medical Director at the material time; (ii) that he was Dr Birrell's "line manager" and "supervised" the preparation of her report in the first appeal; (iii) that he would have dealt with the appellant's complaints about HM. Nor is there a finding that the appellant was given anything in the nature of "an assurance" that the senior physician would be external. Counsel for the appellant acknowledged that the appellant could not maintain that he had a legitimate expectation in that regard upon which he had relied to his detriment. In fact, here the PO accepted (paragraph 120 of his determination) that Dr Groom's association with HM had ceased before his appointment to

consider the second appeal. The criticism that there is not a formal finding in fact to that effect in the stated case sits ill in the appellant's mouth given that the apparent bias argument was not advanced to the PO. Nor do we consider that the fair-minded and informed observer would think (i) that Dr Groom's past association with HM was something which he required to disclose; or (ii) that Dr Birrell's involvement in completing sections 1 to 4 of Dr Groom's report affected its substantive content in any way.

[43] It follows that we are not satisfied that the first respondent ought to have concluded that it should not have relied upon Dr Groom's report because of apparent bias. Its decision to rely upon it was not maladministration, let alone maladministration in consequence of which the appellant sustained injustice. The PO did not err in law by not holding that it was.

Question 6.4

[44] The issue relating to apportionment which the appellant now wishes to argue is not one which was advanced to the PO. However, on balance, we are satisfied we should exercise our discretion to allow it to be argued. The weightiest factors in favour of following that course are that the issue can be determined on the existing findings, without significant prejudice to the respondents' interests. The weight to be given to those factors is enhanced a little by the fact that the appellant was a party litigant at the material time. In the circumstances of this case we consider that those factors outweigh factors which point the other way *viz*. the policy in favour of finality in litigation; and the fact that there has been significant procedure, at least some of which might be subverted were the appellant to succeed in establishing this ground.

[45] On the other hand, we are satisfied that the ground is not made good. There is a clear finding in fact at paragraph 1.97 of the stated case that "… In section five, Dr Groom assessed [the appellant's] degree of apportionment as in the 71% to 90% "medium" band…". The appellant has not established that it was not open to the PO to make that finding on the evidence before him. He has not shown that in making it the PO committed an error of law falling within the third or fourth categories described by the court in *Advocate General* v *Murray Holdings Limited.* That is sufficient to dispose of this ground of appeal. However, we think it right to add that we agree with counsel for the third respondent that on a fair reading of Dr Groom's report it contains no incongruence, and that it is clear that he assessed the degree of apportionment as being within the 71% to 90% "medium" band.

Disposal

[46] We answer Questions 6.3 and 6.4 in the negative and refuse the appeal. We reserve meantime all questions of expenses.