Neutral Citation: [2015] IEHC 23

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 244 J.R.]

BETWEEN

ALAN BENNETT

APPLICANT

AND

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered the 20th day of January, 2015

Background

1. The applicant is a member of the Permanent Defence Forces ("PDF"). He enlisted in the Naval Service in December, 1999 with the rank of signalman, equivalent to private in the army, and is currently based at Collins Barracks in Cork. His period of service came to an end after twelve years in December, 2011 when he became eligible to apply for an extension of his service for a further nine years to bring his total service to 21 years.

2. In order to be considered for an extension of service, the applicant had to undergo a medical review by a medical officer in the Medical Corps. Such officers are registered medical practitioners. A medical grading system is employed by the PDF and is embodied in Defence Force Regulations A12, a statutory instrument created pursuant to the provisions of the Defence Act 1954 and its predecessor. One of the categories to be graded for classification purposes is "constitution". If an applicant for re-engagement achieves a constitution grade of less than 1, he is deemed ineligible.

3. The applicant duly applied for a re-engagement and underwent a medical examination for that purpose on the 24th January, 2012, which was carried out by Commander Murphy. The result of this examination was that the applicant received a constitution grade 2, effectively bringing his career in the Naval Service to an end. He appealed this decision to a Medical Board which convened on the 23rd August, 2012 and upheld Commander Murphy's decision. In these judicial review proceedings, the applicant seeks, inter alia, an order of certiorari quashing the Board's decision.

Facts

4. Following his examination of the applicant on the 24th January, 2012, Commander Murphy submitted his report on the same day to the company commanding officer: --

> "1. I reviewed Sgmn Bennett today for his re-engagement of service medical.
>
> 2. On reviewing his medical records he demonstrates a recurring requirement for sick leave, for subjective often unrelated conditions.
>
> 3. Over the past 5 years, he has the following sick leave/ED record, which is greater than average, and his SL/ED requirements have increased since the last extension of service.
>
> 2012 3 days
>
> 2011 24 days
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> 2010 58 days
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> 2009 36 days
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> 2008 14 days
>
> 2007 22 days
>
> 4. Whilst on clinical examination I cannot detect any current abnormality at this time. However given the above history of sick leave requirements I am unable to certify Signalman Bennett as healthy (i.e. Grade 1) as he obviously has a higher requirement for medical attention. Consequently I have reclassified him to medical category 2 and graded him as 80-21-311.
>
> 5. I have informed him that this grading is below the standard required for re-engagement and that he may appeal my decision to a medical board under the auspices of DFR A12 Para. 66 (2), by making written application to this office through his chain of command.
>
> 6. For your information."

5. The applicant appealed to the Medical Board and although it does not appear to have issued a written report, its findings were

communicated by Commander Murphy on the 23rd August, 2012 to the company commanding officer as follows:

> **"Outcome of Medical Board**
> **858282 Sgmn Alan Bennett 1Fd CIS**
> 1. 858282 signalman Alan Bennett 1 Fd CIS, appealed his medical grade to a medical board under the auspices of DFR A12 para 66 (2).
>
> 2. He was examined by a medical board consisting of Lt Col Concannon and Comdt Zmudka on 23rd August 2012 and was classified to medical category 80 -- 21 -- 311.
>
> 3. In compliance with DFR A12 66 (2) the decision of this board is final.
>
> 4. For your attention please."

6. The applicant alleges that at the conclusion of the proceedings before the Medical Board, he was told by the presiding member that whilst it was upholding the brigade medical officer's classification, the Board would review its decision in five months, i.e. in January, 2013. The applicant claims that this was to allow a period of 12 months to elapse from the date of his examination by Commander Murphy so that the board could review his record of medical absenteeism for the preceding full year and if that was satisfactory, he may be upgraded. The applicant's allegations in this regard are disputed by Lieutenant-Colonel Concannon, the president of the board. The applicant avers that after the Medical Board proceedings were concluded, his company sergeant, Sgt Hennessy enquired as to the outcome and having been informed of same by the applicant, Sgt Hennessy wrote in hand on the document giving the applicant notice of the convening of the board the following:

> *"23/08/2012 to be seen by a reclass bd in 5/12 [signature]"*

7. The applicant says that the Medical Board did not in fact reconvene but rather he was summoned by his commanding officer on the 14th January, 2013 and advised that the commanding officer had received an e-mail from the Medical Board confirming the classification previously awarded.

8. The within proceedings were commenced on the 8th April, 2013, when leave to apply for judicial review was granted by order of Peart J.

The Regulations
9. Defence Force Regulations A12 ("the Regulations") were originally enacted on the 7th May, 1943 but have been revised and updated on numerous occasions up to at least 1997.

10. Insofar as relevant to these proceedings, the Regulations provide:

> **"PART VI. - MEDICAL EXAMINATION AND GRADING.**
> **Section I. - General.**
> **Application of these Regulations.**
> 59. The provisions of this Part of these Regulations shall apply to all officers, cadets, non-commissioned officers and privates except as provided in paragraph
>
> 77.
>
> **Prescribed categories to be used.**
> 60. The medical grades and categories prescribed in Section II of this Part of these Regulations shall be used in determining and describing the degree of mental and bodily fitness required for service in the defence forces...
>
> **Classification or reclassification.**
> 66. (1) Classification or reclassification shall be carried out in accordance with instructions which shall be issued by the Director, Medical Corps. The classification of an officer or enlisted person shall be entered on his or her medical book (LA 30 or AF 30 as appropriate).
>
> (2) Routine classification or reclassification to any Grade, other than Grade X, of members of the Defence Forces shall be carried out by a Medical Officer of the Medical Corps. The decision of the Medical Officer may be appealed to the appropriate Command Medical Officer who shall convene a Medical Board to classify or reclassify the officer or enlisted person concerned. The decision of the Board shall be final...
>
> **Section II - Medical Classification.**
> **Determination of Classification.**
> 70. All personnel of the Defence Forces shall be graded under each of the following headings: --
>
> (a) year of birth;
>
> (b) constitution;
>
> (c) military fitness;
>
> (d) keenness of vision;
>
> (e) colour vision; and
>
> (f) keenness of hearing.
>
> The combination of these grades shall be the medical classification in each case.
>
> **Standards of classification.**
> 71. (1) **Year of birth**. This shall be recorded as the last two digits of the year in which the member was born.

(2) **Constitution**. Grading under this heading shall have regard to the presence or absence of physical or mental impairment, disability, and/or physiological alteration, and the level of medical care required.

Grade 1: Personnel with no significant impairment or disability who are considered healthy and at most require only routine medical surveillance and unscheduled medical care.

Grade 2: Personnel with minor impairments or disabilities who require medical supervision and/or treatment, where the medical supervision is at intervals of not less than 6 months, or where an unexpected interruption of treatment will not create an unacceptable risk to health.

Grade 3: Personnel with moderate impairments or disabilities who have a chronic medical condition which requires supervision and treatment at intervals more frequently than every six months, or where an unexpected interruption of treatment will cause an unacceptable risk to health.

Grade 4: Personnel with marked impairments, disabilities or medical conditions requiring close medical supervision by a clinical specialist.

Grade T: Personnel suffering from or recovering from a serious illness or injury where there are temporary significant restrictions on duties, and personnel who because of their medical condition are temporary (sic) unfit.

Grade X: Below Defence Forces constitutional standards, i.e. those who do not fall into Grade T and who are of a standard lower than Grade 4."

11. Regulation 71 goes on to provide for similar standards of classification in respect of military fitness, keenness of vision, colour vision and keenness of hearing. Thus in the applicant's classification 80-21-311, the first two digits refer to his date of birth, the third to his constitution, the fourth his military fitness and the last three to his keenness of vision, colour vision and keenness of hearing respectively.

12. As appears from Regulation 66 above, classification or reclassification shall be carried out in accordance with instructions which shall be issued by the Director, Medical Corps ("DMC"). Such instructions were issued by the DMC on the 14th November, 1997 in relation to the application of the medical classification system. These are stated to be a guide to assist in achieving uniformity of classification in relation to a range of specified illnesses or medical conditions. Para. 38 of these instructions states:

"Recurrent illness pattern. A recurrent illness pattern is hereby defined as an illness pattern resulting in medically certified light duty (LD), excused duty (ED) or sick leave on ten (10) or more occasions per calendar year. Personnel who exhibit a recurrent illness pattern will not be graded higher than Constitution 3."

12. The applicant appears to have initially believed that he was graded as Constitution 3, presumably on the basis of this instruction from the DMC and initially mounted a number of challenges to its lawfulness. However this instruction now assumes less importance when it emerged that in fact he was graded Constitution 2.

The Affidavits

13. In all, 16 affidavits were exchanged between the parties. There are a number of disputes of fact evident on the affidavits and I have already referred to one in relation to what, if anything, was said by the Medical Board to the applicant after his examination. Another related to the extent, if any, to which the applicant received warnings about the effect his record of medical absenteeism may have on any future application for re-engagement. It is of course not possible to resolve such conflicts without the deponents being cross-examined. It was urged on me by the respondents, and I accept, that the onus of proving facts remains at all times on the applicant and accordingly where facts are alleged and disputed on affidavit, I must proceed on the basis that such facts have not been proven.

14. I do not propose to refer to all the affidavits other than in a general way, but rather to highlight some averments which appear to me to be of particular relevance to the issues herein.

15. In his affidavit sworn on the 11th September, 2013, Commander Murphy said:

"(5) I conducted a clinical examination of the applicant, and while I could not detect any abnormality at that time, given the history of sick leave/excused duties requirements, I was unable to certify the applicant as healthy, that is to say "Grade 1", as he obviously has a higher requirement for medical attention than that of persons achieving Grade 1. Consequently, I reclassified to medical category 2 and graded him as 80-21-311...

(7) ...the said history shows that the Applicant had a total of 163 days comprising both certified and uncertified sick leave between 15th January 2007 and 11th January 2013. From my experience as a doctor and officer in the naval service, I can state that the average number of days of sick leave for a member of the defence forces with medical grade 1 is 6.3 days and that given the number of days of certified and uncertified sick leave recorded in respect of the applicant, it would be inappropriate to award medical grade 1 to the applicant.

(8) It is not accurate to state or imply that the applicant's medical grade 2 was awarded because of "sporting injuries". It was awarded because of a pattern of sick leave/excused duties, created over a number of years, which taken together show that the applicant has a higher than average requirement for sick leave/excused duties which make it inappropriate to assign him medical grade 1."

16. In his second affidavit sworn on the 18th November, 2013, the applicant avers that when he came before the Medical Board for assessment, he was not clinically examined at all and this averment has not been contradicted. Rather, it appears that a paper review was conducted by the Board. He says, and again it appears not to be contradicted, that the Board only had regard to his sick leave record up to the date of Commander Murphy's review but not subsequent to it.

17. An affidavit was sworn by Dr. Hugh O'Donnell on the 6th December, 2013, who avers that he is a medical practitioner in general practice and was formerly a member of the Army Medical Corps. The general tenor of his affidavit is that in his opinion, the military medical grading system as set out in the Regulations can only have regard to the subject's present state of health, and past history of resolved injury or illness is entirely irrelevant. In support of this contention, he exhibits a DMC instruction of 2005 amending the 1997 instruction above referred to and in particular, para. 14 states:

"Constitution. Ref A para 71(2). Graded under this parameter are corporal integrity, intellectual competence, mental health and the function or dysfunction of the body organs."

18. Dr. O'Donnell says that this instruction makes no reference to recurrent illness or absence from work through illness being a basis for medical reclassification in regard to constitution grade. He also says that he examined the applicant and he is in perfect health. Strong issue is taken with Dr. O'Donnell's evidence in a number of replying affidavits although not with the averment that the applicant is currently in perfect health which appears to be common case.

19. The president of the Medical Board, Lieutenant-Colonel Concannon swore an affidavit in February, 2014, in which he said the following:

"(3) I say that the examination carried out on Signalman Bennett by Commander Murphy and by the board over which I presided, were occupational medical examinations, for the purpose of examining a person's past medical history including medical absenteeism and the distribution of such absenteeism with a view to making a recommendation to an employer as to the likelihood of the person becoming a good and consistent employee, or to retain him as an employee if his contract of service has expired. A person who demonstrates a five-year record of significant medical absenteeism and then when under observation makes a dramatic improvement, indicates to an occupational physician that the person can work well under supervision, but apparently not so when unsupervised. An occupational medicine physician would be unlikely to recommend such a person to a prospective employer to fill a responsible position nor to retain him in service if his contract had expired.

(4) In the case of Signalman Bennett, the board examined all the medical records available to Commander Murphy on 24th January, 2012. The concern of the board was the correctness or otherwise of the grade awarded by Commander Murphy to Signalman Bennett on that date, based on the evidence available to him at that time...

(6) The board, through me, made it very clear to Signalman Bennett that it was only concerned with the correctness or otherwise of the grade awarded by Commander Murphy, based on the evidence available to him on 24th January, 2012."

20. A second affidavit was sworn by Commander Murphy on the 17th February, 2014, in which he exhibits a document incorrectly dated the 24th January, 2012, the date of his examination, although in a subsequent affidavit he clarifies that this document was in fact created on the 12th July, 2013, subsequent to the commencement of the proceedings. In this document, Commander Murphy set out the basis upon which he arrived at his conclusions and says:

"3. An extension of service medical is an employment medical, under the current defence forces contract of employment system, the medical practitioner is required as in Signalman Bennett's case to certify that the person as healthy DFR A10 (REF B). Certification that a person as healthy implies an expectation that the subject's state of health is sufficient to render regular and effective service at work and that such work will not significantly impair their health and that their health status will not pose a serious threat to the health and safety of others."

21. Commander Murphy goes on to conduct a statistical analysis of the sick leave days for all personnel in the Southern Brigade and concluded that when long-term sick leave was excluded, the average number of sick days in 2012 was 6.3 days. He again confirms that at the time of his examination of the applicant, he did not find any physical abnormality. He states that even excluding the applicant's sick leave for injury in 2009 and 2010, he still has a higher than average sick leave requirement in each year from 2007 to 2011. His conclusion was as follows:

"1. Given Sgmn Bennett's recurrent requirements for greater than average sick leave each year over a prolonged period, I was not prepared to certify Sgmn Bennett as being healthy.

2. His sick leave record at that time indicated a requirement for a higher than average medical attention and consequently I classified him to medical grade 2."

22. The same theme is revisited in Commander Murphy's third affidavit sworn on the 23rd April, 2014:

"(4) In relation to paragraph 15 of the applicant's second supplemental affidavit, I say that in assessing military personnel for contractual medical examinations, the function of a doctor is to provide the military authorities with an accurate medical classification code. If a person is to be awarded the classification of military category 1, the doctor has to be able to certify that person as "healthy". In my experience, a person's past medical history/sick leave record is a useful and objective indicator of that person's state of health, and the likely future requirements for medical care. I am of the opinion that it would not be proper medical practice for a doctor to certify a person as "healthy" if that person has exhibited recurrent sick leave pattern over a protracted time period, in the case of the applicant a period of five years, and particularly where some of the recurrent complaints have direct implications for the person's ability to discharge military duties, such as recurrent low back pain."

23. In a second affidavit sworn by Lieutenant-Colonel Concannon on the 29th April, 2014, he says:

"(4) In relation to paragraph 7 of the applicant's second supplemental affidavit, I say that a record of significant medical absenteeism over a five year period, which suddenly becomes negligible medical absenteeism after reclassification, must be indicative of some major change in circumstances or of attitude. The only obvious change in circumstances, is that the applicant became formally aware that his medical record was being observed after the re-classification. This is not unfounded, but is a matter of record...

(8) In relation to paragraph 18 of the applicant's second supplemental affidavit, I say that the amount of sick leave of which any military personnel avails is neither a mark for or against a person. It is a simple statement of fact to be taken into account during an employment medical examination and to be used to determine the appropriate medical category of such person. The cause of the requirement of sick leave is carefully considered. A long period of absence due to a limb fracture is not considered in the same light as multiple short absences due to subjective conditions. The distribution of the absences is also given careful consideration. Whether the sick leave periods for subjective conditions are necessary or unnecessary is known only to the subject patient. Both the capability of a patient to go to work and the requirement for sick leave is almost totally subject of the decision of the individual patient, and doctors whether inside or outside of the defence forces have to depend on what they are told by such patient. It is not irrational for a military medical officer or for an occupation medicine physician to consider this information."

24. Finally, the Director of the Medical Corps, Colonel Gerald M. Kerr swore an affidavit on the 26th September, 2014, in which he said:

> "(4) All military medical examinations, whether carried out by an individual medical officer or by a medical board, have one common outcome, that is the award of a medical classification code. The medical classification system is designed to convey to the unit commander of the patient, the medical capabilities of an individual, but without revealing the exact nature of the symptomatology in accordance with principles of medical confidentiality. In arriving at the appropriate medical classification code, inter alia, a full account of the past illness pattern and past medical history must be determined, because this is one of the most powerful indicators of future illness, or the potential for an individual patient to require sick leave or be excused duties in the future. While the physical examination will also determine the current status of the individual patient, the current status is a poor indicator of future prognosis compared with the aforementioned past illness/medical history patterns..."

Submissions

25. The applicant's case is quite a simple one. He says that he was awarded constitution grade 2 which applies to persons with minor impairments or disabilities when it is common case that he has none. Accordingly this is irrational on its face. He says that the respondents acted ultra vires in applying criteria to his classification that are not provided for in the regulations. He further submitted that the Medical Board fell into error in considering that their sole function was to determine whether Commander Murphy's classification was correct at the time it was made and to have no regard to subsequent events or the position as it obtained on the date of the medical board review. He further complained that the failure of the Board to conduct any clinical examination was an additional flaw.

26. The applicant also submits that if the respondents have a concern about a recurring requirement for sick leave on the part of a member of the PDF, this can and should be addressed within the framework of Regulation 34, which provides that cases of frequent or recurrent sick leave shall be brought to the attention of the Command Medical Officer who can convene a Medical Board to examine the member to determine if he is fit for duty, if a further period of sick leave or treatment is likely to render him fit for duty, or if he is unfit for further service in the PDF.

27. On the issue of the timing of the proceedings raised in the Statement of Opposition, Mr. Maguire SC on behalf of the applicant submitted that time ran from the 14th January, 2013, being the date upon which the applicant was informed that the Board was confirming the classification and there would be no further review. The proceedings were commenced within 3 months of that date.

28. Mr. Dillon-Malone SC on behalf of the respondents submitted that the proceedings were out of time as the relevant date was the date of the Medical Board's decision, the 23rd August, 2014. He said that a very important part of any medical examination, and this case was no different, was the patient's past medical history and it would be nonsensical to suggest that the examining doctor could only have regard to the actual physical condition of the patient on the day of the examination. He highlighted various instances referred to in the affidavits such as a patient with a history of drug abuse being drug free on the date of the examination only or someone with a history of recurring dislocation of the shoulder being apparently normal when examined. He argued that it would be unreal if the examining doctor could not have regard to the history.

29. He submitted that this was consistent with the wording of the Regulations which explicitly require the examining doctor to have regard to the level of medical care required. The Regulations provide that in order to be classified as constitution Grade 1, the person must be considered healthy and at most require only routine medical surveillance and unscheduled medical care. He contended that Commander Murphy was perfectly entitled to come to the conclusion having regard to the applicant's history of medical absenteeism that he was not healthy and required more than routine medical surveillance and care.

30. The respondents relied on a number of authorities including *Fitzgerald v. Minister for Defence and Others* (Unreported, Supreme Court, Fennelly J., 19th November, 2003). That case also concerned the Regulations and in particular Regulation 71 where the applicant, a coeliac, was discharged from the navy as a result of having been awarded a constitution Grade 3. There was a dispute on the affidavits, as here, about whether the applicant had received warnings about the effects of her condition which the court felt could not be resolved without cross-examination. This case was also relied upon as authority for the proposition that the court cannot be asked to override medical judgments made by experts and this is not the function of judicial review. Whilst Medical Boards have to act judicially and are amenable to review, the court held that the hurdle of irrationality is a high one.

31. The issue of conflicts on affidavit was also discussed to similar effect by the Supreme Court in *Mellett v. Minister for Defence and Others* [2014] IESC 33. The respondents referred to *Rawson v. The Minister for Defence* [2012] IESC 26 and relied on the dicta of Clarke J. who said (at p.15):

> "7.1 It seems to me that the issues which arise in this case potentially come within the third of the four categories of lawfulness challenge identified earlier. The issue is as to whether the ultimate decision maker asked himself the right question...
>
> 7.2 While a judgment made in relation to a "reasons" case it seems to me that the logic of Clare v. Kenny [2009] 1 I.R. 22 is equally applicable to a challenge based on a contention that the correct question was not asked or inappropriate considerations were given. In that case MacMenamin J., at p.36, stated that:-
>
> '... a court in judicial review proceedings cannot act on what must be at best a hypothesis as to the possible rationale for the decision, particularly so in the context of the array of possible reasons, some of which would go beyond jurisdiction … The situation required a decision so that all the parties would be aware precisely of their positions. The reason or rationale for the decision as to jurisdiction unfortunately cannot be inferred from what was said by the respondent.'
>
> 7.3 There may, of course, be cases where it is possible to say with a great deal of comfort that the decision maker has approached the issue in a particular way. The materials before the court may make it clear as to what the approach of the decision maker was so that, even if not set out in express terms, there is only one real basis on which it might be considered that the decision maker approached the issues under consideration. However a review of the facts seems to demonstrate that this is not such a case."

Analysis of the Issues

32. The Regulations provide for a mandatory scheme of medical classification for members of the PDF. Medical assessors must classify personnel within one of six grades. The DMC instructions are designed to assist and facilitate that process and are stated as being not intended to always bind the medical assessor but to act as a guide. Medical assessors have no discretion to determine that personnel fall partially into a particular grade or one or more grades.

33. The respondents contend that the grading requirements must be considered disjunctively. Accordingly in relation to constitution grade 1, a person must first have no significant impairment or disability, secondly, he or she must be considered healthy and thirdly, he or she must at most require only routine medical surveillance and unscheduled medical care. If a person fails to meet any one of those three criteria, viewed separately, he or she cannot be classified as grade 1. This means, according to the respondent's argument, that although they accept that the applicant is a person with no significant impairment or disability, the Medical Board were entitled to conclude, as did Commander Murphy, that his record of medical absenteeism was such that he could not be regarded as being healthy and further required more than routine medical surveillance and unscheduled medical care. They argue that it was thus appropriate to classify the applicant as grade 2.

34. The obvious difficulty with this approach is that for a person to be classified as grade 2, he must to be a person with a minor impairment or disability whereas the applicant has none. Indeed I recall that during the course of the trial, I enquired from counsel for the respondents what minor impairment or disability did they contend that the applicant was suffering from which rendered it is appropriate to classify him as grade 2 and counsel had to concede that there was none. In my view this points to the fallacy in the respondent's argument because the reality of their contention is that the applicant does not fall into any of the six categories.

35. It seems to me that when construed properly, the grading criteria must be considered conjunctively. It is to be noted that a grade 1 classification requires the individual to be suffering from no **significant** impairment or disability and it therefore appears that a person suffering from a minor or trivial impairment or disability could achieve grade 1 status where such impairment or disability is felt to be not significant enough to prevent him from being considered healthy or to require above the norm in terms of medical care and monitoring. One can conceive of many such instances.

36. The respondents submit that it would be entirely unreal to exclude from consideration a person's medical history which is an essential part of any medical evaluation. That is certainly true up to a point. It is of course essential for any doctor examining a patient for therapeutic purposes with a view to diagnosing his illness and prescribing appropriate treatment that he has access to the patient's medical history. However, that is for the reason that the patient's history will frequently provide invaluable assistance in reaching the diagnosis and perhaps also deciding the appropriate treatment.

37. It may also be legitimate for the purposes of say insurance or occupational medical examinations to have regard to a person's medical history in the context of determining whether they present an increased risk to an insurer or a predisposition to a particular illness that might affect their performance at work. Thus, for example a person who suffered from recurrent chest infections or depression in the past might reasonably be considered by a medical examiner to have a vulnerability to the same conditions in the future which may be viewed as an impairment or disability even though such person is well when examined. The examples given in the respondent's affidavits of a person with a drug dependency or recurring dislocated shoulder fall into the same category.

38. The applicant's situation however is entirely different. It is not suggested that he suffers from any recurring illness such that recurrences might reasonably be anticipated in the future and therefore be viewed as a present impairment or disability or other defect in his constitution. On the contrary, the respondents expressly say that much of the applicant's absences on sick leave were caused by unrelated and subjective conditions.

39. It cannot therefore be said that they point to any specific constitutional weakness. In fact, the respondent's evidence is to the effect that the applicant's sick leave record improved dramatically in relation to these unrelated and subjective conditions when he was aware that his medical record was under observation. The clear inference to be drawn from the respondent's evidence in this regard is that they came to the conclusion that the applicant was malingering in respect of a significant number of his absences from duty which were not the direct result of injury.

40. That may or may not be the case and I am sure it is correct to say, as the respondents do, that such record of absenteeism is a legitimate cause for concern on the part of any prospective employer. However that is not the issue in this case. Commander Murphy in his first affidavit says fairly and squarely that the applicant was awarded a constitution grade 2 because he has a higher than average requirement for sick leave/excused duties. This conclusion raises a number of questions.

41. For example, by reference to what is the average to be calculated? Does it refer to personnel in the Southern Brigade only, as Commander Murphy considered, or does it refer to the PDF as a whole? Is it appropriate when calculating the average to exclude absences due to injury, as Commander Murphy did in relation to the applicant, and if so is it not also necessary to analyse all absences in the Southern Brigade and/or entire PDF to determine whether same included absences due to injury and if so, to what extent, in order to compare like with like? To what period does the average apply? Is it over a single year or longer? In the applicant's case, Commander Murphy had regard to his average over a five-year period from 2007 to 2011 and compared it to the Southern Brigade average for the year 2012 only in his document dated the 24th January, 2012, but actually created on the 12th July, 2013. Yet, if one takes the applicant's 2012 absences only, they are below the average for the same year.

42. If Commander Murphy had taken the applicant's average over say a 10 year period, would the same result have ensued? Over the five-year period examined by Commander Murphy in his July, 2013 report, the applicant accumulated 154 days sick leave/excused duties giving him an annual average of 30.8. If for the sake of argument the applicant had had 150 such days in 2007 and one in each of the following years, his five-year average would be the same yet for the last four of those years, he would be below average. Would it then still be legitimate to classify him, in 2012, as constitution grade 2 on the basis that he had a higher than average requirement for sick leave/excused duties?

43. Of course the list is endless and merely serves to highlight the difficulty arising from the approach adopted by the respondents. All of this is entirely apart from any consideration of how the applicant was to know that he was going to be classified by reference to his past requirement for sick leave as against the average and in that event, what the average was.

44. The other striking feature of the conclusion arrived at by Commander Murphy is that he could have arrived at the same conclusion without ever examining the applicant. The conclusion was entirely unrelated to the clinical examination conducted by Commander Murphy and indeed was in spite of it. The respondent's argument therefore means that Commander Murphy, a medical doctor, was entitled to conclude that the applicant was not healthy without even seeing him. The same conclusion could surely have been arrived at by anyone carrying out the statistical exercise undertaken by Commander Murphy and it is difficult to see how his medical qualification and expertise had any bearing on it. Accordingly it does not seem to me that this was a matter of medical judgment at all

in the sense discussed by Fennelly J. in *Fitzgerald*.

45. I for one would find it difficult to accept the notion that the intent of the Regulations was that determinations as to the health of personnel could be made by Medical Officers or Medical Boards for classification purposes without any clinical examination being undertaken. This brings me to the decision of the Medical Board under attack herein.

46. As provided by Regulation 66(2), the duty of a Medical Board dealing with an appeal from a Command Medical Officer is to "classify or reclassify the officer or enlisted person concerned" rather than determine if an individual was correctly classified at some time in the past. Thus, it appears to me that the Board must adopt the same approach to classification as that required of a medical officer at first instance. It must assess the officer or enlisted person concerned as he presents to the Board at the time he so presents.

47. If therefore at the time of examination by the medical officer, the person concerned was suffering from some malady or did not possess the requisite level of fitness which resulted in a particular grade being achieved, and by the time the Medical Board was convened had recovered from such malady or improved his or her level of fitness, it would be absurd to suggest that the Medical Board could not have regard to those changed circumstances. This is also consistent with Regulation 67, which provides that the president of the Medical Board may secure the opinion of a medical officer specially qualified in a particular branch of medicine if necessary to assist in classification.

48. In the present case, it is clear from the evidence of Lieutenant-Colonel Concannon that this was not the approach adopted by this Medical Board. As he stated in his first affidavit:

> "The Board, through me, made it very clear to Signalman Bennett that it was only concerned with the correctness or otherwise of the grade awarded by Commander Murphy, based on the evidence available to him on 24th January, 2012."

48. It seems to me the Board fell into error in adopting this approach. Quite apart from the issue of not examining the applicant, it was obliged to consider all the evidence before it on the 23rd August, 2012 in order to classify the applicant and not merely to conduct a paper exercise of determining, as an appellate court might, whether the evidence before the lower tribunal sustained its conclusions. This was particularly so where the applicant's sick leave record had changed significantly during the course of 2012 if that was to be the basis for his classification as turned out to be the case.

49. Having regard to my findings above regarding Commander Murphy's decision, I am satisfied that the Medical Board in upholding that decision for the same reasons acted in excess of its jurisdiction and ultra vires.

50. Turning finally to the time issue, whilst as I have said I cannot determine the conflicts that arise on the affidavits regarding what was said at the conclusion of the Medical Board hearing it does appear that the applicant held the belief, rightly or wrongly, that he was to be reviewed in January, 2013 and some support for that conclusion is to had from the report he made to Sergeant Hennessy on the same day as the Medical Board concluded its hearing. If therefore the applicant were to be viewed as outside the period prescribed by the Rules for initiating judicial review proceedings, I would enlarge the time for doing so to the date the proceedings were commenced.

51. Accordingly I will grant an order of certiorari quashing the decision of the Medical Board of the 23rd August, 2012 and if necessary of the 14th January, 2013.