

**JUDGMENT : MR JUSTICE CRANE:** Administrative Court. 26<sup>th</sup> April 2006

1. This is a judicial review of two decisions of the Pensions Appeal Tribunal made on 18th March 2005. Permission was granted by Mr Nicholas Blake QC on 6th October 2005.
2. The claimant served in the Life Guards from May 1971 to March 1976. During the period of his service on 19th July 1973, he was hit by a vehicle driven by a drunken fellow soldier and suffered extensive wounds requiring rehabilitation and leaving him with various physical and mental disabilities.
3. There is, today, no appearance on behalf of either the Tribunal or the Secretary of State. I am indebted to Miss Tessa Hetherington, who appears on behalf of the claimant, for her helpful skeleton argument and oral argument.
4. Pensions for disablement due to service in the armed forces are governed by the Naval, Military and Air Forces (Disablement and Death) Service Pensions Order 1983. Under Article 3 of that Order pensions may be awarded where a member of the armed forces is disabled due to service. Article 5 deals with entitlement. There is no issue as to entitlement in this case.
5. The assessment of the degree of disablement is governed by Article 9. The most important parts of that Article are these:

*"9(2)(a) the degree of disablement due to service of a member of the armed forces shall be assessed by making a comparison between the condition of the member as so disabled and the condition of a normal healthy person of the same age and sex, without taking into account the earning capacity of the member in his disabled condition in his own or any other specific trade or occupation, and without taking into account the effect of any individual factors or extraneous circumstances;*

*(b) for the purposes of assessing the degree of disablement due to an injury which existed before or arose during service and has been and remains aggravated thereby -*

*(i) in assessing the degree of disablement existing at the date of the termination of the service of the member, account shall be taken of the total disablement due to that injury and existing at that date; and*

*(ii) in assessing the degree of disablement existing at any date subsequent to the date of the termination of his service, any increase in the degree of disablement which has occurred since the said date of termination shall only be taken into account in so far as that increase is due to the aggravation by service of that injury;*

*(c) where such disablement is due to more than one injury, a composite assessment of the degree of disablement shall be made by reference to the combined effect of all such injuries;*

*(d) [subject to sub-paragraph (e),] the degree of disablement shall be assessed on an interim basis unless the member's condition permits a final assessment of the extent, if any, of that disablement; ...*

*(3) The degree of disablement assessed as aforesaid shall be certified by way of a percentage, total disablement being represented by 100 per cent (which shall be the maximum assessment) and a lesser degree being represented by such percentage as bears to 100 per cent the same proportion as the lesser degree of disablement bears to total disablement..."*

6. By Article 10, if percentage is 20 per cent or more, an annual pension is awarded. By Article 11, if a percentage is under 20 per cent, a one-off gratuity is awarded. It is to be noted that under Schedule 1 which governs gratuities the amounts of the gratuity are calculated for a series of bracketed percentages. In other words, a particular gratuity is paid if the disablement is between 1 and 5 per cent, an increased gratuity if the disablement is between 6 and 14 per cent, and so on.
7. Claims for disablement pensions are handled by the Veterans Agency which is an executive agency of the Ministry of Defence. An important part of the process is the assessment of the degree of disablement by the Veterans Agency Medical Services ("VAMS") who are governed by Article 9. An important part of the present claim is based on a failure by the Tribunal to give reasons for its decisions.
8. The relevant rule is Rule 18 of the Pensions Appeal Tribunals (England and Wales) Rules 1980 which provides, for the purposes of the hearing in this case, as follows: *"The decision of the tribunal may, at the discretion of the tribunal, be announced by the chairman immediately after the hearing of the case, or may be communicated in writing to the appellant and the Secretary of State within seven days after the tribunal has reached its decision, and in either case the chairman shall indicate the tribunal's reasons for its decision."*

It is to be noted that the word "shortly" was removed from the rule in 2001.

9. There is further authority on the kind of reasons which must be given in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409. At paragraph 19 the Court of Appeal said: *"It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision."*
10. At paragraph 118 the court said: *"There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the judge to produce a judgment*

*that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."*

11. I am helpfully referred, also, to the dicta of Mr James Goudie QC sitting as a Deputy High Court Judge in *M v SW School and the SENDIST* [2005] ELR 285.
12. The complaint made about these decisions is that they were not supported by adequate reasons and that the decisions themselves were irrational.
13. The history so far as it is relevant is as follows. Following the accident the claimant spent many months in hospital and in a rehabilitation centre. He became overweight. He returned to service in June 1974 and worked in the officers' mess and as a driver. But on 26th March 1976 he was discharged, having been absent without leave on two occasions. In the years following he worked on the London Underground between 1976 and 1984. He was then unemployed for four years. He then worked for two years with British Rail and two for a motor dealer. Since 1992 he has been unemployed except for comparatively short periods. He completed a 12-month course in industrial archaeology and he began a university course in 1997 but gave it up as he did not feel able to cope.
14. In 1995 he applied for a war pension. He had not applied earlier because he had been incorrectly advised by a DSS officer. After examination by VAMS and evidence from the claimant and his general practitioner, the claimant was initially assessed in 1996 as 40 per cent disabled. That took into account, as attributable to service, his previous head injury, the fracture to his left femur, osteoarthritis in his left knee and the mental condition dysthymia, which is a comparatively mild form of depression. He was reviewed in 1997 and 1998, and in 1999 osteoarthritis to his right hip was accepted as attributable to his service. An appeal to the Tribunal led to the claimant's obesity being recognised as a condition aggravated by service and these various developments led to an increase in his assessment of disability to 60 per cent.
15. On 26th August 2004, following a review by VAMS, it was accepted that the osteoarthritis in the claimant's right knee and left hip, and the chronic sprain to his left ankle, were also attributable to his service. The assessment of his disability was raised to 70 per cent.
16. Meanwhile the claimant asked that his pension be backdated to 1976 on the ground that he had been wrongly caused to think that he had no valid application to make. In due course that matter went before a Pensions Appeal Tribunal which, on 9th March 2004, held that the claimant was entitled to have his award backdated. It is to be noted that the Tribunal on that occasion gave detailed reasons, some six pages, for reaching its decision.
17. The Veterans Agency then assessed the disability for the period from 1976 to 1995. They assessed his disablement during this period as 6 to 14 per cent which, being under 20 per cent, resulted in a gratuity rather than an annual sum. The present proceedings before the Tribunal resulted from an appeal by the claimant against both assessments. In relation to the 70 per cent assessment he accepted that his physical condition had been adequately considered, but contended that his mental condition was not adequately reflected by the assessment of 70 per cent. As regards the assessment of 6 to 14 per cent for the 20 years up to 1995, the claimant contended that that assessment was too low. In the result the Tribunal reduced the assessment of 70 per cent to 40 per cent and upheld the level of disablement for the period 1976 to 1995 as 6 to 14 per cent.
18. I deal with those in turn. As to the first decision, the disablements accepted by the Secretary of State were listed under the following labels: head injury 1973, fracture of the left femur, osteoarthritis of the left hip, osteoarthritis of the left knee, dysthymic disorder, osteoarthritis in the right hip, osteoarthritis in the right knee, chronic sprain of the left ankle, obesity (aggravated).
19. The reasons given for the decision were as follows:

*"The tribunal heard from Mr Viggers that he has significant mobility and mental problems. We do not accept that these are of the severity described to us by Mr Viggers. In particular we note that Mr Viggers has had no special adaptations made to his house. Mr Viggers has a mobility car but is capable he does use this for long journeys such as to London to visit his friend who lives in Acton and he drove to today's hearing. We also note that contrary to his oral evidence, Mr Viggers displayed excellent recall and concentration during the Tribunal Hearing which was over some two hours in duration.*

*"In our view Mr Viggers has been considerably over-assessed and the award should be reduced to 40% combined for all the conditions which should continue until 17.3.08 as we have no credible evidence that there is likely to be any significant deterioration in the near future."*
20. In my judgment those reasons are not only very brief, but wholly inadequate. I express no view on the issue whether the claimant was in fact over-assessed. That will be, now, a matter for the new Tribunal which will consider this matter.
21. The submissions by Miss Hetherington can be summarised as follows. First of all, the Tribunal were differing from the opinion of VAMS. Secondly, the tribunal were, as she puts it, drastically slashing the overall assessment of disability in an appeal brought by the claimant in relation to a discrete and limited aspect of the assessment. Thirdly, the Tribunal were lowering the assessment not only to its level prior to the assessment under appeal, but also below the level set by an unchallenged assessment in 1999.

22. I accept those as matters which required detailed justification, but the most important was the fact that the tribunal were differing from the opinion of the VAMS. The VAMS had submitted an opinion dated 12th October signed by Squadron Leader ALS Parham, medical adviser for and on behalf of VAMS. That was an opinion in 12 paragraphs dealing individually with each of the disabilities and putting a figure for disablement on each, arriving at a combined assessment of 70 per cent which, in the view of VAMS, fully reflected all the disablement that arose.
23. The reasons given by the Tribunal do not even mention the fact that they were differing from the VAMS opinion, let alone refer to evidence before them in the papers other than what Mr Viggers had told them. If they were going to differ, and differ so markedly, from the opinion of the VAMS, the basis of that disagreement required, in my judgment, to be spelt out. Bearing in mind the provision of Article 9(2)(c) of the 1983 order, the tribunal certainly had to assess the degree of disablement as a composite assessment by reference to the combined effect of all such injuries. But there is no explanation for the rejection by the Tribunal of the VAMS combined assessment. There is no indication of whether the Tribunal disagreed with any of the individual findings apart from the assertion that the mobility and mental problems were not of the severity described by Mr Viggers. What was perhaps just as important was a description of why they were differing, as apparently they were, from the severity as assessed by the medical evidence. There is no indication that the Tribunal were relying on any expertise of the medical member of the Tribunal and if they were it would have been necessary to make that clear.
24. I turn now to the second decision. The second decision related to the following mental labels, fracture of the left femur, osteoarthritis of the left knee, dysthymic disorder and head injury 1973. Again the reasons, described as findings of fact, were as follows: *"The Tribunal heard detailed and comprehensive evidence from Mr Viggers and his two witnesses. Mr Viggers' main concern is that he failed to realise the extent of his dysthymic disorder until 1993 when he then sought treatment. The evidence before the Tribunal was that there is no contemporaneous medical history of mental problems until the early 1990's. We found Mr Viggers a plausible but inconsistent witness. Mr Viggers between 1976 and 1995 managed to hold down jobs with both London Transport and British Rail, both of which involved significant responsibility and passenger safety. We find that Mr Viggers, on his own evidence, displayed pedantic tendencies, and on that of his witnesses Mr Perrat who said Mr Viggers did "not suffer fools". We find this type of conduct inconsistent with any significant depressive condition. The Appeal period, although long in duration, is in our view appropriately covered by an assessment of 6-14%."*
25. Miss Hetherington makes a series of criticisms of the reasons given, but also, in this instance, of the opinion given by VAMS. They are set out at paragraph 39 of her skeleton argument. It is not, in my view, necessary, for me to analyse these since the fifth would be sufficient to render the present reasons inadequate. VAMS, in its opinion in relation to this period, assessed each of two conditions, namely the physical conditions and the mental condition, at 6 to 14 per cent, but gave a composite assessment of only 6 to 14 per cent. That is not necessarily inconsistent, bearing in mind the way in which percentages may work, but if that was going to be upheld reasoning was required.
26. If one goes back to the reasons given by the Tribunal, there is nothing in the reasoning about the physical condition. If they accepted that there was a measure of physical disablement then that should at least have been recorded. It was an issue before the Tribunal.
27. What is more important is that the reasons given, which all relate to the mental condition, leave it unclear whether the Tribunal were accepting some measure of depressive condition or not. The implication of the penultimate sentence, *"We find this type of conduct inconsistent with any significant depressive condition"*, is that they did not accept any significant depressive condition, but they did not say so. There is no indication why they rejected the view of the VAMS that there was some depressive condition.
28. Apart from that, they were, if one stands back in relation to the two decisions, finding that the 6 to 14 per cent condition applied up to May 1995 despite the fact that the initial and unchallenged assessment of disablement from that date was 40 per cent. It is true that that 40 per cent assessment was not directly in question before the Tribunal. Nevertheless this was not a straightforward case and the claimant was entitled to know what view was being taken of his degree of disablement prior to May 1995 and in the later period for the period 2004 to 2008. Again there is no indication as to whether the medical member's expertise was relied on as against VAMS.
29. In each of these decisions the reasons given, in a far from straightforward case, amount to a series of comments. Those comments may, individually, have been matters that the Tribunal were entitled to take into account, but there is no attempt to set them against the picture as a whole, nor, in particular, to deal with the medical evidence before them, not only from VAMS, but in the form of letters from the general practitioner and a report from a psychologist.
30. In consequence this application must succeed simply on the basis, unusually, of inadequate reasoning. It follows from my decision that the decisions reached must be regarded as irrational in the sense that no proper reasoning has been provided to justify them. I do not necessarily conclude that given proper reasons either decision would be one that no rational tribunal could reach and I express no view on what the outcome of the further hearing should be.

31. It seems to me, in the circumstances, unnecessary to give more detailed reasons. Certainly I do not wish to be interpreted as expressing any view either on the overall outcome, nor on the individual issues that arise. Those are all matters for a new Tribunal to consider and to arrive at reasoned decisions.
32. Is there anything else that you wish me to deal with Miss Hetherington?
33. MISS HETHERINGTON: My Lord, I am instructed to apply for costs against the tribunal on the basis that your Lordship has a general discretion as to costs, and, while the claimant is legally aided, the heavily stretched funds of the LSE have had to bear the cost of bringing this application to challenge a decision that was clearly flawed with reasons that your Lordship described as wholly inadequate. There was a patent and serious error here. It is unjust that simply by not appearing the tribunal can prevent the Legal Services Commission from recovering its costs. I submit that the tribunal should have offered to submit to judgment if it wished to avoid such a costs risk. I should draw your attention to the case of *Davies* --
34. MR JUSTICE CRANE: Yes, certainly I will look at any case, but the -- it is relatively unusual to award costs against a tribunal, is it not?
35. MISS HETHERINGTON: My Lord, yes, and that is why I felt I had to draw your attention to the case of *Davies*.
36. MR JUSTICE CRANE: Yes, well show me the case.
37. MISS HETHERINGTON: My Lord, it is true that in this case paragraph 47 is the relevant paragraph.
38. MR JUSTICE CRANE: Sorry?
39. MISS HETHERINGTON: Paragraph 47 is the relevant paragraph.
40. MR JUSTICE CRANE: I was just looking at the headnote. Yes, well, they certainly have not attended to seek to uphold the decision.
41. MISS HETHERINGTON: No, my Lord.
42. MR JUSTICE CRANE: The test "flagrant instance of improper behaviour" or "unreasonably declined or neglected to sign a consent order disposing of the proceedings". It is in fact quite difficult for a tribunal which has reached a decision then to concede that it has it wrong, is it not? I do not mean difficult in the sense that simply the tribunal will be reluctant to do so, but what I mean is that if there has been some flaw, for example, no notice given to the appellant or something of that kind, a clear breach of procedure, one would expect then there to be a concession. But if what the claimant is asking is a concession that the decision was irrational, it would be comparatively unusual for a tribunal to accept something like that, would it not? It is quite difficult to expect them to.
43. MISS HETHERINGTON: My Lord, perhaps it may be unusual but I do not think that it would be an undesirable course on the part of the tribunal who wish to avoid a costs risk and were not intending to contest the application. If one looks just above paragraph 47 at paragraph 45(7) the Court of Appeal do note that "The very heavy pressures on the funds available to the Legal Services Commission no longer make it possible to justify the refusal of a costs order on the basis that one public fund would simply be paying another."
44. Furthermore, it is recognised by Sir Martin Nourse that the courts, of course, always have a residual discretion as to costs. That is in paragraph 59 of the judgment.
45. In our submission there was here a patent and serious error by the tribunal and it was unreasonable for them not to offer to consent to judgment.
46. MR JUSTICE CRANE: Well, they were not asked to, were they?
47. MISS HETHERINGTON: I do not believe so, my Lord, but it should have been something that they should have considered.
48. MR JUSTICE CRANE: Unreasonably neglected to sign a consent order? They certainly were not presented with one, that was not suggested to them. I agree they could have suggested it. But it really would have to be on that basis, would it not, because it does not seem to me that this, however regrettable, can be described as a flagrant instance of improper behaviour?
49. MISS HETHERINGTON: My Lord, perhaps not, but the severity of the --
50. MR JUSTICE CRANE: I agree, and I maintain what I said that the reasons were wholly inadequate --
51. MISS HETHERINGTON: But, my Lord, that would feed into the reasonableness or otherwise of failing to offer to concede. My Lord, the only other matter is that we request an order for detailed assessment of our costs to be paid out of the Community Legal Services fund.
52. MR JUSTICE CRANE: Yes, you can certainly have that.
53. MISS HETHERINGTON: The Community Legal Aid certificate should be on file, but if not I have one here.
54. MR JUSTICE CRANE: That can be found. Can I just indicate that having been referred to *R (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207 in the Court of Appeal, and particularly paragraph 47 in relation to costs against lower courts and tribunals generally, this does not seem to me to be one of those exceptional cases where costs should be awarded against the tribunal. They have not attended. They have not sought actively to uphold

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the decision. It does not seem to me that it is a flagrant instance of improper behaviour, although it is a regrettable inadequacy of reasons. I do not think it is one of those situations in which one should necessarily expect a tribunal to take the course of signing a consent order.

55. I shall refuse costs as far as costs against the tribunal are concerned, but subject to a certificate you shall certainly have the public funding costs. On an undertaking to file a certificate within the next 7 days you can have the usual order for publicly funded costs.

56. MISS HETHERINGTON: Thank you very much, my Lord.

57. MR JUSTICE CRANE: Thank you very much again for your help.

MISS T HETHERINGTON (instructed by Linder Myers) appeared on behalf of the CLAIMANT  
THE DEFENDANT DID NOT ATTEND AND WAS NOT REPRESENTED