IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S260 of 2017

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN:

SAS TRUSTEE CORPORATION
Appellant

and

PETER MILES
Respondent

APPELLANT'S REPLY

Part I: CERTIFICATION

1. SAS Trustee Corporation (the **appellant**) certifies that these reply submissions are in a form suitable for publication on the internet.

Part II: ARGUMENT IN REPLY

(a) Clarification of issue on appeal

2. The respondent's framing of the issue raised on the appeal incorrectly conflates two matters (see RS [2]). The issue is not to what extent the consequences of being hurt on duty are to be "disregarded" in determining the extent of a member's incapacity for work outside the police force. The issue is whether additional amounts of superannuation are payable where the claimed incapacity is *not* a consequence of the "hurt on duty" infirmity which has been certified and determined pursuant to s 10B.

(b) Factual matters

3. Though the scheme is one which required contributions on the part of the respondent as a member, the scheme is nonetheless a defined benefit superannuation scheme such that there is no nexus whatever between the amount contributed and the superannuation allowance ultimately paid: s 3(3) of the Act; cf RS [5], [14]. The fact that contributions are required does not assist the respondent.

4. Additionally, as to the respondent's submission that the scheme is not a "compensation scheme" (at RS [5]), the appellant refers to AS [69]-[70] for the context in which the issue arose in *Lembcke v SAS Trustee Corporation* (2003) 56 NSWLR 736.

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5. As to RS [9], Neilson J was not required to make any of the findings listed. The issue between the parties was whether the uncertified psychiatric condition could be taken into account. Importantly, it was common ground that the alleged psychiatric condition had neither been certified as a specified infirmity by the appellant pursuant to s 10B(1) nor determined to be caused by being "hurt on duty" by the Commissioner of Police pursuant to s 10B(3)(a) of the Act, and was not the basis upon which the plaintiff had been discharged: PJ [29]. RS [10] glosses over the reality of this two-stage process.

6. Finally, it is not in issue between the parties that the respondent is and was a "disabled member of the police force" (RS [6]), however, critical to the appellant's case is that that resulted not from any psychiatric illness, but from four specified infirmities of an orthopaedic nature: see AS [6]-[9].[1]

(c) Flaws in the respondent's construction

7. The crux of the respondent's argument is that once someone meets the definition of a "disabled member of the police force", then any injury sustained by that person, which "for whatever reason" causes an incapacity for work outside the police force, triggers an additional allowance being payable under s 10(1A)(b)(ii): RS [13]; [18]; [32]; [35]. This is so on the respondent's argument even where the injury is wholly disconnected from any form of police service, or from any certified infirmity.

8. In so submitting, the respondent effectively embraces the CA's "gateway" construction (RS [34]), which ignores the role that the infirmities which have been certified and subsequently determined as being caused by the member being "hurt on duty" in fact play.

9. The respondent has accepted, as he must, that the provisions of ss 10B(1) and (3) are "relevant to whether the member falls within the definition of 'disabled member of the police force'": RS [27].

10. The vice in the respondent's argument thereafter is his contention that this definition can then be put to one side.

11. In RS [32], the respondent asserts that s 10(1A)(b) "does not in any respect turn on the extent to which that incapacity is attributable to the injury which meant that the former member had been 'hurt on duty'", and that "[o]nce the requirements of the definition are satisfied, ss 10B(1) and (3) have no further function": RS [45].

12. This, however, ignores the very definition of "disabled member of the police force", which is expressly incorporated within s 10(1A)(b), and which in turn picks up s 10B. The statutory question, in context, focusses on the "incapacity" for work outside the force of a person certified as "incapable" from a "specified infirmity" of performing police functions, that infirmity

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[1] For the sake of completeness, the appellant notes that contrary to RS [24], an appeal does not lie to the District Court from a decision of the appellant under s 10B(1). Section 21(1)(a) is only relevant to the appellant's decisions that arise under the Act "*by reason of the member of the police force being hurt on duty*". At this first stage (certification of the infirmity by the appellant) no finding as to hurt on duty has been made by the Commissioner of Police. Accordingly, disputes concerning s 10B(1) (or for that matter s 10B(2)) fall under a different appeal process in accordance with ss 67 and 88 of the *Superannuation Administration Act 1996* (NSW). The respondent followed that process unsuccessfully in an attempt to have his psychiatric condition certified prior to the proceedings in the District Court currently under appeal.

having been certified by the Commissioner as caused by being hurt on duty. In that context, the respondent's focus on the "member" or "former member" is inapt: cf RS [32], [42]. See also RS [48] referring to a "police officer". The respondent's construction would see the incapacity that brings the member within the chapeau of (1A) as tied strictly to the certified "specified infirmity" but the incapacity which is then assessed in (ii) as wholly unshackled from it.

13. In circumstances where the relevant definition (and s 10B) are placed at the fore of the statutory inquiry, the artificiality of separating the stages of the inquiry, and thus giving "incapacity" and "incapable" different meanings becomes readily apparent: cf RS [42]-[43]. The respondent in this regard largely fails to engage with the context of the Act as raised in AS [37]-[71].

14. Additionally, the analysis at RS [35]-[36] overstates the operation of s 10(1D). On the appellant's construction, the only relevant incapacity is that which is a consequence of the "hurt on duty" infirmity as certified and determined. It is thus only for the purposes of the appellant varying a determination in relation to that incapacity that s 10(1D) has any application: cf RS [36]. Section 10(1D) is nothing more than a provision pursuant to which the appellant is vested with the power to make and vary determinations under s 10.

15. Finally, at RS [46]-[48], the respondent seeks to make much of s 10(1A) being a "quantification" as opposed to an "entitlement" provision. This distinction is of no assistance to the Court where the Act makes no reference to "quantification" as distinct from entitlement, and where it is apparent on the face of the Act that the provisions which provide for benefits, do so without distinguishing between these two concepts which are a construct of the respondent.

16. Section 7, for example, quantifies an allowance for a member of the police force who has served 20 years or more and retires, and sets out percentages of the annual superannuation allowance that is payable, but it is that same provision that creates the allowance for those members. Section 10 is no different.

(d) Concession by the respondent

17. The final matter to bring to the Court's attention is the example given by the respondent at RS [47], fn 14. If one were to assume for the sake of argument that the respondent's pension in relation to his psychiatric condition was payable to him as a "former member" pursuant to s 10B(2) rather than a "member...who is discharged" pursuant to s 10B(1), the respondent not only accepts at fn 14 that his failure to give statutory notice of his psychiatric condition prior to his exit from the police force would disentitle him from receiving the "basic s 10 superannuation allowance", but he also accepts that this "demonstrates that the legislature addressed the limits of the scheme".

18. However, on the respondent's construction of s 10(1A)(b), despite the above scenario being an obvious and accepted exclusion, namely, that "police officers who sustain injury or impairment after their resignation or retirement through disease of gradual onset, or latent disease, are not entitled to a superannuation allowance", the respondent nevertheless contends that this would not affect his right to have a psychiatric condition which meets exactly

that description from being taken into account in the assessment of "incapacity for work outside the police force" – even though unrelated to the infirmity for which he received a certification and subsequent determination.

19. The respondent's concession as regards s 10B(2) demonstrates the logical weakness of his argument and confirms why, when he has been certified and determined hurt on duty for one infirmity under s 10B(3), an incapacity that arises from a separate and unrelated infirmity is irrelevant for the purposes of s 10(1A)(b)(ii).

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