CAS (AP-4)

3-12-98

HL/RC/1

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CI/4642/97, CI/4645/97, CI/4649/97, CI/4651/1997

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER H LEVENSON

Claimant	:	Carl Faulkner
Tribunal	:	York
Tribunal Case No	:	1/12/97/01019

1. For the reasons given below these four appeals by the claimant do not succeed. I confirm the decisions given by the social security appeal tribunal of 30 May 1997 that in relation to each of the incidents of 9 March 1994, 16 March 1994, 19 April 1994, and 15 September 1994 there was no industrial accident.

2. These appeals are part of a series of six linked appeals relating to the same claimant and various incidents in the same employment on different dates. I have given separate decisions in relation to incidents on 8 September 1994 (CI/4647/1997) and 22 August 1995 (CI/4648/1997) because slightly different issues are raised in those appeals.

3. The claimant was born on 14 March 1961. Having undergone training, the claimant became a prison officer in May 1988. At all relevant times the claimant was working in employed earners employment, at his place of employment in Great Britain, and each of the relevant incidents arose out of and in the course of his employment. I take the following facts, which are not disputed, from the tribunal's decision:

> "The facts of this case which are not in dispute and which we accept were that the Appellant became a Prison Officer in May 1988. Before that time he had received a 9 weeks Residential Training Course and his first post was at a category "B" training Prison, a position which he held for 4 years without any medical problems.
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> He told us that his state of health was excellent when he joined the Prison Service and that in those initial years he had had to deal with a number of disturbances and assaults and at that time he was able to deal with them adequately and did not have to take any time off for work related illness.
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> From October 1992 until the date of his retirement in October 1996 he worked as a Prison Officer in ... a full security Prison. He told us there was not a lot of difference between this Prison and his previous place of employment other than the fact that the inmates were generally persons who were serving at least 20 years of imprisonment and therefore consisted of murderers, rapist and terrorists.
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> In the first two to two and a half years ... he was on the Residential wing and one year on the special unit. None of the incidents referred to happened whilst he was in the special unit.
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> Before March 1994 there had been incidents but he had not reported them as this was discouraged. He did not recall having seen a doctor before March 1994 as a result of anything that had happened at work.

On the 9th March 1994 he was in "B" wing supervising meals. There was never no more than 5 Prison Officers on duty controlling between 30 to 40 inmates. The staff served the food and this was one time of the day when the inmates were all together and when difficulties or trouble could arise and on this particular day one of the inmates had complained about the food and the Appellant had been subject to a torrent of abuse; this particular inmate had encouraged other inmates to do the same. The Appellant had stood his ground and he had feelings of nervousness and felt himself shaking. He said that he had probably felt like that before but had not reported it. Shortly afterwards he had a break for lunch but does not recall working in the afternoon. He had reported the incident and he had felt that it had been significant that he had taken this step. He had not sought any medical help and the shaking feeling had subsided by the end of the lunch break.

The thought of what had happened he felt had never gone away.

A week later on the 16th March 1994 he was in the education block checking names off to ensure that nobody would be let in that should not be there. One of the inmates who was not entitled to be in and whom the Appellant had refused entry used verbal abuse to him and indirect threats of violence questioning the Appellants authority and implying that something would happen to him. The Appellant was shaken and frightened but had tried to stay composed and worked until lunch-time. He had calmed down after a short while and did not seek any medical help but felt as the years went on his tolerance to such situations was reducing.

On the 19th April 1994 he was in charge of locking inmates in their cells just after the lunch break and one of the inmates who was one of the last to go into his cell wanted to go somewhere else which the Appellant refused to let him do. This inmate was a violent person, stood face to face with the Appellant and threatened physical violence to him. He was put on report and given three days confinement and the Appellant says again he was very shaken and frightened but did not seek any medical help and reported the matter after his lunch break.

On the 8th September 1994 he was in the new education classrooms controlling the corridor when the alarm went off. He attended the location of the incident with three other members of staff to find two inmates fighting. It was a violent episode and he tried and succeeded eventually to break up the fight sustaining injuries to

his left thumb, right heel and right triceps. Again he was shaken but worked the rest of the morning and again did not seek any medical help.

On the 15th September 1994 he was supervising a wing landing; he was in the cleaners office watching down the corridor when one particular inmate stormed into the office and started threatening him with physical violence He believe he had put this inmate on report and as before he was shaken by this incident.

Between September 1994 and August 1995 he felt that there must have been other incidents but he did not report them on the basis that he thought perhaps they did not bother him as much or his thoughts were that there was no point in doing so.

On the 22nd August 1995 he was searching inmates leaving the workshops when one particular inmate would not remove his cap when going through the X-ray machine as he is a Rastafarian.

He was given the opportunity of being taken into a separate room and as he went past the Appellant he shoulder charged him unexpectedly and was ready to physically assault the Appellant but was led away by other inmates. The Appellant placed him on report; he had sustained no physical injuries but again was shaken.

In January 1996 the Appellant first sought medical advice and was diagnosed with acute anxiety but at first was not given any medication but advised to take time off work to see how he felt but in fact he never returned to work.

After about a month he was prescribed prozac, seeing his doctor every week to begin with and then every two weeks. He was on prozac for three months but as the Appellant was reluctant to take any medicine he had therapy with a psychiatric nurse.

In July 1996 he was informed that he would be medically retired but officially retired on 12th October 1996 on the advice of his own doctor and the Prison's medical officer.

He had not had any treatment since October 1996 and felt that his health was better now than it was and he was able to concentrate and now able to remember names which he was not able to do before his retirement.

4. As I have indicated above, the incidents on 8 September 1994 and 22 August 1995 are each the subject of separate decisions, but I have included the tribunal's findings for the

sake of completeness and to avoid any misrepresentation of what the tribunal found.

5. Section 44 of the Social Security Administration Act 1992 provides that where a claimant has made a claim for industrial injuries benefit he is entitled to have determined a question whether the relevant accident was an industrial accident. Section 44(6) provides that an accident whereby a person suffers personal injury shall be deemed, in relation to him, to be an industrial accident if it arises out of and in the course of his employed earners employment and happens in Great Britain.

6. On 23rd July 1996 the claimant made claims for industrial injuries disablement benefit in respect of each of the incidents referred to above. the adjudication officer refused to make declarations of industrial accident in relation to the four incidents with which this decision is concerned. The claimant appealed to the social security appeal tribunal against these decisions of the adjudication officer. The tribunal considered the matter on 18 March 1996 and confirmed these decisions of the adjudication officer. On 16 July 1997 the claimant applied for leave to appeal to the Social Security Commissioner against the decision of the tribunal. On 30 July 1997 the chairman of the tribunal gave leave to appeal. In relation to each of the four matters with which this decision is concerned the adjudication officer now concerned with the matter opposes the appeal and supports the decision of the tribunal.

7. The tribunal explained its decision as follow:

> "In our view the Appellant's employment particularly in the enrolment of a full security Prison was in itself of stressful nature and the incidents which he has described could not have been unexpected or untoward; indeed he accepted in his evidence that there had been other disturbances and assaults which he had not reported.
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> Whilst we have no doubt that anybody faced with such situations would feel some anxiety it has not been shown that on each of these occasions he suffered any degree of exceptional stress sufficient to justify a declaration of accident. We note in particular that after each incident he was able to recover within a short period of time; that he did not feel it necessary to have any time off work as a result of these incidents or to seek any medical advice or attention.
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> The Appellant accepted in his own evidence that he felt that his tolerance to such situations was reducing.
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> Taking into account the number of incidents and the period of time over which these occurred we feel that the

> Appellant's medical condition in January 1996 when he first consulted his own Doctor was a culmination of a general deterioration in his condition; and therefore one of process and not accident.

8. The first question to be decided in each case is whether there was an accident. As a matter of law the decision as to whether a particular accident is an industrial accident is a separate decision. Some of the cases were reviewed by Mr Commissioner Rice in CI/5249/1995 (*53/96). In particular, he cites the observation of Lord MacNaghten in the decision by the House of Lords in Fenton v Thorley and Co Limited [1903] AC 443 at 448:

> "I come therefore, to the conclusion that the expression 'accident' is used in a popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed".

9. In the same case, at page 453, Lord Lindley pointed out that the word "accident" is often used to denote both the cause and the effect. Although dealing with an earlier version of similar legal provisions, the approach taken in that case has been followed on many occasions in relation to subsequent legislation. It has become clear that the references to unlooked-for mishap or an event which is not expected or designed refer to the situation where the employee claimant neither looks for nor expects nor designs the event. An event can still be an accident although it is deliberate on the part of someone else (Board of Management of Trim Joint District School v Kelly [1914] AC 667). In CI/15589/1996 (*5/1998) Mr Commissioner Goodman rejected the view that an accident had to be unforeseeable. This was because it was perfectly foreseeable, for example, that repeated heavy lifting, although part of the job, could give rise to an accident. I agree with the Commissioner that this must be the case. However, the Commissioner went on to decide that encountering one of the risks of a risky occupation (for example a policeman assaulted in the course of arresting someone) will not normally amount to an accident. Unfortunately, I cannot agree with the Commissioner on that point (and on the facts of the case he decided that there had been an accident). This approach seems to me to be inconsistent with his approach on the irrelevance of foreseebility. It discounts the concept of an incident being unlooked-for on the part of the claimant, and I fail to understand why an incident (such as an assault on a police officer making an arrest) which is an illegal action carrying liability for prosecution or civil suit should not also carry industrial injuries protection just as much as when a factory worker is working with dangerous machinery. In Chief Adjudication Officer - v- Faulds [1998] SLT 1203 the Court of Session held that injury could be caused by accident even where the event or events causing injury might be foreseeable

or might be expected to be encountered by a person carrying out normal hazardous duties, if these were unplanned and unintended. To paraphrase an argument put to the Court of Session in that case, a prison officer does not sign up to take psychological trauma through encountering terrifying threats and abuse.

10. Accordingly, my conclusion is that foreseeability is irrelevant as is the fact that the accident arises from encountering one of the risks of a risky occupation.

11. The adjudication officer relies on the decision in CI/7/1971. That case concerned a claimant who suffered a severe shock when he was asked, without a reason being given, to resign his employment. In a relatively brief decision the Commissioner decided that the use of language alone is incapable of constituting an accident, although a shout or cry or abusive or harsh words may be incidental to causing injury by accident, for example by startling or disturbing the claimant so that he trips or falls or traps himself in a machine. However, in such cases it would be the latter event which was the accident. That decision pre-dates the development of a greater understanding of the possible psychological effects of trauma and harassment and I have no doubt that, for example, in an extreme case a particular incident of verbal sexual or racial harassment at work is capable of constituting an accident. Whether it is an accident which causes personal injury is a different question to which I return below.

12. In deciding whether a person has suffered personal injury as a result of an accident, regard may be had to nervous or neurotic or psychoneurotic or psychosomatic or mental effect. There are several early decisions to this effect (e.g. R(I)4/49, R(I)43/55 and R(I)22/59) and this proposition has not been seriously doubted in recent years. It was affirmed by the Court of Session in Faulds (see above).

13. In the present appeals, it is clear from the tribunal's reasoning that, although it did not present a sophisticated legal analysis, the tribunal was of the view that an accident had not taken place in the sense of the effect on the claimant and also that (if an accident had taken place) there was no personal injury. These are conclusions that the tribunal was entitled to reach on the evidence before it and I do not accept that it could have reached any other conclusion on the facts, no matter how rigorous or detailed an analysis of the law it had carried out.

14. For the above reasons, these appeals by the claimant do not succeed.

(Signed) H Levenson
Commissioner

(Date) 27 November 1998