Neutral Citation Number: [2018] EWCA Civ 2367

Case No: C3/2016/1263

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
UTJ S M Lane
JR24152014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 October 2018

Before :

LORD JUSTICE PATTEN
LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE PETER JACKSON

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Between :

Criminal Injuries Compensation Authority	**Appellant**
- and -	
First-tier Tribunal (Social Entitlement Chamber) (Criminal Injuries Compensation)	**Respondent**
and	
Christopher Michael Jones	**Interested Party**

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Ben Collins QC for the Appellant
No appearance by the Respondent or the Interested Party

Hearing date: 16 October 2018

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Judgment Approved

Lord Justice Peter Jackson:

Overview

1. Since 1964, victims of violent crime in England, Wales and Scotland have been able to apply for an award of compensation from public funds. By the Criminal Injuries Compensation Act 1995, Parliament established the Criminal Injuries Compensation Authority ('the CICA') to administer the scheme, under which compensation is awarded by reference to a tariff. The scheme has been amended from time to time. The original rules appeared in the Criminal Injuries Compensation Scheme 1996 ('the 1996 Scheme'), with subsequent schemes being approved in 2001, 2008 and 2012. Applications are determined by claims officers, whose decisions may be reviewed by the CICA itself and thereafter appealed to the First-tier Tribunal ('the FTT'). A decision of a claims officer on review is normally regarded as final, but there is a power to reopen a decision. This appeal concerns the scope of that power.

2. The provision with which we are directly concerned is paragraph 56 of the 1996 Scheme[1]:

> "**Re-opening of cases**
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> 56. A decision made by a claims officer and accepted by the applicant, or a decision made by the Panel, will normally be regarded as final. The claims officer may, however, subsequently re-open a case where there has been such a material change in the victim's medical condition that injustice would occur if the original assessment of compensation were allowed to stand, or where he has since died in consequence of the injury."

3. The central question is whether a claims officer is required to reopen a case where there has been a material change in the applicant's medical condition even though the officer considers that applicant would be disentitled to compensation for some other reason. The CICA decided the matter on the basis that the officer was not required to do this. The FTT did not engage with the issue. The Upper Tribunal ('the UT') ruled that the officer was obliged to reopen the case in these circumstances.

4. As a matter of construction, I consider the view of the CICA to be correct. The purpose of the power to reopen is the prevention of injustice. Paragraph 56 on its true construction does not compel the reopening of a decision where the maintenance of the original decision would not create an injustice. In order to reopen a case, an officer must be satisfied that if the original assessment was allowed to stand there would be an injustice and that the injustice would be caused by a change in the applicant's medical condition. It is not sufficient for there to be a medical change if for some other reason there would be no injustice if the decision stood, and in such circumstances there is no power to reopen the case. Take as an extreme example an applicant who receives an

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[1] The 1996 Scheme applies because the relevant decision was taken under that scheme. At that date, appeals were heard by a Panel; now by the FTT. The equivalent provision to paragraph 56 in the 2012 Scheme is found at paragraphs 114 and 115, which are differently drafted but, so far as concerns the questions arising on this appeal, paragraph 56 and paragraph 115(b) are to the same effect.

award for injury sustained as a victim of a robbery but who, having applied for the case to be reopened on the basis of a worsening of the injury, is convicted of murder. In such circumstances, it would be futile and contrary to the efficient use of powers under the Scheme for the case to have to be reopened for medical reasons, only to be inevitably dismissed on grounds of ineligibility. In my view, the provisions set out above do not have this unfortunate consequence.

The underlying facts

5. The interested party Mr Christopher Jones ('CJ') has made three applications for criminal injuries compensation. The earliest, in 1992, was successful and is not now relevant, except to the extent that it shows CJ's general awareness of the compensation system.

6. For our purposes, CJ's first relevant application was made in August 1999, arising from his having been the victim of an assault in 1998. This application was rejected in February 2000 as the injury was not deemed to be sufficiently serious to qualify for an award. In September 2002 CJ applied for a review but in October 2002 the CICA decided not to waive the 90-day time limit. So the decision made in February 2000 was a final one and remained binding unless the rules of the Scheme allow for it to be reopened.

7. However, in June 2011 CJ made a second claim arising out of the same incident. This was handled under the 2008 Scheme. In the application, he stated that it was late because he did not know of the Scheme, that he had made no other claims for compensation to the CICA, and that he had no criminal convictions. None of these statements was true.

8. This second claim was rejected on 16 June 2011 because it was manifestly out of time. On 28 June 2011, CJ applied for that decision to be reviewed because of his mental health and issues with his legal representation. The CICA sought medical and police reports. The medical records revealed the 1999 application, while the police report disclosed a number of previous convictions. On 4 November 2011, the CICA refused the second application as being a repeat claim. That brought the second claim to an end.

9. At this point, CJ reverted to his original 1999 application. On 10 November 2011, he asked the CICA to re-open it. On 5 March 2012, the CICA rejected the application, but in doing so it relied on two grounds. The first was under paragraph 13(e) on the basis of the applicant's character, and the second was under paragraph 56 on the basis that his condition had not materially changed. CJ asked for a review, disputing the conclusion about his medical condition and claiming that the information about his previous convictions was inaccurate. The police carried out further investigations which confirmed that there were indeed convictions. On 18 July 2012 the officer reviewing the case refused to reopen it. The decision letter included the following:

> "Paragraph 13(e) of the Scheme requires us to take account of your character as shown by criminal convictions or other evidence. As you knowingly provided the Authority with false information a full or reduced award of compensation is not appropriate. …

> On the basis of the above I have concluded that the information and arguments contained within your "application for a review" were deliberately misleading and constitute giving false information to the Authority. That is a very serious matter indeed, and the review is consequently refused."

10. Paragraph 13 of the 1996 Scheme[2] provides for a claims officer to withhold or reduce an award in specified circumstances, including (c) where the applicant has failed to give all reasonable assistance to the Authority in connection with the application and (e) where the applicant's character as shown by his criminal convictions or other available information makes it inappropriate for a full award or any award at all to be made.

11. It is the CICA's refusal to reopen its February 2000 decision that led to the subsequent litigation.

The litigation

12. The litigation, which has continued for over six years in respect of an injury sustained two decades ago, has followed a tortuous course, which I shall now attempt to describe.

13. On 21 July 2012 CJ appealed to the FTT. On 9 March 2013 it decided that it needed the original evidence filed in the 1999 claim and gave directions for the production of medical records and a medical report. It nonetheless directed a reduction of 75% under paragraph 13(e) if the case was subsequently reopened. CJ's medical records were duly gathered. On 19 September 2013 the tribunal issued a strike-out warning on the (then incorrect) basis that no right to reopen existed in the absence of an original award of compensation, but that even if such a right did exist, there was no medical evidence to show that CJ's health had suffered as a result of the assault or that his mental health had subsequently deteriorated as a result of the assault. Finally, on 16 January 2014 and despite CJ's representations (referred to below), it struck out the appeal on the basis that there had been no original award of compensation and that in consequence the case could not be re-opened. This was clearly incorrect, since paragraph 56 of the 1996 Scheme allowed a case to be reopened where no original award had been made, a position accepted by the CICA.[3]

14. On 6 May 2014 CJ applied to the UT for a judicial review of the FTT decision of 16 January 2014. On 31 December 2015 the UT (Judge S M Lane, deciding the matter without an oral hearing) quashed the FTT's decisions of 9 March 2013 and 16 January 2014 and remitted the matter to the FTT to rehear CJ's appeal from the decision of 18 July 2012 refusing to reopen his application. On 25 February 2016 the UT refused the CICA's application for permission to appeal. On 14 October 2016 Davis LJ refused permission on the papers, but permission was subsequently granted by the President of the Queen's Bench Division, Sir Brian Leveson, at an oral hearing on 24 October 2017 on the basis that the correct construction of the Scheme is a matter of importance that may affect other cases.

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2 Now, broadly, paragraphs 22-27 of the 2012 Scheme.

3 The position is different under the 2012 Scheme, as paragraph 114 only permits the reopening of a claim in order to make a further payment where a final award has been made.

15. We have received written and oral submissions from Mr Ben Collins QC for the CICA. Neither the FTT nor CJ himself has taken part in this hearing.

The reasoning of the Upper Tribunal

16. The judge first accepted that the January 2014 decision of the FTT was made in error, since, as has been noted, paragraph 56 allowed for the reopening of claims where there had not been a previous award. She then turned to the question now before us, and rejected the submission made by the CICA that (as she summarised it) injustice encompasses issues of bad character that may go a long way, or indeed the whole way, towards deciding whether it would be unjust to leave the existing decision standing. She said that this analysis would undermine the structure of the Scheme, which provides different powers for making an initial decision as opposed to a reconsideration, reopening or review. As she put it at [22]:

> "… It is reasonably plain that paragraph 56 does not give an open invitation to claims officers to make new eligibility decisions. It asks the claims officer to answer a specific question from a specific perspective: would there be injustice, in the changed medical circumstances, if the earlier decision remained in place? I do not consider that character evidence is relevant to this paragraph."

17. The judge also considered the provisions of paragraph 60(1), which includes this provision:

> "The officer conducting the review will reach a decision in accordance with the provisions of this Scheme applying to the original application, and will not be bound by any earlier decision, either as to the eligibility of the applicant for an award or as to the amount of an award."

She held that this did not give a claims officer *carte blanche* to change any decision regarding any matter, regardless of the scope of the particular review being carried out. In this connection, the judge said that the claims officer was not hamstrung and referred to paragraph 53, which allows for the reconsideration of a decision at any time before actual payment of a final award has been made. This, she said, would allow a claims officer to look again at an applicant's character.

18. The judge enumerated a number of errors made by the FTT in March 2013 and January 2014. In particular, she held that there was no basis on which the tribunal could have decided that there should be a 75% reduction in compensation if there was a reopening when it had not yet been determined that the claim should be reopened and where the question of reduction in compensation would, at least initially, be one for the CICA.

19. The upshot was that the judge quashed the decisions of the FTT and remitted the case to that tribunal to reconsider CJ's appeal in the light of her construction of paragraph 56.

The grounds of appeal

20. On behalf of CICA, Mr Collins argues (1) that the judge's reading of paragraph 56 was incorrect, (2) that the judge's construction of the extent of a review under paragraph 60

was also incorrect, (3) that paragraph 53 did not provide the remedy suggested by the judge, and (4) that CJ's conduct made it inappropriate that the discretionary remedy of judicial review should be granted. He also submits that, on the true construction of paragraph 56 and the facts of this case, the result of CJ's application to reopen has only one possible outcome, namely that it must be refused. This goes to relief, if the substantive appeal is successful.

21. As to Ground 1, Mr Collins's primary submission is that the words of paragraph 56 require injustice to be considered, not merely by reference to any change in an applicant's medical condition, but on the basis of all relevant factors. Indeed, he submits that injustice can only ever be considered in such an overall context. At a practical level, paragraph 56 contemplates a single decision being taken about whether an application should be reopened. The construction favoured by the UT instead involves a two-stage process whereby an application that is bound to fail may have to be reopened only to be dismissed. It is this, rather than the construction for which he argues, that would undermine the structure of the Scheme by requiring meritless applications to be reprocessed.

22. If his primary argument were to fail, Mr Collins argues in the alternative that the word "may" (and not "must") provides a discretion to the claims officer as to whether a claim should be reopened or not.

23. On Ground 2, Mr Collins submits that a claims officer undertaking a review of a decision not to reopen a case is clearly entitled by the terms of paragraph 60 to reach a fresh decision when reapplying paragraph 56.

24. Ground 3 speaks for itself. Paragraph 53 can only apply where there has been an award that has not yet been paid out. The judge was mistaken to consider that it provided a solution in the case of this kind.

25. Under Ground 4, Mr Collins submits that the judge did not consider CICA's argument about the appropriateness of the discretionary remedy at all.

Conclusions

26. As stated, I consider that paragraph 56 on its true construction does not compel the reopening of a decision where the maintenance of the original decision would not create an injustice. The difficulty with the judge's interpretation is that it is impossible to assess whether injustice exists without taking all relevant circumstances into account. It is artificial to consider one factor (medical change) on its own. That does not allow a proper assessment to be made and does not give effect to the intention of the paragraph.

27. In the passage cited at paragraph 16 above, the judge put the question for the decision-maker in this way: *Would there be injustice, in the changed medical circumstances, if the earlier decision remained in place?* On a plain reading, I would not disagree with this formulation, but it is clear that the judge meant something different because she continued: *I do not consider that character evidence is relevant to this paragraph.* In that respect I consider that her conclusion was mistaken. The correct questions for the decision-maker are:

Would there be injustice if the earlier decision remained in place and would that injustice be the result of a change in the applicant's medical condition?

If the answer to both these questions is 'yes' the officer may, and no doubt in practice will, reopen the case. In such cases, one possible approach would be to take the account of medical change at face value and then decide whether injustice would be caused if the original decision stood. If the conclusion is that injustice would not be caused regardless of any medical change, the decision cannot be reopened, and it will then be unnecessary to engage with the often complex question of whether or not there has been a sufficiently material medical change.

28. As to Mr Collins' fallback argument, the use of the word "may" is consistent with the proper construction of paragraph 56, but my conclusion does not depend upon it.

29. In the light of this conclusion on Ground 1, the argument under Ground 2 in relation to paragraph 60 takes matters no further. An officer carrying out a review of a decision not to reopen the case can only have the powers of the original claims officer under paragraph 56, and on this I would agree with the judge.

30. Ground 3 (paragraph 53) is made out but is in reality subsumed in Ground 1. In the light of the overall outcome it is unnecessary to say anything about Ground 4.

31. My conclusion is that the UT was correct to quash the decisions of the FTT, but that its interpretation of the nature of the CICA's power to reopen a claim cannot be upheld.

Outcome

32. The question therefore arises as to whether the UT was right to remit the matter to the FTT. In these circumstances, this court has two options. We could uphold the UT's order and remit to the FTT to hear CJ's appeal on the basis of correct principle. Or we could decide the matter ourselves, a course that could only properly be taken if there was only one possible outcome.

33. In this regard, it is necessary to give a brief summary of the arguments that CJ made to the CICA when it was conducting its review and to the FTT in support of his appeal and in reply to its strikeout warnings. As already recorded, he said that he had made no previous claims for compensation and that he had no criminal convictions. When his criminal convictions were discovered, he first cast doubt upon whether they related to him and then protested that his most serious conviction was a miscarriage of justice. He referred extensively to the consequences of the assault for his personal life and his mental health and also to difficulties that he had experienced with his legal representation.

34. In favour of remitting the matter to the FTT is the undeniable fact that it struck out CJ's appeal on a legally incorrect basis. However, there can be no purpose in doing that if the tribunal, properly directing itself as to the powers of the CICA under paragraph 56, would be bound to dismiss the appeal in any event.

35. My conclusion is that in the light of (i) CJ's criminal record, (ii) his lack of frankness about that and about his previous applications, and (iii) the nature of the medical evidence, any tribunal would be bound to dismiss the appeal, both on the basis of the

character and disclosure provisions in paragraph 13 and on the basis of the lack of any sufficient evidence of medical change. It follows that it would be bound to conclude that no injustice would arise if the original decision was to stand. There is accordingly no purpose in this grossly overdue matter being remitted for further consideration.

36. I would therefore allow this appeal and set aside the order of the UT, so restoring the strikeout order of the FTT. The effect of that order is to preserve the decision of the reviewing officer dated 18 July 2012 by which CJ's application for the reopening of his 1999 application was refused. That decision remains in effect and these proceedings are now at an end.

Lord Justice Hickinbottom:

37. I agree that the appeal should be allowed for the reasons given by my Lord, Peter Jackson LJ; and to the disposal he proposes.

Lord Justice Patten:

38. I also agree.