THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 81

[2014 No. 887]

[2013 No. 275]

The President
Peart J.
Hogan J.

ARTICLE 64 TRANSFER

IN THE MATTER OF THE HEPATITIS C COMPENSATION TRIBUNAL ACTS 1997 TO 2006

AND IN THE MATTER OF AN APPEAL PURSUANT TO THE PROVISIONS OF SECTION 5(19)

BETWEEN

P.B.

APPELLANT

AND

THE MINISTER FOR HEALTH

RESPONDENT

EX TEMPORE JUDGMENT of the President delivered on 23rd January 2018

1. In normal circumstances in a case of this kind, the court would prefer to take time to deliver a written judgment. These are not, however, normal circumstances.

2. The first point is that we have a limited time because of personnel changes that will happen by dint of retirement which is the situation that applies in my case. That is the first reason. Therefore, we do not have a huge amount of time available to us to explore all the various authorities. The second reason is that this is an important case and the appellant has been waiting a very long time pursuing his application for compensation under the statutory scheme. The court is very conscious that we do not want to delay any longer. To take any uncertainty out of the matter, the court is allowing the appeal and finding in favour of the appellant so that he will be able to make his claim for compensation under the scheme and that is our decision.

3. Let us go back a little. First of all, because this is an *ex tempore* judgment, I am going to make it as short as I reasonably can.

4. This is an appeal with leave from a judgment of the High Court (Irvine J.) dated 31st May 2013. Irvine J. explains in the introduction to her judgment that it was an application pursuant to s. 4(15) of the Act of 1997. The matter came before the High Court by way of an appeal against a decision of the Tribunal dated 24th May 2012, which refused such relief. Reference should be made for further details of the finding, decision and rationale of the Tribunal, so far as it is relevant, to the Tribunal decision of the stated date. Reference may also be made for the consideration given by the High Court to the judgment of Irvine J. which sets out the background circumstances; the law as the judge understands and the decision. Except where necessary, I am not going to refer to the findings made by Irvine J. which are helpfully set out at para. 31 of her judgment.

5. Let me set the context of the case by reference to the following provisions of the Act. We have two subsections of s. 4 to deal with, subsection 14 says, so far as relevant:

> "A claimant may only make an application to the Tribunal within the period of three years of the date upon which she or he first became aware of the fact of the diagnosis."

In this case, having being diagnosed positive for Hepatitis C.

6. There is no real issue about the dates in this case. The appellant was out of time when he made his application; he was out of time by some five and a half months. The issue in the case concerned the application of subsection (15) of s. 4 and that subsection reads:

> "The Tribunal may, at its discretion and where it considers there are exceptional circumstances, extend the periods referred to in subsection (14)."

In this case, the Tribunal had a discretion if it was satisfied that there were exceptional circumstances whereby it could extend the time.

7. Irvine J. found that, having referred to specific authorities, in certain circumstances:

> "The mental or physical state of health of an appellant may be such as to amount to exceptional circumstances within the meaning of s. 4(15)."

The judge found that the appellant had indeed had significant mental health issues in the relevant time during the 3-year period in which he could have made his application. However, the judge found that those medical reasons, significant though they were, did not account for the appellant's failure to make his application in time and therefore that they could not be exceptional circumstances.

8. The judge did record that the appellant had told the court that he did not engage with newspapers, television or politics regarding current affairs; he confined himself to watching soaps or whatever. I pause to say that that is a matter entirely for the appellant; it does not mean that he is to be criticised, nor necessarily praised, although there may be some people nowadays who might find that an entirely desirable way to proceed, but that is for him to decide; he may choose to do so or not. The question is, however, that the judge was satisfied that this was the reason for it.

9. But the judge clearly, implicitly rejected as a reason or an exceptional circumstance the fact that the appellant had these social features, somewhat reclusive – I appreciate that he held down a job for a considerable period and for that he is to be commended – but at the same time, there were certain features of his life that suggested a degree of social reclusiveness, of a standing away from society, of not getting involved, not watching television or talking to people about things in general.

10. Irvine J. felt that she was obliged, and I think it reasonable, as Dr. Craven SC for the appellant, submitted that the tone of Irvine J's judgment is broadly sympathetic to the appellant's circumstances, but she felt constrained, in the circumstances, to find that his failure, ascribed to this social feature rather than to the medical element, by the legal authorities to hold that they were not exceptional circumstances. Two possibilities arise: one, whether the social circumstances were exceptional circumstances or could have been so considered or, two, whether the admitted medical elements in combination with the social reclusiveness were sufficient to constitute exceptional circumstances.

11. By an order of 20th June 2013, Irvine J. gave leave to the appellant to bring the application to this Court under the provisions of s. 5(19) and this was on two certified questions. This was originally to the Supreme Court and then under Article 64 of the Constitution, referred back to this Court. The two questions are these:

> - Does lack of knowledge or ignorance of the existence of the Hepatitis C Compensation Tribunal Scheme *per se* amount to exceptional circumstances within the meaning of the Hepatitis C Compensation Tribunal Act 1997, s. 4(15) as amended by the Hepatitis C Compensation Tribunal Amendment Act 2002, s. 4(1)?
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> - Is the appellant's lack of knowledge or ignorance of the existence of the Hepatitis C Compensation per se sufficient for the Hepatitis C and HIV Compensation Tribunal and/or the High Court to exercise its discretion pursuant to the provisions of the Hepatitis C Compensation Tribunal Act?

12. Counsel are agreed that the first question cannot really stand on its own because the answer is no. However, Counsel is satisfied that that is not really the question. The first question is a general one; the second question is more specific to the appellant's circumstances. But the real question is whether a lack of knowledge of the existence of the scheme can be excluded from being exceptional circumstances. It seems to me, to that question the answer is no. In fairness to Mr. Callanan SC for the respondent, he does not make that case and acknowledges that the former President of the High Court, Kearns P., held that there are circumstances or could be a case in which a lack of knowledge could be considered exceptional circumstances. I think the answer to the question: can you exclude lack of knowledge as being relevant? is clearly, No.

13. The second question focuses on the appellant's own circumstances. We have to look at that in light of the authorities. This is a situation in which there are changes, the law has been developed over a number of cases – we have the decision of this Court in McE and I adopt the rationale as expressed in this Court's judgment which concerned the Residential Institutions Redress Board which had a similar provision. In the course of the case, I discussed with Counsel the suggestion that the criterion of exceptional circumstances "postulates a criterion which is both vague and subjective". That decision, and also the comment that like beauty, exceptional circumstances lies in the eye of the beholder, was approved by the full court of the Australian Federal Court in a subsequent decision of *Hicks v. Aboriginal & Torres Strait Islander Commission* [2001].

14. Again, as discussed with Counsel during the case, in a position advanced tentatively for comment by Peart J. was to draw attention to the levels of threshold that an appellant has to meet and he drew attention to a scale going from an absolute limit of time which one had in the old Statute of Limitations which had the merit of certainty, but the demerit of injustice in certain circumstances. The next one was the date of knowledge provision in the 1991 Statute of Limitations Amendment Act. Again, a series of specific pieces of information that have to be had and then a provision of this kind which is at a level of generality and vagueness that is to confer a very wide discretion.

15. I am aware that in this case and in the *McE* case, Hogan J. who delivered the judgment of the court, referred to a previous analysis of his, making that very point and I entirely adopt those observations on the necessary generosity of meaning that has to be ascribed to something like exceptional circumstances. I also take the point that the draftsman is not coming up with this phrase in a vacuum, a point made by Dr. Craven which is entirely correct. This has not a specific meaning, but a set of implications as to the capacity of the body deciding it to have a wide discretion. It is not just that the body has a wide discretion; it is that the factual matrix to which this statutory criterion is to be applied is extremely broad. Nobody can say just what exceptional circumstances amount to, in the sense of saying what they do not amount to. One has to say, it all depends. Another reason for delivering this judgment *ex tempore* is the observation that all of these cases about knowledge and exceptional circumstances are extremely fact-specific. This is a feature that cannot be ignored.

16. It seems to me that a reasonable approach and I do not say that it is the only approach, based on a legitimate, proper statutory interpretation is to proceed in the following manner. Why did the appellant not bring his claim? We are not talking about s. 4(15) unless the appellant has not brought his claim in time.

17. In this case, he did not know about the scheme, there is not doubt about that, that is a fact as found by the High Court and the Tribunal because when he did know about it, he brought it expeditiously as Irvine J. tellingly remarked. Why did the appellant not know about the scheme? We are talking here about the reasons why the person did not know. Does the person's not knowing about the scheme furnish exceptional circumstances? I do not think this is the right question. The right question is do the factual reasons why the person did not know about the scheme furnish exceptional circumstances? We are talking about facts. Do the facts that explain why the appellant did not know about the scheme constitute exceptional circumstances?

18. In this case, we have the circumstances as identified by Irvine J. The appellant's circumstances are undoubtedly unusual – one would think, manifestly exceptional – somewhat reclusive, withdrawal behaviour, setting himself away from taking any interest in affairs. That would, undoubtedly, appear to me to constitute exceptional circumstances. But if and insofar as they were considered to be wanting in that respect, I think that the combination of the medical features that had been certified and that the learned High Court judge took into account but did not regard as explaining the appellant's lack of knowledge could and did amount to exceptional circumstances.

19. This is redress legislation, a point emphasised by the Supreme Court in the judgment of McKechnie J, but I do not think that one needs to go beyond interpretation of the legislation. The scheme which we are addressing here is a mode of providing compensation to persons injured by a great national disaster that was being put right. So, it is reasonable to say that if there were to be a choice between a narrow and a broad interpretation, then the latter would be the appropriate one. I do not find it necessary to embark on any special construction as opposed to interpretation of the meaning of the provision.

20. So, I come to answer the questions as posed in the appeal. Bearing in mind the perfectly reasonable approach adopted by Counsel, which I endorse and commend which is to regard the first question as necessarily requiring recasting, I say that lack of knowledge or ignorance of the existence of the scheme cannot be excluded as being relevant. When I come to the second question, it seems to me that the appellant's lack of knowledge or ignorance of the existence of the Hepatitis Scheme is, in all the relevant circumstances, sufficient to constitute exceptional circumstances.

21. Accordingly, I would allow the appeal and allow the appellant to proceed to make his application to the Tribunal.

Peart J.
22. I would also allow the appeal and I agree with the *ex tempore* remarks of the President.

23. Having regard to the extensive breadth of the discretion which is evident in s. 4(15), I would recast the first question in the manner in which it was recast during discussion with Counsel. I have said in my notes is lack of knowledge or ignorance of the scheme incapable of amounting to exceptional circumstances? I would answer that in the negative.

24. In relation to the second question, in the precise terms in which it is cast, perhaps the words "*per se*" are a distraction, but still I think the answer is yes. In my view, it needs to be explained that the reason why the answer is yes is for the reasons stated by the President: that the facts do, objectively speaking, explain and excuse the appellant's lack of knowledge of the scheme and in my view constitute exceptional circumstances, and that his lack of knowledge of the scheme is the only reason that he did not lodge his application with the prescribed time.

25. I would allow the appeal.

Hogan J.
26. I would likewise allow the appeal. I agree with comments that have been made by the President and by Peart J.

27. For my part, I would follow my own judgment in *J v. McE* for this Court and my analysis of the substantive issue in the judgment in *A.G.*, I consider that what is conferred by the subsection is a largely freestanding discretion and that its exercise has to be formed by what McKechnie J. described in the Supreme Court decision given in December in C.M. as legislation to redress a social wrong and must accordingly be construed with a significant degree of liberality. Adopting what Lord Macmillan said in *Donoghue v. Stevenson*, I think that the category of exceptional circumstances are never closed, but in this case, I think that the facts are indistinguishable in principle from *J. v. McE* and from *A.G.*

28. For those reasons, I consider that the appeal should be allowed and the appellant should be allowed to proceed to maintain his claim before the Tribunal.