IN THE UPPER TRIBUNAL **Case No** JR/3711/2016
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The application for judicial review is allowed. I make a quashing order under section 15 of the Tribunals, Courts and Enforcement Act 2007 in respect of the First-tier Tribunal's decision and remit the matter to a differently constituted panel of the First-tier Tribunal. I direct that the file be placed before a duly authorised judge of the First-tier Tribunal to consider giving case management directions in connection with the rehearing.

REASONS FOR DECISION

Introduction

1. This case concerns a review decision dated 21 November 2012 by one of the interested party's ("CICA's") claims officers that an award to the applicant should be withheld under para 13(1)(a) of the Criminal Injuries Compensation Scheme 2008 ("the Scheme"). (Originally CICA had, additionally, not accepted that the applicant was the victim of an assault, but that objection to an award has long since been dropped.)

2. The index incident occurred as long ago as June 2009. The applicant was shouted at and shoved by a fellow worker. She suffered bruising. It forms part of her case that the consequences of the incident were not limited to that and I turn to that below.

The proceedings to date

3. The applicant's appeal to the First-tier Tribunal ("FtT") took a convoluted and protracted course. A hearing on 9 December 2013 resulted in CICA's decision being upheld. The decision was subsequently set aside on the application of the applicant and the case re-listed. On 1 October 2014 the appeal was again dismissed, the FtT considering that it was not appropriate to make any award because of para 13(1)(a). On 28 April 2016 Upper Tribunal Judge Levenson granted judicial review and remitted the case to the FtT. A fresh hearing took place on 28 September 2016 and the appeal was again dismissed in reliance on para 13(1)(a).

4. No less convoluted has been the subsequent progress of the case in the Upper Tribunal. On a fresh application for judicial review lodged (with an extension of time) on 6 February 2017 and containing 28 pages of grounds, I gave permission, limited to one ground only (discussed further below), on 15 February 2017. A submission on that ground was received from CICA on 14 March 2017.

5. The applicant is said to be neurodiverse and to have impaired vision and specific learning difficulties (this is to be understood as background rather than as formal findings). She sought, as was her right, to renew her application on the numerous grounds on which I had refused permission to an oral hearing, which was eventually held by telephone, with numerous accommodations to assist the applicant, by Upper Tribunal Judge Markus QC. On 2 November 2017 Judge Markus refused permission on all outstanding grounds and on 10 April 2018, following another extension of time, refused a 39 page application for her refusal to be set aside. To cut a long story short, it now appears that it became the applicant's wish both to seek permission to appeal to the Court of Appeal against Judge Markus's refusal of permission and to progress the judicial review on the one ground on which she had been given permission. There were numerous apparent misunderstandings on the part of the applicant along the way and considerable further time elapsed while documents were put on to audio CD in response to suggestions that this was required as a "reasonable adjustment". Various extensions of time and strike-out warnings were given, but the applicant did, in the end, manage to submit both her grounds for permission to appeal to the Court of Appeal and her reply to CICA's submission of 14 March 2017. It falls to me to deal only with the latter of those and in doing so I add my apologies to the parties that to do so has taken me considerably longer than I would have wished. No party has asked for an oral hearing and I am satisfied that I can properly decide the case without one.

6. Para 13(1)(a) of the Scheme provides:

> "A claims officer may withhold or reduce an award where he or she considers that:
>
> (a) the applicant failed to take, without delay, all reasonable steps to inform the police, or other body or person considered by the Authority to be appropriate for the purpose, of the circumstances giving rise to the injury;…"

7. In para 7 of its statement of reasons ("Reasons"), the FtT indicated that:

> "The particular issue for the Panel to decide was:- Did the appellant take, without delay, all reasonable steps to inform the police, or other person or body considered appropriate by the Authority to be appropriate for the purpose, of the circumstances giving rise to the injury" *(sic).*

8. The FtT found as fact, among other things, that the applicant reported the index incident to her immediate supervisor within an hour; that "the report was of an employment-related incident, not a crime"; the incident was reported to the police on 12 December 2010, probably on legal advice taken in respect of a possible dismissal; and that the police were unable to contact the applicant and their investigation was closed on 8 July 2011.

9. The FtT considered that

> "apart from the [applicant's] bare assertion, there was no evidence that [she] was suffering from a disabling mental illness or symptoms which would have prevented her from reporting the incident at this time and, to the contrary, (a) she was able to attend A & E later in the day and no mention was made of a psychiatric problem (b) she went into work the next day, (c) she discussed and planned a project to last into the next 6 months and [(d)] from the limited medical information available it appears that [she] did not seek psychiatric help until May 2010."

The FtT further concluded she had no reasonable ground to expect that her employer would report the incident to the police; and that she had realised by May 2010 that the incident had not been reported to the police but failed to provide the FtT with any satisfactory explanation as to why, despite that, the matter had not been reported until December 2010.

10. Turning to the adequacy or otherwise of a report to the applicant's employer rather than to the police, the FtT did not accept that reliance on her employer to report the assault satisfied the obligation imposed under para 13(1)(a). The employer was responsible for employment matters and relations between employees; it had no responsibility in relation to dealing with crimes, nor was there anything in the material before the FtT suggesting that the employer would accept responsibility for making a complaint to the police on behalf of its employee. The FtT noted CICA's guidelines as to when it would consider bodies other than the police to be appropriate, correctly noting that it was not bound by them, and indicating that it considered them good examples of exceptional circumstances when a report to the police was not to be expected. The purpose of requiring a report to the police was the prosecution and prevention of crime, reasons frustrated by failing, without good reason, to report the incident to the police for 18 months.

11. The FtT's decision notice included, in the usual way, summary reasons, which concluded with the words (emphasis added):

> "For all these reasons we consider that no award <u>or reduced award</u> should be made and refuse the appeal."

12. Returning to the Reasons, the FtT indicated that:

> "Our decision rests upon our conclusions that the report to the employer was not a report to an appropriate body and that the report to the police was not made without delay."

<u>The ground on which permission granted</u>

13. The ground on which I gave permission was:

> *"Illegality – not considering the size of a potential award when deciding to withhold compensation*
>
> Para 13 of the scheme creates a discretion. The case relied upon by the applicant [this was *R(RW) v FtT (CIC)* [2012] UKUT 280 (AAC), previously known as JR/2614/2011] does suggest that the size of an award should be considered "where that may be relevant to the question whether it should be withheld". The tribunal does not appear consciously to have applied itself to any exercise of a discretion, a fortiori by way of considering the possible quantum as part of that exercise. While I note the view of the previous tribunal, which had considered the point, effectively making assumptions on quantum in the applicant's favour but nonetheless still finding against her, its conclusions on this aspect were the subject of some adverse comment by Judge Levenson at para 17 of his decision."

14. One of the grounds in *RW* on which Upper Tribunal Judge Rowland granted permission for judicial review proceedings to be brought was whether

> "the Panel erred in not having regard to the likely amount of a full award when deciding whether it should be withheld in full or in part."

At [18] he commented that this ground

> "raised the question whether the practice of the Authority in always, or nearly always, considering questions arising under paragraph 13 of the Scheme as preliminary issues enabled adequate regard to be had to the principle of proportionality. I suggested that it was arguable that there are at least some cases where such questions should be dealt with at the same time as other questions, including assessment."

15. He continued:

> "24. It is to be inferred that the power under paragraph 13(a) to withhold or reduce an award where a crime has not been reported to the police or another relevant authority without delay exists so that the police or other authority has the opportunity to carry out an investigation. That, in turn, serves two purposes from the point of view of the Authority. One is to enable criminals to be brought to justice. In this regard, paragraph 13(a), coupled with paragraph 13(b), implies that a person who seeks compensation from the State in respect of a criminal injury ought, as a quid pro quo, to assist the State to prosecute the offender insofar as that may be appropriate. The second purpose of paragraph 13(a) is to enable an award to be withheld where a claimant's failure to report it immediately has meant that there has not been a proper opportunity to investigate whether the incident in fact occurred or, indeed, whether the claimant ever suffered any injury. The Authority's ability to investigate those issues some months later may obviously be compromised if there has not been any contemporaneous investigation.
>
> 25. …
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> 26. Paragraph 13 confers a broad discretion and the Authority and the First-tier Tribunal are required to consider all material circumstances, having regard to the purpose of the paragraph. When considering a failure to report an incident promptly to the police or other authority, it seems to me that the reason for the claimant not

having done so may be highly relevant, as may the identified consequence. If the claimant intended to reduce the likelihood of the offender being prosecuted, or was reckless as to whether that would be the consequence, withholding the award altogether or making a substantial reduction may be justified, whereas if the claimant merely made a misjudgement, a lesser reduction, or no reduction at all, may be appropriate. Similarly, delay that did not actually prevent the offender being prosecuted may result in a lesser reduction, or no reduction, whereas similar delay that did prevent an effective investigation might be viewed differently.

27. Moreover, in considering whether the claimant took "all reasonable steps" to inform the police, regard must be had to the position as it would have appeared to him at the time. …

28. …

29. In any event, if the Panel did regard the claimant's motivation and the accuracy of his understanding to be irrelevant, it erred in law and it erred in law anyway in not recording sufficient findings in the light of the way in which the claimant had put his case. It simply is not clear to the claimant or to me to what extent the Panel accepted his evidence or the accuracy of his assessment as to the effect of reporting the incident.

30. It also erred in not giving any indication as to why its findings led to the conclusion that no award should be made. In particular, it seems to me that it was necessary for the Panel to have regard to the size of the award that was to be withheld and I do not accept the Authority's submission to the contrary.

31. The Authority, in response to my observations when granting permission, submits:

"3. It is the usual practice of claims officers within the Authority to consider paragraph 13 at the earliest possible stage. Where a claims officer makes the decision that an award is to be withheld based on paragraph 13 the claims officer would not proceed to consider what quantum would have been had the award not been withheld.

4. It is considered an inappropriate use of resource within the Authority to calculate quantum in a case where the Applicant is not eligible for an award.

5. Claims officers do, however, give consideration to each case on its own merits and may consider quantum at the same time as paragraph 13 of the Scheme should this be appropriate in the individual circumstances of the case.

6. Where a claims officer makes a decision that an award should be reduced based on paragraph 13 of the Scheme this decision is taken without having regard to quantum which may be assessed before or after a decision to reduce an award.

7. The decision to reduce or withhold an award under Paragraph 13 of the Scheme is solely based on the action/inaction of the Applicant and it is not appropriate to consider the amount of the award the Applicant would otherwise have received. This is to suggest, for example, that an applicant who has sufficient unspent convictions to justify withholding an award of compensation may not have his entire award withheld as he otherwise would have been entitled to £500,000, whereas the applicant who would have been entitled to £1,000 would have his entire award withheld."

32. I do not consider that the Authority's approach is appropriate in all cases. Different considerations apply to different cases within paragraph 13 or even to different cases within each subparagraph of that paragraph. Withholding £500,000 is wholly different from withholding £1,000 and what may justify withholding a small

award may justify only a reduction in a larger one. The penalty, in terms of the loss of an award, must be proportionate to what the Scheme regards as misconduct, having regard to the purpose of paragraph 13.

33. I accept that there are some cases which are really all-or-nothing cases. This may be true of cases with paragraph 13(e) and also cases under paragraph 13(a), (b) or (c) where there has been obstruction of, or non-co-operation with, the police or the Authority, deliberately designed to frustrate any adequate investigation of an incident, or cases under paragraph 13(d) where the claimant has a history of involvement with serious crime.

34. There are other cases, particularly those arising under paragraph 13(d) where misconduct of the claimant has placed the claimant at a greater risk of being a victim of crime or even directly contributed to the particular injury in question where, although the conduct is not sufficiently serious to justify withholding an award, it is justifiable to reduce at least larger awards by a fixed proportion, irrespective of the precise size of the award, by analogy with the approach take by the courts to contributory negligence.

35. But there is nothing in the Scheme to suggest that a reduction of an award must always be expressed as a percentage of an award and must, in given circumstances, be the same percentage whatever the size of the award. There is no reason why, in some cases, the reduction should not be expressed as a sum of money or even, if the First-tier Tribunal is not sure of the amount of the award that would otherwise be made, as "£x or y per cent, whichever is the greater". Nor is there any reason in principle why misconduct should not be regarded as sufficiently serious to justify the withholding of a small award but to justify a mere reduction in a large award. If a £13,500 award would be reduced to £6,750, why should a £4,400 award not be withheld altogether? Equally, and more pertinently, why should a view that a £4,400 award should be withheld altogether necessarily lead to the conclusion that a £13,500 award should also be withheld rather than merely being reduced?

36. This seems to me to be particularly relevant in cases under paragraph 13(d) where a claimant has committed minor offences that are not related to the incident that has caused his or her injury. Indeed, it might also be appropriate where behaviour has been a contributory factor in relation to minor injuries, since minor contributions to events might be thought to justify the complete withholding of small awards. In any event, regard should have been had to the size of a potential award in present case, which arises under paragraph 13(a) but in which, if the claimant's evidence is accepted but it is considered that the failure to report the incident immediately was nonetheless a significant failing, the failing might be attributed to misjudgement rather than a lack of civic responsibility.

37. I accept that the Authority should not be required unnecessarily to consider quantum, but it should consider the size of a potential award where that may be relevant to the question whether it should be withheld. I do not consider that this should be an undue burden on the Authority. In the first instance, the size of the likely award need be ascertained only with sufficient precision to enable it properly to be decided whether or not it should be withheld in its entirely. A decision to withhold an award can be made in the light of a "ballpark" figure. There are, as I have said, cases where the Authority may properly consider that an award should be withheld whatever the amount. There are many other cases, particularly where there is no claim in respect of lost earning capacity, where it is obvious that the claimed injury will result in an award that will be below a level at which the Authority can properly decide that withholding the whole award will be appropriate, even if a higher award would merely be reduced. There are other cases, perhaps like the present case, where it may be unclear initially what tariff award would be appropriate but where the answer is likely to become much clearer as soon as any medical evidence is obtained, even if

> some further enquiries would be necessary to enable the precise figure to be determined. It may well be that the Authority quite reasonably made its initial decision in this case without obtaining any further evidence but, following the application for review, it could have obtained medical evidence at the same time as it sought further information from the police. There was, after all, a year's delay at that stage and doing these things sequentially as seems now generally to be done, may be less efficient than doing them at the same time, which would involve a claims officer having to look at, and digest the contents of, the claimant's file less often."

CICA's submission

16. The submission on behalf of CICA sets out paras 32 to 37 of *RW*. It does not seek to argue that *RW* was wrongly decided but invites me to read the decision in the light of subsequent decisions concerning the approach to be adopted to a judicial review concerning the written decision of the FtT. CICA seek to rely on the italicised words below from Lord Hope of Craighead's judgment (with which the other Justices agreed) in *Jones (by Caldwell) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, but I prefer to set out here a rather longer passage to provide context.

> "25. The Court of Appeal appears to have been unwilling to accept that the question that the FTT was asking itself was whether it could be satisfied that a section 20 offence had been committed rather than whether Mr Hughes' actions amounted to a crime of violence. It was also unduly critical of the FTT's reasoning, attributing to it things that it did not, in so many words, actually say. *It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.* It is true that the FTT said in para 38 that it accepted the evidence of PC Sexton. But the parts of his evidence referred to were elicited from him in cross-examination by counsel who was then appearing for Mr Jones. And PC Sexton's comment that in his experience it was very unusual for a suicide such as this to cause such extensive personal injuries and damage to vehicles can hardly be said to have been outside his expertise.
>
> 26. There are signs too that the Court of Appeal allowed itself to be unduly influenced by its own view that it was highly improbable that anyone who runs into the path of traffic on a busy motorway will not at the least foresee the possibility of an accident and of consequential harm being caused to other road users. The question whether Mr Hughes did actually foresee this possibility was for the FTT to answer, not the Court of Appeal. Taking its judgment overall, it seems to me that the Court of Appeal failed to identify a flaw in the reasoning of the FTT which could be said to amount to an error of law. The FTT appreciated that the question it had to consider first was whether an offence under section 20 had been committed. It identified correctly the tests that had to be applied and reached the conclusion that it was not satisfied that Mr Hughes did commit that offence. It did not go on to consider whether he had committed a crime of violence within the meaning of the Scheme because, having concluded that no crime was committed, it did not have to."

17. CICA also rely on *Hutton v Criminal Injuries Compensation Authority* [2016] EWCA Civ 1305, where Gross LJ, giving the judgment of the Court, drew together the relevant principles in the following terms:

> "i) First, this Court should exercise restraint and proceed with caution before interfering with decisions of specialist tribunals. Not only do such tribunals have the expertise which the "ordinary" courts may not have but when a specialised statutory

> scheme has been entrusted by Parliament to tribunals, the Court should not venture too readily into their field.
>
> ii) Secondly, if a tribunal decision is clearly based on an error of law, then it must be corrected. This Court should not, however, subject such decisions to inappropriate textual analysis so as to discern an error of law when, on a fair reading of the decision as a whole, none existed. It is probable, as Baroness Hale said, that in understanding and applying the law within their area of expertise, specialist tribunals will have got it right. Moreover, the mere fact that an appellate tribunal or a court would have reached a different conclusion, does not constitute a ground for review or for allowing an appeal.
>
> iii) Thirdly, it is of the first importance to identify the tribunal of fact, to keep in mind that it and only it will have heard the evidence and to respect its decisions. When determining whether a question was one of "fact" or "law", this Court should have regard to context, as I would respectfully express it ("pragmatism", "expediency" or "policy", *per Jones*), so as to ensure both that decisions of tribunals of fact are given proper weight and to provide scope for specialist appellate tribunals to shape the development of law and practice in their field.
>
> iv) Fourthly, it is important to note that these authorities not only address the relationship between the courts and specialist appellate tribunals *but also* between specialist first-tier tribunals and appellate tribunals."

18. CICA accept that the Reasons make no express reference to the possibility of a reduced award. However, they submit that there are two indicators that the FtT did, in fact, have the discretionary nature of para 13 (1) in mind. The first is that it is evident that the Panel had before it, and had read, Judge Levenson's decision on the previous judicial review in this matter. That decision refers to the earlier FtT (whose decision was set aside) having considered whether it could make a reduced award but concluded that the delay had made an investigation extremely difficult and a conviction impossible. The second is that the decision notice concluded, as noted at [11], with the indication that the FtT had concluded that "no award or reduced award should be made" (emphasis added).

19. As to why the discretion was exercised as (on CICA's submission) it was, CICA rely on the FtT's finding that there was no evidence apart from her own bare assertion that the applicant had developed a disabling mental condition or symptoms which would have prevented her from reporting the incident at the time. That it, is submitted, is a conclusion of fact with which, applying *Jones*, the Upper Tribunal should be slow to interfere.

20. From that it follows, submit CICA, that there was no evidence to suggest that the applicant would have qualified for an award even if she had notified the police timeously. That being so, it is no error of law on the part of the FtT to have failed to consider the possibility of a reduction in award which would have been nil in the first place.

21. Finally, CICA submit that if, contrary to their primary position, the FtT failed consciously to exercise its discretion, it is highly likely that the outcome for the applicant would not have been substantially different if the failure had not occurred. This addresses section 31(2A) and (2B) of the Senior Courts

Act 1981 (which applies to judicial review cases before the Upper Tribunal which were lodged on or after 8 August 2016: see Tribunals, Courts and Enforcement Act 2007, s.15(5A) and SI 2016/717). The 1981 Act provides:

> "(2A) The High Court—
> (a) must refuse to grant relief on an application for judicial review, and
> (b) may not make an award under subsection (4) on such an application,
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

22. Thus, it follows by necessary implication from their submission, the Upper Tribunal would be compelled by s.31(2A) to refuse to grant relief in those circumstances and (the submission expressly argues) there are no "reasons of exceptional public interest" to depart from those requirements.

The applicant's submission

23. The applicant's submission, while extremely long, is clear and careful. In summarising it, as I have CICA's submission also, I cannot include every last detail. I aim however to do justice to the points it makes.

24. Her submission is predicated on there being evidence that she did in fact sustain psychiatric injuries in consequence of the assault. She refers to evidence (all of which I have considered and the key parts of which are noted below) and to a finding of fact made by the FtT in relation to her claim for industrial injuries disablement benefit that a loss of faculty, amounting to 100% disablement for that purpose, resulted from the index incident.

25. Her submission further notes, as a preliminary to contrasting them with the FtT's decision that is under challenge in these proceedings, the terms of previous decisions of the FtT, both of which considered expressly whether as an alternative to withholding any award in its entirety, any award should be reduced.

26. She relies on what is said in *RW* from which she draws that in determining the proportionality of a reduction or withholding of a full award under paragraph 13(1)(a), regard should be had to three factors, considered below. She submits that the FtT's failure to have regard to any of them shows that it did indeed treat the case on an "all or nothing" basis, failing to consider the

possibility of withholding part of an award in the exercise of the discretion conferred upon it.

27. The first such factor is whether the delay could have seriously hampered any police investigation. For this she relies on the opening words of para 24 of *RW*. She submits that the evidence was collected immediately by her employer for its purposes and was and remains available. Further there was a contemporaneous investigation and CICA's ability to investigate could not be said to be compromised given that the FtT in the exercise both of its industrial injuries and its criminal injuries jurisdiction had managed to make findings.

28. The second such factor is what were the reasons for delay and in particular whether the delay resulted from a misjudgement rather than a lack of civic responsibility (this last point is derived from para 36 of *RW*). The applicant submits that the FtT failed to consider the medical evidence (which she identifies) which demonstrated both pre-existing neurological disorders and psychiatric injuries directly attributed to the index incident. Without considering such evidence, the FtT could not form a view as to whether the applicant understood her civic duty but, being able to do so, failed to fulfil it; whether she was capable of independently making a crime report and failed to do so through recklessness or non-cooperation; and whether, with her disabilities, she simply made a misjudgement after what she described as a "traumatic violent incident". Instead of considering the medical evidence, the FtT is criticised for having relied on the management role the applicant formerly undertook and on her academic qualifications (which include a doctorate).

29. The third factor is that in order to exercise the discretion conferred by para 13 of the Scheme, the FtT needed to determine the true extent of the applicant's injuries. She notes that the FtT in 2014 observed that

> "If the appellant were able to establish that all of her mental problems were because of the incident, which had subsequently caused loss of her employment, then any award would be substantial."

The FtT could not exercise its discretion at all without regard to the medical evidence and to the finding of the FtT in her industrial injuries benefit case and certainly was not entitled to come to the conclusion that it was not bound to consider quantum after finding the applicant to be the victim of a "minor assault". The absence of proper consideration of the likely quantum – even by way of the "ball-park figure" Judge Rowland indicated in *RW* would be sufficient – indicates that the FtT did not exercise its discretion validly or at all. Because of the respects already identified in which the FtT failed properly to apply *RW*, all of which are absent from the FtT's Reasons, their decision is not, contrary to CICA's submission, saved by the one-line reference at the end of their decision notice.

The medical (etc.) evidence

30. In considering whether the FtT did exercise a discretion, it is necessary to look at whether it did what would have been required of it as part of a valid exercise of discretion, which in turn, necessitates looking, to a limited extent, at the evidence identified by the Applicant. The issues are whether the FtT as the tribunal of fact was entitled to conclude that

> "there was no evidence that the applicant was suffering from a disabling mental illness or symptoms which would have prevented her from reporting the incident at [the] time"

and whether it was entitled to categorise it as a "minor assault" so that the compensation would have been nil in any event and any failure to exercise discretion could have made no difference.

31. On 24 May 2010 a telephone counsellor from the applicant's employer's Employee Assistance Programme wrote to the applicant's GP indicating that when a screening tool had been used, the answers indicated that the applicant was

> "at risk of having PTSD according to the DSM-IV and require[d] more detailed assessment".

The referral to the GP was, accordingly, being made so that such an assessment could be carried out.

32. The applicant was seen by Ms Delphine Foggo, a Chartered Counselling Psychologist, on 20 October 2010. Ms Foggo, in a letter dated 12 November 2011 at A46-47, indicated that it was her professional opinion

> "that at the time of the assessment [the applicant] suffered from post-traumatic stress disorder (PTSD) as a result of this industrial accident"

and went on to explain why. The symptoms noted as exhibited by the applicant included "significant symptoms of intrusiveness, hyperarousal and avoidance". Ms Foggo's conclusion (with an obvious typo corrected) was that

> "In summary, the assault on 16/6/09 caused [the applicant] to experience PTSD and thus led to a significant loss of faculty.

33. At A15 is a letter from the applicant's GP indicating (among other things) that

> "Statement of fitness for work has her well enough for home working from August 2010".

34. At A42-A45 is a medical report dated 28 December 2011 prepared by Dr Sanjeevan Somasunderam, Consultant Psychiatrist for the relevant Mood and

Personality Disorder Team, setting out his views on the effects of PTSD upon the applicant. The report was based on having met the applicant once and on her clinical records. He noted that the applicant had first come to the attention of the Community Mental Health Team in May 2001 following a crisis[1], when she had been diagnosed with Post Traumatic Stress Disorder (F43.1) and Mixed Anxiety and Depression (F41.2). Dr Somasunderam commented (emphasis added) that

> "her condition is substantial and has been present since June 2009 following an assault" and that her "core symptoms" included "avoidance of situations, places and talking about what reminds her of the original attack."

35. The Notes to the Tariff under the 2008 Scheme suggest that the soft tissue injures sustained by the applicant would not themselves have led to an award. The category "Mental illness and temporary mental anxiety", however, can produce awards from £1,000 for "Disabling but temporary mental anxiety lasting more than 6 weeks, medically verified" through a range from £2,500 to £13,500 depending on the condition's duration for "Disabling mental illness, confirmed by psychiatric diagnosis". Awards for "permanent mental illness, confirmed by psychiatric prognosis" are at to £19,000 or £27,000 (depending on whether the condition is to be viewed as "moderately disabling" or "seriously disabling"). "Psychiatric diagnosis/prognosis" according to the Notes requires the diagnosis/prognosis to have been made by a psychiatrist or clinical psychologist. While that may call into question whether Ms Foggo, as a chartered counselling psychologist, would be able to give a diagnosis sufficient for the purposes of the Scheme, it seems likely that the evidence of Dr Somasunderam would suffice. I am not intending to express a concluded view on this issue – merely to indicate that the applicant's claim for an award based on mental illness would not be destined to fail at the outset because of the source of the diagnosis.

36. As well as any injury itself, there would also be the potential issue of loss of earnings (see e.g. T20).

Workplace correspondence

37. There are emails on file, dated 17 and 18 June 2009, from two possible witnesses to the index incident to the applicant's line manager, Mr Smith, who had evidently been asked to state what, if anything, they had seen and heard. The likelihood, supported by the following emails, is that Mr Smith was acting after the applicant had raised the matter with him. On 22 June 2009 the applicant emailed him:

> "Hope you had a good weekend!

[1] Other parts of the evidence indicate that the applicant had taken an overdose in April 2011

> Having considered the events of last week, I would like the incident from Tuesday formally reviewed. I'm concerned about being in the same office as [the other person involved in the incident] after what happened. I'm not the only one with this view and would like to work from home until this matter is satisfactorily resolved. I therefore prioritised my statement and notes of meetings last Friday."

She attached a typed statement about the incident, but also several other documents relating to the ordinary work of the organisation where she worked, including material relating to the 6 month project to which the FtT had referred.

38. On 3 and 10 August 2009 the applicant emailed Mr Smith chasing up the lack of response to what she viewed as her "grievance".

39. The ramifications continued at length, but further details are not needed here.

Conclusions

40. I am required to apply the principles of *Jones* in reviewing the FtT's Reasons. However, those principles were stated in the context of reversing a decision of the Court of Appeal, which itself had reversed decisions of the FtT and the Upper Tribunal. As paras 25 and 26 of *Jones* (set out at [16]) indicate, it appears to have been the view of the Supreme Court that the Court of Appeal had criticised the FtT for asking the wrong question when it had not; attributed to the FtT things which the FtT had not actually said; substituted its own view of the weight to be given to the evidence of a witness for that of the FtT; and possibly substituted its own view of the likely consequences of an action for those of the tribunal of fact. Given the view the Supreme Court took that there was a considerable level of what it evidently regarded as inappropriate intervention, it is unsurprising that Lord Hope (with whom the other justices agreed) restated the need for restraint on the part of appellate courts, but the principle does not prevent an appellate court (or indeed the Upper Tribunal on judicial review) from intervening where a tribunal decision has been based on a clear error of law, as *Hutton* acknowledges.

41. In my view the FtT was entitled to take the view that an 18 month delay frustrated the purpose of the prosecution and prevention of crime. The applicant suggests that the material was still available. However, even leaving aside possible questions of limitation, the contemporaneous statements by the two work colleagues would be of little or no value in providing a criminal offence to the necessary standard (in prosecution proceedings, as opposed to a compensation claim) of "beyond reasonable doubt".

42. The submission that the delay arose not as a result of lack of civic responsibility on the applicant's part but because of her ill-health turns on whether the FtT was entitled to reach the conclusion it did which I have set

out in [9] above. The FtT's finding is a composite one – not that there was no evidence that she was suffering from a disabling mental illness per se, but no evidence that she was suffering from a disabling mental illness or symptoms which would have prevented her from reporting the incident at this time. The high point of the evidence in her favour is that of Dr Somasunderam, set out at [34] above, in that it states that the PTSD had been present since June 2009 and listed core symptoms which might discourage a person from making a report which would necessarily involve thinking back to what had happened. However, it is a question of degree. Even if PTSD was present as a condition in the immediate aftermath of the incident, the question is what its limiting effects were at that time. In the passage noted at [9], the FtT was seeking to assess the applicant's mental state by virtue of the other things she was able to do at that time. Those were matters for it as the tribunal of fact and the note of caution sounded by *Hutton* and *Jones* is relevant here.

43. Though I have to take the FtT's Reasons as I find them, it is convenient to note here, and it is relevant to the question of remedy, that the FtT might also have referred to the email traffic summarised at [37] – [38]; if it were to be objected that the matters on which the FtT relied were all unconnected to the index incident and so did not involve reliving it, the objection is met by the fact that the applicant showed herself well able to follow up the index incident at her place of work.

44. I also note that the decision of a different FtT on the applicant's disablement benefit claim, upon which she seeks to rely, (a) was not binding on the FtT in the present case; (b) was between different parties and (c) would be insufficiently specific as to the effect on the applicant in the aftermath of the index accident, and so even if it was in evidence – and I have not found it – does not assist her in showing that she was precluded by mental ill-health from reporting the matter sooner.

45. The FtT accordingly was entitled to approach the matter on the basis that there had been an unjustified delay of 18 months, but did it go on to exercise the discretion conferred by para 13 and if so, on what basis? I note CICA's submission that the FtT would have read Judge Levenson's decision which referred to the previous FtT having considered the possibility of a reduced award, but am not inclined to take that, without more, as an indication that the present FtT must have had such a possibility in mind when reaching its decision. However, I further note that FtT's decision notice suggests that they did decide that a reduced award was inappropriate.

46. In *RW*, Judge Rowland observed that:

> "Paragraph 13 confers a broad discretion and the Authority and the First-tier Tribunal are required to consider all material circumstances, having regard to the purpose of the paragraph".

In the present case, the FtT found that there was an unjustified, and long, delay. The consequences of that were a matter for the exercise of the FtT's

discretion; however, their Reasons provide no indication that they did exercise it (or, if they did so, how). The case is not obviously one that falls within, or is analogous, the "all or nothing" categories contemplated by Judge Rowland — yet there is no consideration of quantum. Further, when in para 7 of its Reasons the FtT set out what it described as the particular issue for the Panel to determine, it makes mention only of whether the applicant failed to take, without delay, all reasonable steps, making no reference at all to the discretion which would fall to be considered if it were to find that she did not. Nor is there any mention of *RW*, an authority to which the applicant had referred in her submission to the FtT at T242.

47. I consider therefore that it is not safe to rely on the passing mention in the FtT's decision notice of a reduced award that the FtT did consciously apply its mind to the exercise of its discretion. It appears to have treated this as an "all or nothing" case, though far from the categories of such case anticipated in *RW*. It failed to consider quantum, even on a "ball-park" level. If it did, notwithstanding this, exercise the discretion, it failed to give an adequate (or any) explanation of how it did so.

48. I do not consider CICA's case is saved by their contention that if the FtT is required explicitly to have considered quantum, the award would have been nil anyway. It was not the case - and the FtT did not say that it was – that there was no evidence that the applicant's mental health problems were caused by the index incident. There was such evidence, from Ms Foggo and Dr Somasunderam. Whether the index incident caused mental health problems more generally is a different issue from whether the applicant's mental health problems were such as to prevent her from reporting the incident to the police without delay.

49. The applicant has not sought to address section 31 (2A) of the Senior Courts Act 1981 in her submission. However, I cannot accept CICA's contention that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred and thus that section 31(2A) should be applied. I accept that there were factors which would weigh against the applicant in a discretionary exercise – that no attempt had been made to contact the police for 18 months; the claimed reason for delay was not established by the evidence and that the requirements of para 13 are there for the important reasons previously identified. However, as *RW* indicated, para 13 covers a wide range of circumstances and requires to be applied proportionately. It is true to say, as had the 2014 FtT, that if the applicant could establish that her poor mental health resulted from the index incident the amount of compensation might be relatively substantial, as the summary analysis at [35]-[36] above, shows. If that could be established, it is entirely possible that a panel of the FtT, mindful of what is said in *RW*, might see fit to withhold a significant part of the award, still leaving a significant figure, rather than all of it.

50. Accordingly, the FtT's decision is made the subject of a quashing order. The applicant also asks the Upper Tribunal:

(a) to make a declaration that she is entitled to compensation under the Scheme; and
(b) to order CICA "to provide a resulting disablement and quantum report of CIC social welfare benefits I'm eligible for."

I consider that I am not permitted to make the declaration sought. That would be tantamount to substituting my own decision for that of the First-tier Tribunal. The power for the Upper Tribunal to substitute its own decision in judicial review proceedings is only exercisable if certain conditions are met, among which is that, without the error, there would have been only one decision that the FtT could have reached: see Tribunals, Courts and Enforcement Act 2007, s.17(2)(c). Given that the matter concerns the exercise of a broad discretion under para 13 of the Scheme, it is impossible to meet that condition in the circumstances of this case. As regards (b), I have provided above for the matter to be placed before a duly authorised judge of the FtT to give case management directions for the rehearing. What further material, if any, to direct the parties to provide for that rehearing is best left to that judge.

C.G.Ward
Judge of the Upper Tribunal
Date: 29 January 2020