**IN THE UPPER TRIBUNAL** **Case No.** JR/2441/2015
**ADMINISTRATIVE APPEALS CHAMBER**

1. This is an application, brought with my permission, for judicial review of a decision made by a First-tier Tribunal on 18 June 2015. For the reasons explained below that decision was in my judgment wrong in law and I quash it and remit the Applicant's appeal against the Interested Party's review decision of 27 May 2010 for redetermination by an entirely differently constituted First-tier Tribunal.

2. For the purpose of explaining the reasons for my decision, I can set out the material facts very briefly.

3. The Applicant is a man now aged 66. The FTT found that on 18 August 2008, when the Applicant was working as a bus driver, he challenged two youths as they tried to avoid paying their fares. When asked to leave one youth tipped a can of soft drink over the Applicant and threw the can so that it cut him under the right eye. He was off work for 3 days because of the effects of the assault, but did not see his GP until 9 December 2008, by which time a number of other incidents had occurred.

4. The Applicant has had various diagnoses of psychiatric illness, including (in the FTT's summary at para. 26(c) of its decision) "PTSD, adjustment disorder with depressive features, acute stress disorder and possibly a generalised personality disorder with some paranoid personality traits." The FTT found that the mental illness will not be permanent. The incident on 18 August 2008 was only one of a substantial number of possible contributing causes of his mental illness. The other possible contributing causes are described by the FTT in its findings of fact in para. 24 of its decision. They include the fact that on 29 November 2009 the Applicant was suspended from work on the ground that he had allegedly used racist language in the bus depot, and then was dismissed in February 2009, which led to him bringing proceedings in the employment tribunal, which failed. Most of the other possible contributing causes of the mental illness occurred after 18 August 2008, but one occurred on 3 March 2008, when the Appellant was subjected to a frightening assault when a brick was thrown through his windscreen, which he described as "like a bomb going off" (see para. 10 of the FTT's decision).

5. The Applicant made his criminal injuries compensation claim on 27 March 2009, and the applicable Scheme is therefore the 2008 Scheme.

6. By its decision, maintained on review on 27 May 2010, CICA made an award of £1500 for facial scarring resulting from the incident, but made no award in respect of disabling mental illness or for loss of earnings. An award for mental illness was refused on the ground that the decision maker was "not satisfied on the basis of medical evidence that you suffered a psychological injury due to this incident which would qualify for an award at at least level 1 of the Tariff."

*Relevant provisions of the 2008 Scheme*

7. By para. 8 of the 2008 Scheme "'criminal injury' means one or more personal injuries …….being an injury sustained in and directly attributable to ……a crime of violence …."

8. Para. 9 provides:

> "…….personal injury includes physical injury (including fatal injury), mental injury (that is temporary mental anxiety, medically verified, or a disabling mental illness confirmed by psychiatric diagnosis) and disease (that is a medically recognised illness or condition)……."

9. Para. 26 provides:

> "The standard amount of compensation will be the amount shown in respect of the relevant description of injury in the Tariff, which sets out:
>
> (a) a scale of fixed levels of compensation;
> (b) the level and corresponding amount of compensation for each description of injury; and
> (c) qualifying notes.
>
> …….. Where the injury has the effect of accelerating or exacerbating a pre-existing condition, the compensation awarded will reflect only the degree of acceleration or exacerbation."

10. In the Tariff annexed to the 2008 Scheme a "disabling mental illness, confirmed by psychiatric diagnosis", if lasting over 5 years, but not permanent, qualifies for a standard amount of £13,500. By Note 5 to the Tariff, when a person suffers both a physical injury and a mental injury, and the tariff amount for the physical injury is higher than that for the mental injury, the applicant will be entitled only to the tariff amount for the physical injury. But where the tariff amount for the mental injury is the same as or higher than that for the physical injury, the applicant will be entitled to awards for the separate injuries in accordance with para. 27 of the Scheme (the serious multiple injury formula).

*The FTT's decision*

11. The FTT dismissed the Applicant's appeal. It therefore upheld CICA's decision that there should be no award for a disabling mental illness or loss of earnings. Its reasoning ran to 9 pages, and it considered the evidence carefully and in detail. It had a substantial amount of medical evidence before it in relation to the Applicant's mental health history and condition.

12. In para. 7 of its reasons the FTT set out what it saw as the 4 issues before it, of which the first was: "did the Appellant suffer a disabling mental illness wholly or partly as a result of the incident?"

13. In para. 19 the FTT recorded the submission on behalf of CICA that the Applicant's mental health condition was not on the evidence caused by the August 2008 incident.

14. The FTT's detailed findings are set out in para. 24. They included a finding, in para. 24(ac), that "the incident played a very minor additive role in the Appellant's disabling mental illness; we find this to be no more than 10% at most".

15. The FTT's reasons are set out in para. 26, which has sub-paragraphs (a) to (s). It is of course essential, in construing the FTT's reasoning, to take into account all the sub-paragraphs, but for present purposes I would highlight the following points.

(1) In 26(d) the FTT said:

> "Whilst there is no doubt that the Appellant's mental illness has been highly disabling for him for a number of years there is no competent evidence to establish that it is wholly attributable to the Incident."

(1) In 26(j) the FTT said:

> "if we were, contrary to our impression of the respective seriousness of the various upsets to the Appellant, to attribute equal causative effect to each (and counting suspension, dismissal, appeal and Tribunal application as one incident between them), the Incident would amount to between 6% and 7% of the whole."

(2) In 26(m) the FTT said:

> "Although the Appellant believes that the Incident is the entire or major cause of his disability, there is no psychiatric or psychological evidence to support this …….Dr Woolley expressly says that the Appellant's mental state is due to his perceived injustice about his suspension and dismissal and <u>not</u> due to the abusive incidents on his bus."

(3) The highest award which could <u>in principle</u> be made would be for a disabling mental illness lasting over 5 years but not permanent - £13,500 (para. 26(n)).

(4) If the Appellant's disabling mental illness was at most 10% attributable to the Incident, the award would be 10% of £13,500, that is £1,350.(para. 26(o))

(5) As £1350 is less than the award of £1500 for facial scarring, the effect of Note 5 to the Tariff is that no award can be made for psychiatric injury. (para. 26(p)).

*The parties' submissions in this judicial review application*

16. The Applicant has had the good fortune to have secured, through the Bar Pro Bono Unit, written submissions of counsel, Dr Anton Van Dellen, on his behalf. In summary, it is submitted by Dr Van Dellen as follows:

(1) In so far as the FTT reasoned (see in particular para. 26(d)) that it was necessary for the Applicant to establish that his mental health condition is "wholly attributable" to the Incident, it went wrong in law and imposed too high a threshold. Under para. 8 of the 2008 Scheme the question is whether the mental illness is "directly attributable to" the Incident. It is trite law that a cause need not be the <u>sole</u> cause for the injury to be directly attributable to the cause. The correct approach is

not the "but for" test which implies that the Incident probably caused the injury, but the "material increase in risk" test, as per *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22, subsequently applied in Leigh v *London Ambulance Service Trust* [2014] EWHC 286 (QB).

(2) It was impermissible to reason that if the Applicant's mental illness was at most 10% attributable to the Incident, the maximum award for mental injury alone would be 10% of £13,500. The Scheme does not permit a discount on that basis.

17. CICA submits in outline as follows:

(1) That when its reasons are looked at as a whole, the FTT in substance found that the Incident was not a substantial or significant cause of the Applicant's mental illness, and thus that the mental illness was not attributable to the Incident. CICA refers, in particular, to the points made by the FTT in para 26(f) to (i), (k) and (m). It also relies on the words "contrary to our impression of the respective seriousness of the various upsets to the Appellant" in para. 26(j), set out above.

(2) CICA accepts that, if the FTT did find that the mental illness was to some significant extent attributable to the Incident, there is "some doubt" as to the permissibility of the approach adopted by the FTT in para. 26(o) and (p).

(3) Even if the FTT made an error of law in the course of its reasoning, judicial review is a discretionary remedy, and in its discretion the Upper Tribunal should refuse to grant any relief, because it is likely that any fresh tribunal would reach the conclusion that the Incident was not a substantial or significant cause of the Applicant's mental injury.

*Analysis and conclusions*

18. Having read the FTT's reasons many times, I am unable to hold that it decided that the mental illness was not "directly attributable to" the Incident because the Incident was not a substantial or significant cause of the mental illness. My view is that although, as CICA has emphasised, the FTT in para. 7(a) of its reasons stated the first issue as being whether the Appellant suffered a disabling mental illness wholly or partly as a result of the incident, it considered at the end of the day that it did not need to decide whether the illness was partly attributable to the Incident because, on the footing that the Incident was at most 10% responsible for the mental illness, the award for mental illness alone would be less than £1500, and therefore the effect of note 5 was that no award could be made.

19. In my judgment, however, there does not appear to be anything in the Scheme which, on the footing that the causative effect of the Incident, taking into account all the other causes, was 10%, permitted the FTT to take a figure of 10% of £13,500 as the correct amount of the award (subject to note 5). As I stated when giving permission to appeal, and as Dr Van Dellen submits, the last sentence of para. 26 of the 2008 Scheme relates only to the situation where the injury has the effect of "accelerating or exacerbating a pre-existing condition." In that situation, "the compensation awarded will reflect only the degree of acceleration or exacerbation." That may permit a percentage of the tariff figure to be awarded, although even that is not

clear. However, in the present case only one of the other causes, namely the brick through the windscreen in March 2008, preceded the August 2008 Incident. It would seem that if a mental illness has a number of effective causes, one of which is the commission of a criminal offence, the applicant is entitled to an unreduced award in respect of that illness unless (possibly) it can be identified that the criminal offence merely exacerbated a pre-existing mental injury.

20. In my judgment the FTT therefore went wrong in law in reasoning as it did. It should have decided whether the mental illness was "directly attributable to" the Incident. It is enough if the Incident was a substantial or significant cause of the mental illness; it did not have to be the sole cause: see *R v CICB, ex parte Ince* [1973] 3 All ER 808. However, I do not accept that the approach adopted by the House of Lords in cases such as *Fairchild v Glenhaven*, which relates to a specific type of situation and for the purpose of the law of damages in tort, is relevant here.

21. In my view the FTT would certainly have been entitled to decide, in view of the number and nature of the other potentially causative events, and the medical evidence, that the Incident was not a cause of the mental illness. But as I have said it did not in my judgment so decide.

20. I reject CICA's submission that I should refuse to quash the FTT's decision, notwithstanding that it was wrong in law, on the ground that a new FTT would be highly likely to decide that the Incident was not a cause of the mental illness. It is true that judicial review is to an extent a discretionary remedy, but if I were to adopt that course I would in substance be re-making the FTT's decision myself. As the law at present stands, s.17(2) of the Tribunals, Courts and Enforcement Act 2007 provides that I can only do that if, without the error of law, there is only one decision which the FTT could have reached. I am not able to say that that is the case. I stress that the decision whether the Applicant's mental illness, or any discrete aspect of it, is directly attributable to the Incident, is one for the new FTT, on all the evidence before it.

**Charles Turnbull**
**Judge of the Upper Tribunal**
**26 July 2016**