

[2017] AACR 36
(Criminal Injuries Compensation Authority v First-tier Tribunal and ML (CIC)
[2017] UKUT 206 (AAC))

Judge Bano
5 May 2017

JR/3834/2016

Criminal injuries compensation – whether injury caused by different assailants should be treated as a single claim – whether more than one descriptor can be applied to a single injury

The claimant applied for compensation to the Criminal Injuries Compensation Authority (CICA) having been sexually and physically abused on different occasions during her childhood by three different men. Following a review CICA made an award of just over £8,000.00 reduced by 50 per cent, for the claimant's unspent convictions. She appealed against that decision and the First-tier Tribunal (F-tT) ordered a report from a consultant psychiatrist, who attributed 100 per cent of the claimant's mental health problems to the childhood abuse. The F-tT took the view that, in the absence of evidence of acceleration or exacerbation of a pre-existing condition, the Upper Tribunal's decision in *BD v First-tier Tribunal and CICA* [2016] UKUT 352 (AAC) required it to make a full tariff award in respect of what it regarded as three separate claims. It awarded compensation of some £40,000 in respect of two of the assailants and remitted the case involving the third assailant to CICA to make a separate determination. CICA applied for a judicial review, arguing that the F-tT had erred in making two tariff awards for the same injury, in making awards for both sexual assault and mental injury and in declining to make any determination in relation to the third assailant who was also alleged to have abused the claimant.

Held, allowing the appeal, that:

1. the tribunal's reliance on *BD v First-tier Tribunal and CICA* was misplaced and the claimant should have been treated as having made a single claim, not separate claims against each of her assailants. Claims under the Criminal Injuries Compensation Act 1995 are made in respect of injuries, not the events leading to them and the use of a single tariff descriptor to describe injury resulting from multiple sex attacks was not unlawful: *R v Secretary of State for the Home Department and CICA ex parte C* (paragraphs 9 to 11);
2. a descriptor which was expressed in terms of the circumstances in which injury occurred can be applied as often as the terms of the descriptor are satisfied, but a descriptor expressed in terms of the nature or severity of an injury can be applied only once for any one injury and the tribunal therefore erred in applying the same mental health injury tariff descriptor twice over in respect of the same injury (paragraph 12);
3. note 5 of the 2001 Scheme precluded an award for both a sexual offence and for mental injury in all cases, irrespective of who was responsible for the mental injury. It was not necessary for the judge to reach a decision on whether the tribunal was precluded from applying the same mental health injury descriptor twice over (paragraphs 13 to 14);
4. there was nothing in the evidence before the tribunal to justify a distinction between the positions of the three assailants and therefore the tribunal erred in remitting the case to CICA to make a separate determination in respect of injury caused by the third assailant (paragraph 15).

The judge set aside the decision of the F-tT and remitted the appeal to a differently constituted tribunal to be re-decided in accordance with his directions.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision: This application for judicial review by the Criminal Injuries Compensation Authority succeeds. I quash the decision of the First-tier Tribunal dated 19 September 2016 and remit the case to the First-tier Tribunal for re-determination by a differently constituted tribunal.

REASONS FOR DECISION

1. This is an application for judicial review by the Criminal Injuries Compensation Authority (CICA), brought with the permission of Judge Jacobs, by which CICA seeks to quash a decision of the First-tier Tribunal made on 19 September 2016 allowing the claimant's appeal against a review decision made on 14 April 2014 under the 2001 Criminal Injuries Compensation Scheme. The tribunal made two separate Level 16 awards of £19,000.00 for "moderately disabling permanent mental illness, confirmed by psychiatric diagnosis" in respect of assaults by two different assailants. The tribunal also made a 30 per cent tariff award, amounting to £1,320.00, for "two or more isolated incidents of non-penile penetrative acts" committed by one of those assailants, and a further 30 per cent tariff award, amounting to £450.00, for "non-penetrative frequent assaults over clothing" in respect of assaults committed by the other. In these proceedings, CICA contends that the tribunal erred in law in making two tariff awards for the same injury and in making awards for both sexual assault and mental injury. CICA further submits that the tribunal erred in law in declining to make any determination in relation to a third person who is also alleged to have abused the claimant. The claimant returned an acknowledgement of service to the application expressing her concern about the proceedings, but unfortunately has not otherwise responded to the claim within the time allowed for her response.

2. The claimant is a woman now aged 42 who was subjected on different occasions during her childhood to sexual and physical abuse by a number of men. In her application for criminal injuries compensation, made on 6 August 2008, the claimant stated that she had been sexually and physically abused and identified three men as having assaulted her, whom I shall call "RK", "SP" and "DG". On 22 May 2013 CICA rejected the claim on the basis of insufficient evidence of the alleged offences and because of the claimant's convictions. The claimant applied for a review of the rejection decision on 30 July 2013 and on 14 April 2014 a review decision was made accepting that the claimant had been the victim of sexual abuse as a child and making a Level 12 tariff award of £8,200.00 in respect of "indecent assault over a period exceeding three years", reduced by 50 per cent because of the claimant's unspent convictions.

3. The claimant appealed against the review decision on 7 August 2014, and on 25 June 2015 the First-tier Tribunal directed CICA to obtain a psychiatrist's report on the extent to which the claimant's convictions and her mental health problems could be attributed to the abuse which she had suffered as a child. In a report dated 1 July 2016, the psychiatrist concluded that at the time of her first offence in 2009 the claimant was suffering from emotionally unstable personality disorder (ICD-10 F60-3), and continued to do so. The psychiatrist attributed 100 per cent of the claimant's mental health problems to childhood sexual abuse.

4. Following a hearing at which the claimant gave evidence, but was not represented, the tribunal made the following findings:

"(i) The Appellant has been the subject of sexual abuse by a number of men over a number of years during her childhood.

(ii) the Appellant was sexually abused by [SP] at around the age of 10 over a period of 6 to 12 months. [SP] was a family friend who was responsible for baby-sitting the Appellant and her siblings whilst her mother and step-father were out. The abuse took place on two or more occasions over a 6 to 12 month period and included touching and vaginal penetration with his finger. It did not involve vaginal and/or anal intercourse.

(iii) In addition, but entirely separately, the Appellant was sexually abused by [DG] from the age of 11 through until approximately the age of 15 by way of non-penetrative touching of her genital area over her clothing. This took place frequently.

(iv) the evidence of [the psychiatrist], which the Tribunal accepts and finds relates to the assaults by [SP] and [DG], makes it clear that as a result of these incidents, the Appellant developed an emotionally unstable personality disorder.

(v) The Appellant made her claim for compensation on 6th August 2008. She made her application in relation to assaults by [RK], [SP] and [DG].

(vi) The Tribunal was satisfied that the assaults by [SP] and [DG] were not connected and constituted separate unrelated assaults.

(vii) The Respondent has not yet made a determination in relation to any assault by [RK] and the Tribunal had insufficient evidence before it to allow it to determine any separate award in relation to this assault.

(viii) The appellant has a history of prosecutions. However, these have lapsed.”

5. At paragraph 35 of the reasons for the tribunal’s decision the presiding judge expressed the tribunal’s view that it was only concerned with compensation in respect of the actions of SP and DG, since the alleged assault by RK had not previously been considered by the authority. So far as the assaults by SP and DG were concerned, the tribunal considered that the decision of the Upper Tribunal in *BD v First-tier Tribunal and CICA* [2016] UKUT 352 (AAC) meant that in a case where a mental injury had a number of causes, an award could be reduced only if the claimant had some pre-existing mental condition which had been accelerated or exacerbated by a criminal offence. For that reason, the tribunal considered that it should make separate tariff awards in respect of the assaults committed by SP and DG:

“The Tribunal also found that although it may arguably have been the case that the two assaults contributed in differing degrees to the development of her condition, it is enough if the incident was a substantial or significant cause of the mental illness. In this case, [the psychiatrist] did not state that one incident was not a substantial or significant cause. Accordingly, the Tribunal found that the two incidents were both substantial or significant causes of her emotionally unstable personality disorder. As there was no evidence before the Tribunal to suggest that the effect of the incidents was to accelerate or exacerbate a pre-existing condition, the Tribunal found that as the Appellant was making claims in respect of the two assaults, she was entitled to two awards of the full tariff in relation to the development of a moderately disabling permanent mental illness. Had [the psychiatrist] suggested that one assault or series of assaults had accelerated or exacerbated a condition caused by the other, it is unclear whether this would have amounted to a pre-existing condition as, sadly, ‘BD’ does not make clear what may amount to a pre-existing condition. Accordingly, the Tribunal found that as in ‘BD’, the two assaults or periods of abuse were substantial and significant causes of the condition [44]”

The reasons continued:

“The difficulty to which ‘BD’ gives rise is that unless it can be shown that the second assault or periods of abuse exacerbated the mental injury sustained in the first assault rather than being a substantial or significant cause of it, the difference between exacerbation and cause being unclear, there must be two awards [44]”

6. The Criminal Injuries Compensation Scheme 2001 was made under the Criminal Injuries Compensation Act 1995. Section 1 of the Act provides:

“(1) The Secretary of State shall make arrangements for the payment of compensation to, or in respect of, persons who have sustained one or more criminal injuries.

(2) Any such arrangements shall include the making of a scheme providing, in particular, for –

(a) the circumstances in which awards may be made; and

(b) the categories of person to whom awards may be made.”

Section 2 provides for the basis on which compensation is to be calculated:

“(1) The amount of compensation payable under an award shall be determined in accordance with the provisions of the Scheme.

(2) Provision shall be made for –

(a) a standard amount of compensation, determined by reference to the nature of the injury;

(b) ...

(c) ...

(d)...

(3) Provision shall be made for the standard amount to be determined –

(a) in accordance with a table (‘the Tariff’) prepared by the Secretary of State as part of the Scheme and such other provisions of the Scheme as may be relevant; or

(b) where no provision is made in the Tariff with respect to the injury in question, in accordance with such provisions of the Scheme as may be relevant.

(4) The Tariff shall show, in respect of each description of injury mentioned in the Tariff, the standard amount of compensation payable in respect of that description of injury.

(5) An injury may be described in the Tariff in such a way, including by reference to the nature of the injury, its severity or the circumstances in which it was sustained, as the Secretary of State considers appropriate.”

7. Paragraph 7 of the 2001 Scheme excludes entitlement to compensation where:

“the applicant has previously lodged any claim for compensation in respect of the same criminal injury”

Paragraph 8 provides:

“For the purposes of this Scheme, ‘criminal injury’ means one or more personal injuries as described in the following paragraph, being an injury sustained in Great Britain and directly attributable to:

- (a) a crime of violence (including arson, fire-raising or an act of poisoning);or
- (b) ...
- (c) ...”

Paragraph 9 provides:

“For the purposes of this Scheme, 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). Mental injury or disease may either result directly from the physical injury or from a sexual offence or may occur without any physical injury. Compensation will not be payable for mental injury or disease without physical injury, or in respect of a sexual offence, unless the applicant:

- (a) ...
- (b) ...
- (c) in a claim arising out of a sexual offence, was the non-consenting victim of that offence (which does not include a victim who consented in fact but was deemed in law not to have consented)...”

Paragraph 27 provides for the calculation of awards where there has been more than one injury:

“Minor multiple injuries will be compensated in accordance with Note 12 to the Tariff. The standard amount of compensation for more serious but separate multiple injuries will, unless expressly provided for otherwise in the Tariff, be calculated as:

- (a) the Tariff amount for the highest-rated description of injury; plus
- (b) 30 per cent of the Tariff amount for the second highest-rated description of injury; plus, where there are three or more injuries,
- (c) 15 per cent of the Tariff amount for the third highest-rated description of injury.”

Paragraph 48 provides for the reduction of an award where an applicant has received a payment for the same injury:

“An award payable under this Scheme will be reduced by the full value of any payment in respect of the same injury which the applicant has received by way of:

- (a) any criminal injury compensation award made under or pursuant to arrangements in force at the relevant time in Northern Ireland;
- (b) any compensation award or similar payment from the funds of other countries;
- (c) any award where:
 - (i) a civil court has made an order for the payment of damages;
 - (ii) a claim for damages and/or compensation has been settled on terms providing for the payment of money;
 - (iii) payment of compensation has been ordered by a criminal court in respect of personal injuries.

In the case of (a) or (b), the reduction will also include the full value of any payment to which the applicant has any present or future entitlement.”

Note 5 to the Scheme provides:

“When compensation is paid for physical injury or for any sexual offence described in the tariff, a separate award for mental injury will not be made (as the tariff award includes an element of compensation for this); save that in the case of an award for physical injury, if the compensation for mental injury is the same as, or higher than, the level of compensation for the physical injury, the applicant will be entitled to awards for the separate injuries calculated in accordance with paragraph 27 of the Scheme (the serious multiple injury formula). When compensation is paid for any sexual offence, a separate award for mental injury will not be made.”

8. The relevant tariff descriptors in this case are:

Disabling but temporary mental anxiety lasting more than 6 weeks, medically verified	1	£ 1,000
Disabling mental illness, confirmed by psychiatric diagnosis:		
– lasting up to 28 weeks	6	2,500
– lasting over 28 weeks to 2 years	9	4,400
– lasting 2 years to 5 years	12	8,200
– lasting over 5 years but not permanent	14	13,500
Permanent mental illness, confirmed by psychiatric prognosis		
– moderately disabling	16	19,000
– seriously disabling	18	27,000

Sexual assault/abuse of children (under age of 18 at time or commencement of abuse) and of adults who by reason of mental incapacity are incapable of giving consent

Indecent assault		£
minor – non penetrative frequent assaults over clothing	3	1,500

9. I must accept CICA’s submission that the tribunal’s reliance on *BD v First-tier Tribunal and CICA* was misplaced. In *BD* the claimant was the victim of a crime of violence, but that was only one of the causes of his psychiatric illness. The tribunal held that the claimant would not be entitled to the minimum award of £1,500.00 for psychiatric injury under the 2008 scheme because the highest award which could be made under the Scheme for a non-permanent disabling mental illness lasting over 5 years was £13,500.00 and the claimant’s injury had contributed at most ten per cent to his mental condition. The tribunal must therefore have assumed that the tariff award should be reduced by 90 per cent to take into account the other causes of the claimant’s psychiatric illness, but Judge Turnbull held that the Scheme only permitted such a reduction if the claimant’s injury had the effect of accelerating or exacerbating a pre-existing condition:

“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”. [19]

10. In this case the psychiatrist found, and the tribunal accepted, that all the claimant’s mental health problems were the result of childhood sexual abuse, although neither the psychiatrist nor the tribunal attempted to apportion the extent to which each of the assailants identified by the claimant contributed to her mental illness. However, it is apparent from the statement of reasons that the tribunal regarded the appeal as being concerned with separate claims by the claimant against each of her three assailants. On that basis, the tribunal took the view that, in the absence of evidence of acceleration or exacerbation of a pre-existing condition, *BD* required them to make a full tariff award in respect of what they regarded as each of the claimant’s separate claims.

11. I do not exclude the possibility that there may be cases in which a single claim form should be treated as encompassing more than one claim. In some cases it may be necessary to decide whether a claimant has brought one, or more than one, claim; for example, where the maximum amount which can be awarded under the Scheme is an issue. However, in this case I consider that the tribunal should have treated the claimant as having made a single claim, and not as having made separate claims against each of her assailants. Section 1(1) of the Criminal Injuries Compensation Act 1995 requires the Secretary of State to make arrangements for the payment of compensation “to, or in respect of, persons who have sustained one or more criminal injuries”. Claims under the Scheme are therefore made in respect of injuries, rather than the events which led to those injuries, although in some cases an injury may be described in terms of the circumstances in which the injury was sustained. In *R v Secretary of State for the Home Department and CICA ex parte C*¹ it was held that the use of a single tariff descriptor to describe injury resulting from multiple sex attacks was not unlawful. The claimant described her injuries on the claim form as being “sexually and physically abused”, and did not seek to differentiate between the harm caused to her by each of her assailants. The “injury” in this case, in respect of which the claim for compensation was made, was therefore in my view the combined and cumulative effect on the claimant’s mental health of the sexual and physical abuse inflicted on her by each of the persons who carried out those actions.

¹ Referred to without citation in Begley *Criminal Injuries Compensation Claims*, 2nd edition, paragraphs 8.2.3, 8.3.8

12. However, I consider that it does not actually matter whether the claimant should be treated as having made one, or more than one, claim, since I have come to the conclusion that CICA is correct in submitting that the tribunal was not permitted to make two tariff awards in respect of the same injury. Section 2(5) of the 1995 Act allows an injury to be described in the Tariff “by reference to the nature of the injury, its severity or the circumstances in which it was sustained”. Where a descriptor is expressed in terms of the circumstances in which injury occurred, as in the case of the indecent assault descriptors, there seems to me to be no reason not to apply the descriptor as often as the terms of the descriptor are satisfied, unless the injury then falls within the terms of another descriptor. On the other hand, if a descriptor is expressed in terms of the nature or severity of an injury, it seems to me that there is no basis for holding that a single injury can satisfy the terms of the descriptor more than once. I therefore uphold CICA’s submission that the tribunal erred in applying the same mental health injury tariff descriptor twice over in respect of the same injury.

13. I must also uphold CICA’s submission that the tribunal acted contrary to note 5 of the Scheme by awarding compensation both for a sexual offence and for mental injury. CICA have suggested that the tribunal should have made a determination as to whether to attribute the award for mental injury to SP or to DG and then make a tariff award under “sexual assault/abuse of children under the age of 18” in respect of the actions of the other assailant. Whilst I do not wish to discourage a sympathetic approach to claimants who have been subjected to what the claimant in this case has endured, it seems to me that note 5 precludes an award for both a sexual offence and for mental injury in all cases, irrespective of who was responsible for the mental injury. In any event, the evidence does not seem to me to allow responsibility for the claimant’s psychiatric condition to be attributed to any one or other of the claimant’s assailants. Although, for the reasons given below, I am remitting the case for re-hearing, I must therefore reject this suggestion.

14. Since I have upheld CICA’s primary submissions, it is not necessary for me to reach a decision on the authority’s alternative submission that the tribunal was precluded from applying the same mental health injury descriptor twice over by paragraphs 7, 48 or 49 of the Scheme.

15. It is, however, necessary to deal with the point that the tribunal erred in law in regarding itself as not bound to deal with the assaults committed by RK. The tribunal can be forgiven for taking that view since the presenting officer seems to have considered that the appeal was concerned with only two incidents. The tribunal’s position seems to have been founded on their view that they were dealing with three separate compensation claims, which I consider to have been erroneous for the reasons set out above. However, I must agree that there was nothing in the evidence before the tribunal to justify a distinction between the position of RK and that of SP and DG. I therefore agree that the tribunal was in error of law in remitting the case back to CICA to make a separate determination in respect of injury caused by RK’s actions.

16. For those reasons, I consider that the tribunal’s decision was in error of law and I therefore make an order quashing their decision. It seems to me to be possible that the tribunal would have applied a higher scoring descriptor if they had appreciated that they were dealing with the cumulative impact on the claimant’s mental health of the actions of three assailants. I therefore refer the case to the First-tier Tribunal for complete re-hearing before a differently constituted tribunal.