R. v. CRIMINAL INJURIES COMPENSATION BOARD, EX PARTE COBB

DIVISIONAL COURT (Dyson J.): July 26, 1994

Criminal Injuries Compensation Board—finding of unreasonable delay by claimant—decision based on hearsay evidence from police officer—application for adjournment by claimant to cross-examine officer—no reasons given by Board for refusal of adjournment—whether decision unfair

The applicant made a claim to the Criminal Injuries Compensation Board ("the CICB") for compensation for injuries which he claimed had been caused by an unknown assailant, and which caused him loss of consciousness. His evidence before the CICB was that he could not recall seeing any police officer at the scene. He said that at hospital he recalled being told by the police that the CID would be coming to see him, but that he was disorientated and did not recall being asked whether he wished to make a complaint. Several days later, not having been contacted by the CID, he went to the police station and reported the matter. He said that he was not aware at that time of the existence of the CICB. A police constable, P.C. T, made a report that he had seen the applicant at hospital and that the applicant had declined to make a complaint because he had no useful information to give. P.C. T also noted on the report that the applicant had made the complaint to the police because he had been told that he was eligible for criminal injuries compensation. Before the CICB P.C. T was not called, although an adjournment for him to be called was requested by the applicant's solicitor. Instead, another officer, P.C. P, gave evidence of P.C. T's report. It was not suggested that P.C. T was not available to give evidence if required. The CICB refused the application for an adjournment, but gave no reasons for doing so. The applicant's claim was rejected on the ground that there had been unreasonable delay on his part in reporting the matter to the police. The applicant sought judicial review of the CICB's decision.

Held,

(1) The evidence of P.C. T was central to the question of whether or not the applicant had been guilty of unreasonable delay in reporting the matter to the police and was also of importance on other topics.

(2) The hearing should not have proceeded unless the Board was satisfied that P.C. T would not be available, even if a lengthy adjournment was required for the purpose.

(3) To deny the applicant the opportunity to cross-examine P.C. T was so unfair, in the circumstances, as to impugn the CICB's decision, which should therefore be quashed.

Per curiam: The Board had failed to give reasons for rejecting the applicant's evidence in finding "unreasonable delay" and in deciding not to award reduced compensation. A statement of reasons and findings of fact sufficient to enable the applicant to see how the decision was arrived at was required.

Cases judicially considered:

R. v. Deputy Industrial Injuries Commissioner, ex p. Moore [1965] 1 Q.B. 456;

T.A. Miller Limited v. Ministry of Housing and Local Government [1968] 1 W.L.R. 992;

R. v. Hull Visitors, ex p. St Germain [1979] W.L.R. 1401

R. v. Civil Service Appeal Board, ex p. Cunningham [1991] 4 All E.R. 310

Other cases referred to in the judgment:
Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 K.B. 223.

Application for judicial review of a decision by the Criminal Injuries Compensation Board

J. Freedman and *J. Roberts* instructed by Crutes, Sunderland, for the applicant.
M. Kent and *R. Pershad*, instructed by the Treasury Solicitor, for the CICB.

DYSON J. This is an application for judicial review of a decision of the Criminal Injuries Compensation Board. The applicant was the victim of an assault in Sunderland in the early hours of the morning of Thursday, September 20, 1990. On October 5, 1990, he applied to the Board for compensation for his injuries and consequential loss of earnings. On May 21, 1991, he was notified that no award would be made on the grounds that the applicant had refused to make a formal complaint to police officers who attended the scene, so that there could be no effective police inquiry. Accordingly, compensation was withheld under paragraph 6(a) of the Scheme. The applicant applied for an oral hearing. This took place on June 16, 1992, before Mr Barry Green Q.C. and Miss Diana Cotton Q.C. The Board confirmed the original decision.

Before I turn to consider the grounds on which relief is sought, I must outline the facts so far as material. The applicant was assaulted in the street by a stranger who drew up in a car. The applicant had never met him before. In a statement made to the police on September 25, 1990, the applicant said:

> "The man swung at me with his right hand. There was a bang on my head and I assume I lost consciousness because the next thing I remember was my son pulling me by my shoulders. An ambulance arrived shortly afterwards and I was taken to Sunderland District General Hospital.
>
> I can't say what type of car it was that the man got out of but I think it was white coloured, possibly a Vauxhall Astra. I can't recall anything about the man who struck me other than he was about 5' 8" tall and 20 years of age. I wouldn't recognise him again."

The assailant escaped and was not arrested. It has never been suggested that the applicant should have taken steps at any time which, had they been taken, would have led to the arrest of the assailant.

In his application for an oral hearing made on June 14, 1991, the applicant said this:

> "During this incident I was knocked unconscious. I recollect lying on the pavement and seeing a Policeman and then I remember nothing until I came round in the Hospital. I was still in a state of semi-consciousness and there was a Policeman in attendance. I was told by this Policeman that they would send someone to see me the following day. I believed this would happen. No Police Officer came to the Hospital to see me, and I was released home. I did not hear anything from the Police and I therefore went to see them, to see what was

happening. At all times I believed that the Police knew of the incident, having been present at the actual scene of the incident, and at the Hospital.

If I had been approached by the Police I would have given them every assistance as they required."

At the hearing before the Board on June 16, 1992, the applicant gave evidence. He said that he did not recall seeing any police officers or the ambulancemen at the scene. He regained consciousness on a bench in the casualty department at the hospital. He did not recall being asked by the police at the hospital if he wished to make any complaint, but he was confused and somewhat disorientated at the time. He did, however, recall that whilst he was in the hospital the police told him that the CID would be coming to see him. He said that following his discharge from hospital he waited at home all weekend. When the CID did not arrive he went to the police station on Tuesday, September 25. At that time he was not aware of the existence of the Criminal Injuries Compensation Board.

In substance, therefore, the applicant's account was that:

(i) he did not refuse to give a statement to the police when he was in the hospital;
(ii) he was in a state of disorientation during his stay in hospital;
(iii) the police said that the CID would visit him at a later stage;
(iv) his decision to report the matter to the police on September 25 was made because the CID had failed to come and see him and not because he saw this as a necessary first step to a successful claim for compensation from the Board.

The officer who saw the applicant in hospital was P.C. Taylor. This officer had made a report in writing of the incident which included reference to his conversation with the applicant in hospital. He recorded in his report that the applicant had declined to make any complaint at the hospital since he had no useful information to give. P.C. Taylor also noted on the back of this report that the applicant had made the report to the police on September 25 because he had been told that he was eligible for criminal injuries compensation. The applicant denied that he had declined to make a statement because he was unable to give any useful information.

The only other piece of evidence which it is necessary to mention at this stage is the hospital medical report, which recorded that on examination the applicant was noted to have been fully alert, conscious and orientated, and had a reading of 15 on the Glasgow Coma Scale.

At the hearing on June 16, 1992, the applicant was represented by a solicitor. P.C. Taylor did not attend. The police evidence was given by Detective Constable Priest, who only became involved in the case after the applicant had made his formal complaint on September 25, 1990. The applicant's solicitor inquired of the chairman of the Board why P.C. Taylor was not going to be called to give evidence and submitted that the applicant's case would be severely prejudiced if he were deprived of the opportunity of challenging P.C. Taylor's report by cross-examination of the officer himself. I do not know why P.C. Taylor was not called. It has not, however, been suggested he was not available on June 16, or that he would not have been available if a short adjournment had been granted. The chairman refused an adjournment and allowed D.C. Priest to speak to P.C. Taylor's report, and

also to say that he had spoke to P.C. Taylor, who had confirmed the contents of the report.

The written reasons of the Board were published on December 16, 1992. Paragraphs 1 to 8 summarise the procedural history of the matter and the evidence given at the hearing. The conclusion of the Board is contained at paragraph 9, which is in these terms:

> "After submissions the Board retired to consider its decision. It had particular regard to the provisions of Paragraph 6(a) of the Scheme and kept in mind the terms of Paragraphs 18 to 23 of the guide to the Criminal Injuries Compensation Scheme. Having considered all the evidence, including the length of the delay on the part of the applicant in reporting to the police, the reasons he gave for that delay and the police evidence about their dealings with the applicant on the night of the incident and on 25 September, the Board concluded that there had been unreasonable delay by the applicant in reporting to the police and that in all the circumstances an award should not be made. The Board therefore returned and announced this decision and confirmed the original decision in the case."

It is to be noted that the Board did not give any reasons for its refusal to adjourn the hearing to allow P.C. Taylor to be cross-examined.

On behalf of the applicant, Mr Freedman submits that the decision of the Board should be quashed for one or more of the following four reasons:

> (i) it was unfair not to adjourn the proceedings so as to require P.C. Taylor to give first-hand evidence as to the events which took place in the hospital on September 20, 1990;
> (ii) the finding of unreasonable delay by the applicant in reporting the assault to the police was perverse in the *Wednesbury* sense: see *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223;
> (iii) even if the finding of unreasonable delay was not perverse, the Board failed to take into account the fact that such delay did not prevent the police from making an arrest which otherwise they would or might have been able to make;
> (iv) the board failed to consider the possibility of awarding reduced compensation rather than withholding it altogether.

Before I deal with these four points I should refer to the paragraphs of the Scheme that are material. Paragraph 6(a) provides:

> "The Board may withhold or reduce compensation if they consider that—
> (a) the applicant has not taken, without delay, all reasonable steps to inform the police, or any other authority considered by the Board to be appropriate for the purpose, of the circumstances of the injury and to co-operate with the police or other authority in bringing the offender to justice."

Paragraph 25 provides:

> "It will be for the applicant to make out his case at the hearing, and where appropriate this will extend to satisfying the Board that compensation should not be withheld or reduced under the terms of paragraph 6 or paragraph 8. The applicant and a member of the Board's

> staff will be able to call, examine and cross-examine witnesses. The Board will be entitled to take into account any relevant hearsay, opinion or written evidence, whether or not the author gives oral evidence at the hearing. The Board will reach their decision solely in the light of evidence brought out at the hearing, and all the information and evidence made available to the Board members at the hearing will be made available to the applicant at, if not before, the hearing. The Board may adjourn a hearing for any reason. ..."

I need not read any more of that paragraph.

I turn, therefore, to the adjournment point. For the Board Mr Kent points out that, as paragraph 25 of the Scheme makes clear, the Board was entitled to take account of hearsay evidence. He submits that, provided the applicant was notified in advance, as in this case he was, that hearsay evidence would be led before the Board, there was no breach of the rules of natural justice or procedural unfairness in allowing D.C. Priest to give in evidence the contents of the written report at least if cross-examination of D.C. Priest was permitted, as was the case.

Mr Kent relies on *R. v. Deputy Industrial Injuries Commissioner, ex p. Moore* [1965] 1 Q.B. 456, and in particular passages in the judgment of Diplock L.J. at pages 486D–H, 488D–F, 489C–F and 490C–F. He also relies on *T. A. Miller Limited v. Ministry of Housing and Local Government* [1968] 1 W.L.R. 992 at page 995D. In my judgment, neither of these authorities really bites on the problem that arose in this case. Clearly if P.C. Taylor had died there could have been no complaint of unfairness if his report had gone in, whether or not D.C. Priest had given evidence about it. That would be so even if paragraph 25 of the Scheme did not exist. The authorities relied on by Mr Kent show that tribunals are entitled to adopt a more relaxed view as to the admissibility of evidence than traditionally the courts have been willing to embrace. But the overriding consideration must always be one of fairness.

In *R. v. Hull Visitors, ex p. St Germain* [1979] 1 W.L.R. 1401 at page 1409D, after referring to the judgment of Diplock L.J. in *ex p. Moore*, Lord Lane C.J. said this:

> "However, it is clear that the entitlement of the Board to admit hearsay evidence is subject to the overriding obligation to provide the accused with a fair hearing. Depending upon the facts of the particular case and the nature of the hearsay evidence provided to the Board, the obligation to give the accused a fair chance to exculpate himself, or a fair opportunity to controvert the charge—to quote the phrases used in the cases cited above—or a proper or full opportunity of presenting his case—to quote the language of section 47 or rule 49—may oblige the Board not only to inform the accused of the hearsay evidence but also to give the accused a sufficient opportunity to deal with that evidence. Again, depending upon the nature of that evidence and the particular circumstances of the case, a sufficient opportunity to deal with the hearsay evidence may well involve the cross-examination of the witness whose evidence is initially before the Board in the form of hearsay."

In my judgment, if the hearsay evidence is of peripheral relevance, or if although the hearsay is important there is a substantial body of other direct evidence to similar effect that can be given by live witnesses who can be cross-examined, it is very unlikely that it will be unfair to an applicant to permit the hearsay evidence to be led. Again, if the original author of the

hearsay evidence is not available and cannot reasonably be made available even if an adjournment is granted, it is likely that it will not be unfair to an applicant to take the hearsay evidence into account. It all depends on the circumstances of the case.

Mr Kent suggested in argument that the *Hull Visitors* case can be distinguished on the grounds that that was a case concerning the liberty of the subject. I accept that unfairness of the kind that I am considering will be more readily found if the hearing concerns the liberty of the subject. It seems to me, however, that the court should be slow to draw up league tables of seriousness for different types of proceedings. I would strongly repudiate any suggestion that proceedings which are concerned only with claims for compensation are on that account to be treated as relatively unimportant, or that the court shall be more ready to turn a blind eye to procedural unfairness in such cases.

Turning to the facts of this case, in my view, the evidence of P.C. Taylor was central to the question whether paragraph 6(a) applied. Although the Board did not make any findings of primary fact, I do not see how they could have concluded that the applicant was guilty of unreasonable delay in reporting to the police unless they found that: (i) he had declined to make a statement on September 20 when he was in hospital; and (ii) the conversation about the proposed visit of the CID did not take place. If the Board had accepted the applicant's account of what passed between himself and P.C. Taylor at the hospital, they could not without perversity have concluded that there was unreasonable delay. P.C. Taylor could also have given other evidence on topics which the Board seem to have regarded as important. He could have said whether when they spoke the applicant was "disorientated", as the applicant asserted, or "alert, conscious and orientated", as described in the medical report upon examination. The Board may well have assumed the applicant's evidence on this point was inconsistent with the medical report, but it is possible that the applicant was describing his condition when he was speaking to P.C. Taylor and that the medical examination by the hospital was carried out at a different time. Furthermore, there was the question of the applicant's motive for making his report on September 25. The applicant denied that compensation had anything to do with it. This is another area in which no doubt the applicant's solicitor would have wanted to cross-examine P.C. Taylor.

Unfortunately, it appears that the Board did not give any reasons for refusing the adjournment. It may be that the chairman had paragraph 25 of the Scheme in mind. I am quite satisfied that the hearing should not have proceeded unless the Board was satisfied that P.C. Taylor was not available and was unlikely to be available even if a reasonable adjournment were granted. The evidence of P.C. Taylor lay at the heart of the case. The claim for compensation had been rejected under paragraph 6(a). The Board must have known that the basis of the decision contained in the letter of May 21, 1991, was challenged. Thus the applicant was asserting that he had not refused to make a formal complaint. The onus was on the applicant to prove that the Board was not entitled to withhold or reduce compensation under paragraph 6. He was faced with the report prepared by P.C. Taylor, which prima facie was very damaging to his case. To be denied the opportunity to cross-examine P.C. Taylor for no good reason was, in my judgment, so unfair as to impugn the hearing before the Board. For that reason alone, therefore, the decision must be quashed and there must be a rehearing.

Although it is not strictly necessary to deal with the other criticisms, I shall nevertheless give my decisions on them. A theme which is common to all three of these criticisms is that the Board failed to give any or any adequate reasons for its decision. For the applicant Mr Freedman does not contend that the Board was obliged to give reasons in the sense that the Board is obliged to give reasons in every case. Rather, he submits that, once the Board did give or purported to give reasons, then those reasons had to be adequate and had to be such that it was possible to see how it had reached its conclusion. He submits that the Board's decisions in this case were inadequate and that this renders the decision unlawful.

I am conscious that the question "In what circumstances does a failure to give any or any adequate reasons render a decision unlawful?" has been the subject of much debate recently. It seems to me that when considering this question the ball on which the judicial eye should be resolutely fixed is that of fairness. In this context I have found *R. v. Civil Service Appeal Board, ex p. Cunningham* [1991] 4 All E.R. 310 of assistance. At page 319B Lord Donaldson M.R. said:

> "I then ask myself what additional procedural safeguards are required to ensure the attainment of fairness. The answer, I believe, is to be found in the judgment of Lord Lane C.J. in the *R. v. Immigration Appeal Tribunal, ex p. Khan (Mahmud)* [1983] 2 All E.R. 420 at 423; [1983] Q.B. 790 at 794–795 which I do not believe owed anything to the fact that the Immigration Appeal Tribunal is required by statute to give some reasons for its decisions:
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> > 'The important matter which must be borne in mind by tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties, and that they should indicate the evidence upon which they have come to their conclusions. Where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis on which it has reached its determination on that issue, then that is a matter which will be very closely regarded by this court, and in normal circumstances will result in the decision of the tribunal being quashed. The reason is this. A party appearing before a tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not. Second, the appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it; in other cases it may not.'
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> Judged by that standard the Board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the Board to the status of a free-wheeling palm tree."

In his judgment at page 322C, McCowan L.J. said:

> "To accord with natural justice a tribunal must permit a party to state his case. But how will that avail him if he has no idea whether any attention has been paid by the tribunal to what he said? Suppose, for the sake of argument, he argues that a particular matter is irrelevant and should be ignored by the tribunal in arriving at its recommendation. How could he, in the absence of reasons, know that they had not rejected his submission and taken the matter into account? How could he formulate a case on the point for judical review? By that analysis I unhesitatingly conclude that the form of the recommendation is part of the procedure of the hearing and no less subject to the requirements of natural justice than any other part."

Then a little later, at H, he said:

> "As Mr Pannick says, it cries out for some explanation from the Board. As I would put it, not only is justice not seen to have been done but there is no way, in the absence of reasons from the Board, in which it can be judged whether in fact it has been done. I find that a thoroughly unsatisfactory situation, in which this court should hold, if it can properly do so, that the Board ought to give reasons for its recommendation."

With these passages in mind I turn to the decision of the Board. An examination of the last paragraph of the decision reveals what seem to me to be following shortcomings:

1. There is no express finding of fact in relation to what passed between the applicant and P.C. Taylor. As I have already said, the conclusion that there was unreasonable delay in reporting to the police is inexplicable unless there lies behind it implied findings of fact adverse to the applicant. What were they? If such findings were in the mind of the Board, no reasons are given for them. Why did they reject the evidence of the applicant in so far as they did reject it? It seems to me that fairness demanded that the applicant would be told why his evidence was rejected to the extent that it was.
2. Moving from the question of primary facts to the finding of unreasonable delay, I observe that no reasons are given for this finding. Merely to say that the Board reached its conclusion having considered all the evidence is not illuminating. On face of it, a delay of five days is not excessive, particularly since it has never been suggested that if the applicant had reported the case formally whilst he was in hospital it would have made any difference so far as arresting the assailant was concerned. The failure of the Board to give reasons for its conclusion makes it impossible to see what factors were taken into account. Did it take account of the fact that the alleged refusal to make a statement did not prevent the arrest of the assailant? Did it take any account of the fact that the applicant knew that he would not be able to recognise his assailant, that he had sustained injuries and been in hospital and so on? It is true that the Board said at paragraph 9 of its written reasons that it "Kept in mind the terms of paragraphs 18 to 23 of the Guide to the Criminal Injuries Compensation Scheme". Paragraph 18 of that Guide is in these terms:

   > "It is not necessary that the offender should have been

convicted before an award can be made. Some offenders are never found. However, the Board attach great importance to the duty of every victim of violent crime to inform the police of all the circumstances without delay, and to co-operate with their enquiries and any subsequent prosecution.

19. The condition that the incident should have been reported is particularly important since it is the Board's main safeguard against fraud. A victim who has not reported the circumstances of the injury to the police and can offer no reasonable explanation for not doing so should assume that any application for compensation would be rejected by the Board altogether."

I need read no more of that paragraph.

The Board does not explain the significance of these paragraphs to its view of the facts. I have already dealt with the fact that the applicant could not help the police arrest the assailant. I do not see what the relevance of paragraph 19 is at all. There could never have been any suggestion in this case that the delay in making a formal complaint might have indicated that the applicant's claim was fraudulent. The police came to the scene of the crime on September 20. It has always been accepted that the applicant was the victim of an assault on that day.

3. Finally, the absence of reasons makes it impossible to discover whether the Board considered the possibility of awarding reduced compensation rather than no compensation at all; and if that possibility was considered why an award even of reduced compenation was rejected.

In my judgment the combined effect of what I referred to as the shortcomings is that it is impossible to know how the Board reached its decision. Mr Kent says that there was material on which the Board was entitled to reach its decision. On the face of it, the Board's decision was a harsh one. I am conscious of the fact that it heard the evidence of that applicant and I have not. Nevertheless, in my judgment, it was incumbent on the Board to explain the basis of its decision. This did not require an elaborate statement of reasons to give detailed justification for each finding of fact. It did, however, require a statement of reasons and findings of fact sufficient to enable the applicant to see how the decision was arrived at.

The result is that the decision must be quashed and the application succeeds.

MR ROBERTS. I am grateful. I would make application for costs.

DYSON J. Yes.

MR PERSHAD. My Lord, I cannot resist that application.

DYSON J. You cannot resist that. Thank you. I should have said that it is obvious, I hope, that the matter will have to be remitted to the Board and be heard by a differently constituted tribunal.