

C0/4185/2002

Neutral Citation Number: [2003] EWHC 243 Admin
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Monday, 3rd February 2003

BEFORE:

MR JUSTICE MOSES

THE QUEEN ON THE APPLICATION OF M

(CLAIMANT)

-v-

THE CRIMINAL INJURIES COMPENSATION APPEALS PANEL

(DEFENDANT)

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Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR C BARNES (instructed by Jackson & Canter, South John Street, Liverpool, L1 8BN)
appeared on behalf of the CLAIMANT

MR J JOHNSON (instructed by The Treasury Solicitor) appeared on behalf of the
DEFENDANT

J U D G M E N T
(As approved by the Court)

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MR JUSTICE MOSES:

Introduction

1. With the leave of the single judge, the claimant, Mr M, seeks to impugn a decision of Ms Cotton QC, sitting as an Adjudicator of the Criminal Injuries Compensation Appeals Panel. Her decision is dated 6th June 2002.
2. The claimant had sought compensation under the Criminal Injuries Compensation Scheme ("the scheme"). This scheme requires claims to be brought as soon as possible after the injury and within two years. Ms Cotton QC refused to waive the time limit of two years. She concluded that it was not reasonable and in the interests of justice so to do.

The Facts

3. The claimant was taken into care by Liverpool Social Services when he was aged about 15. He was born on 20th April 1959 and he is now 42. He was placed at the Woolton Vale Assessment Centre in Menlove Avenue in Liverpool on two separate occasions between 1974 and 1975. He says that, whilst resident at that centre, he was the subject of a serious sexual assault at the hands of a member of the staff, a Mr Senior. He says he was also sexually assaulted later by a social worker called Bennett. This took place at his home while he was waiting to return to the Woolton Vale Assessment Centre. He says that he reported the abuse to his social worker, but no action was taken; indeed, he was beaten and disbelieved. He says he mentioned the abuse to his General Practitioner, Dr Rao, about 12 years ago, in 1989, and to a specialist mental health team at Arundel House in about 1997.
4. On 20th March 2001 he made an application to the Criminal Injuries Compensation Authority for compensation pursuant to the terms of the scheme. In answer to the question "When did the incident in which you were injured happen?", he replied, "In 1973". In response to the question relating to abuse over a period of time, he gave the first date as 1973 and the last as 1974. In response to the question for an explanation as to the delay in bringing the claim, he replied that it was "because of psychological problems only now coming to the forefront in my mind". In answer to a later question as to why the police were not told about the incident, he replied, "This has only just come to light and it is only now I can bear to discuss this matter".
5. In a covering letter dated 23rd March 2001 his solicitors wrote:

"We have [not] enclosed a statement at the moment because our client has just been into us and he has only just been able to disclose this to a lawyer and we understand that he was anally raped.

"However he did not go into detail [save] to say that the perpetrator of this crime was a worker at Woolton Vale Assessment Centre namely Tom Senior who's [sic] nickname was Wiggy.

"Mr Senior was one of the people who was investigated [at] the same

time [as] a Rory McNally, who was also [a] residential care worker at this assessment centre and was imprisoned.

"However Mr Senior died by the time the investigation [got] off the ground and therefore he was never brought to justice.

"We will be providing you with a psychological report which will go into detail and as we get to know our client and he is more forthcoming we shall of course take a full statement from him and let you have this.

"However so that there is no difficulties in relation to limitation and in view of the fact that this is a sex abuse case we should be grateful if you now commence to investigate this matter."

6. In an unsigned statement dated 27th June 2001, which was before the appeal panel, and indeed before the officers who had considered the matter earlier in accordance with the scheme, the claimant said:

"I was physically assaulted there during that time, I was so upset and distressed that I eventually ran away, smashed a window, cut my head, I have got a scar on my head as far as that is concerned, I ran away in bear [sic] feet, I went to my sisters and basically I was on the run for months."

He says in relation to the delay:

I told Dr Rao ... and he basically told me that I had to get help. He was the first person that I told, I had never told Diane [his former wife], I was absolutely devastated and distraught about it. I didn't want to go to the Police or a Lawyer because I had been so ashamed about it and basically I am still struggling with that at the present time. I have spent twelve years under Doctors in Hospitals such as Windsor Clinic for alcoholism and depression, I was at Newsham Park Hospital for years on and off, I have been on medication for the whole time, I haven't worked during that time

...

"Four years ago when I was under Arundel House I did tell them that I had been raped but I just walked out because I couldn't go into detail. They know about it and they have been treating that for me."

7. On 5th November 2001 the authority refused the application to waive the time limit. It said:

"In this case, as a result of the delay in submitting the application, the Authority is unable to obtain sufficient relevant information to show that you were injured as a result of a crime of violence."

8. On 7th November 2001 the claimant sought a review and enclosed a report from Lesley Cohen, consultant clinical psychologist, dated 1st October 2001. The report of Dr Cohen, to which I shall refer later, referred to a draft statement signed by the

claimant and dated 30th June 2001. This was not before the authority or the appeal panel, and has not been disclosed.

9. On 11th January 2002 the authority refused the claimant's application for a review. It said:

"The reason provided for the delay is that the psychological effects of the incidents have prevented Mr M from disclosing these events sooner. The time lapse aside, which is itself unreasonable, in insurmountable difficulty in this case is that the Authority has been advised by Liverpool City Social Services that they have no records of complaint or allegations by Mr M, and the incidents have never been reported to Merseyside Police. This means that for the purposes of the Scheme there is no independent corroboration of the incidents and so even if the time limit were set aside, there would be no proper basis on which an award from public funds could be considered."

10. On 15th January 2002, the claimant filed a notice of appeal against the decision. On 15th April 2002 solicitors for the claimant indicated they would file no further evidence, but referred to the fact that they had had 170 previous similar cases of sexual abuse in which claims had been made under the scheme, and that none of them had been refused on the grounds that they were out of time.
11. On 6th June 2002 Ms Cotton QC, as Adjudicator of the appeal panel, dismissed the appeal. In her letter giving reasons for her dismissal, she said:

"In your client's application, which was received by the Criminal Injuries Compensation Authority on 28 March 2001 he alleges that between 1973 and 1974 he was sexually abused while at the Walton [sic] Vale Assessment Centre. However, when seen by Lesley Cohen in October 2001 he seems to have suggested the abuse was when he was 15 and 16 which would have been between 1974 and 1976."

12. She then refers to fact that the time limit is normally waived for those under 18, or within two or three years of becoming 18. She pointed out that the claimant was 18 in 1977. The application was, she remarked, made 24 years after he reached the age of 18, and about 26 years after the abuse complained of. She continued:

"The applicant's explanation for his delay is that he had suppressed the memory. I note however that he told Lesley Cohen that he had complained of sexual abuse to his GP 12 years ago and to the team at Arundel House 4 years ago. In spite of this he has never reported the alleged abuse to the police, and he made no application for compensation until 2001. He claims to have had difficulty talking about the abuse but he chose to disclose these matters to a solicitor rather than to a member of the medical profession.

"Paragraph 13(a) of the Scheme provides important safeguards for public funds, as it requires that incidents of violence are reported promptly to the police.

"Limits have to be put on the time within which claims can be made both so that the Authority can have a reasonable prospect of ascertaining from an authoritative source what did occur and also because the investigation of late claims can only be done at the expense of dealing effectively with fresh claims. After a lapse of about 26 years I am not satisfied that it is now possible for there to be a reliable investigation of the circumstances in which the injury occurred or of its affects [sic], so as to provide a proper basis for an award of money out of public funds.

"I have given careful consideration to the particular circumstances of this case, and whilst I am sympathetic to anyone who has been the victim of abuse I am not satisfied it would be either reasonable or in the interests of justice to allow a claim for compensation from public funds to be pursued in this case."

13. The scheme made by the Secretary of State in the exercise of powers conferred on him under the Criminal Injuries Compensation Act 1995 is the scheme dated 12th December 1995. By paragraph 17 of the scheme:

"An application for compensation under this Scheme in respect of a criminal injury ... must be made in writing on a form obtainable from the Authority. It should be made as soon as possible after the incident giving rise to the injury and must be received by the Authority within two years of the date of the incident. A claims officer may waive this time limit where he considers that, by reason of the particular circumstances of the case, it is reasonable and in the interests of justice to do so.

"(18) It will be for the applicant to make out his case including, where appropriate:

- (a) making out his case for a waiver of the time limit in the preceding paragraph."

14. The scheme allows for a review of a decision not to waive the time limit (see paragraph 58), and that review should be considered by a more senior claims officer (see paragraph 60). Paragraph 66 allows an appeal to a chairman of the panel or another Adjudicator. The appeal will be allowed where the Adjudicator considers it appropriate to do so (see paragraph 67).

The Issues

15. The claimant advances three grounds for impugning the decision of Ms Cotton QC. Firstly, he contends that her decision is inconsistent with the very many other cases of sexual abuse to which his solicitor had referred, 170 in all, where late claims were made and not refused on the ground of delay. Secondly, he contends that Ms Cotton QC failed to have regard to the cogent evidence from the expert in the field, Lesley Cohen, whose evidence was the only expert evidence in the claim. Thirdly, he contends that the decision of Ms Cotton QC was Wednesbury unreasonable. I shall deal with those contentions in turn.

Inconsistency

16. Mr Whitelaw, in a statement supporting this application, and indeed in the earlier letter to which I referred, says that his predecessor working on these cases in the solicitors firm representing the claimant have submitted some 170 applications in relation to child abuse, some dating back to the 1960s. None have been refused on the grounds of delay. This, it is submitted, demonstrates inconsistency. It is accepted that each case will turn as to its merits on its facts, but Mr Barnes, on behalf the claimant, draws attention to the fact that the Adjudicator is exercising a procedural jurisdiction. She would have had no opportunity to hear or see the claimant, and thus cannot primarily be concerned with the merits. The stark fact that this, out of 170 other cases, is the only one in respect of which the time limit has not been waived, demonstrates an inconsistency.
17. To my mind, the claimant must establish some error in principle or approach; that the Adjudicator was applying an approach which is unjustifiably different from that which was shown in the other cases where the application was not refused on the grounds of delay. In my judgment, the claimant is quite unable to do so. I know nothing of the facts of the other cases. I cannot say whether they were similar or dissimilar. The claimant cannot, to my mind, demonstrate from the mere fact that all those other cases succeeded, so far as time limits were concerned, an inconsistent approach, still less is there any available evidence of other cases where, for all I know, a claim was refused on grounds of delay. Accordingly, this ground fails.

Failure to take into account the evidence of Dr Lesley Cohen

18. Before the panel there was submitted a report from a distinguished clinical and forensic psychologist experienced in sex abuse cases, Lesley Cohen. Her report was dated 1st October 2001. It is headed "Draft Report". The reasons for that are plain from her report at paragraph 3.3. At that stage, she records, she had not seen any other documentation, including GP medical notes and correspondence. She says:

"T has reported significant mental health problems at interview and he has had involvement over years with local mental health services. I do not feel able to come to firm conclusions regarding his mental health until I have seen his medical records. Hence, this report should be considered a provisional one and is hence marked "draft". I will be pleased to review and finalise this report once I have seen the appropriate records."
19. Although I was told the other records and correspondence were forwarded to her, she has not had an opportunity to make that further report. At paragraph 2.1 she records that the claimant had spent just over a week at the Woolton Vale Assessment Centre when he was 15 years and some months, and when he was 16 years old. At paragraph 3.1 she records that the interview lasted three and a half hours. During the course of the report, she records the claimant's description of an incident of buggery committed by a member of the staff, Mr Senior. The record shows some detail at paragraph 6 of the report. The claimant then described further sexual abuse, at paragraph 8.6, by another member of staff, who he was unable to name, and finally another serious sexual assault by a social worker who visited him at home. This is described at paragraph 9.

20. At paragraph 14.6 she records that the claimant did confide in his General Practitioner some 12 years before. At paragraph 14.7 she records that four years ago he managed to disclose that he had been sexually assaulted to the mental health team at Arundel House. At paragraph 15 she notes the results of the questionnaire relating to the Trauma Symptom Inventory. She mentions that there is a risk that he has exaggerated his symptoms, but overall she concluded at 15.6:

"Overall, his scores on the questionnaire are consistent with his report at interview, of severe emotional, experiential and personal disturbance of a kind which is associated with traumatic events."

21. At paragraph 16 she deals with the history of his disclosure of sexual abuse. She records again the report to the GP, followed by disclosures to the mental health team. She says at paragraph 16.2:

"Though he was able to talk very briefly to medical and health care staff he has never felt able to go through his experiences in any detail. He feared being overwhelmed by his distress and he still considered others would see him as dirty."

At paragraph 16.3:

"In the last year, he has finally come to the point where he has decided to face up to these experiences. Even then he has found it difficult and he had been unsure how he would cope with my interview. He said he had previously attempted to contact the police concerning 'Operation Care' but had not received responses to his messages. Eventually, he decided to report his experiences to his solicitor."

22. Dr Cohen's conclusion can be summarised at paragraph 17.7:

"Given the above pattern of experiences and difficulties, from the information of the assessment so far, I consider that the best formulation of his problems is that he is suffering from post traumatic stress disorder as a result of the two serious sexual assaults he suffered while in the care of the local authority."

23. It is clear that Dr Cohen accepted, at least provisionally, the claimant's account. The claimant alleges that Ms Cotton QC failed to have proper regard to that report. In her letter she referred to what Mr Barnes described as "trivial and irrelevant discrepancies as to the dates and difficulties in the investigation". But, Mr Barnes contends, by her decision, the Adjudicator has removed the possibility of a panel on appeal itself considering credibility. The issue before the Adjudicator, Ms Cotton QC, was not so much whether his client, the claimant, was credible. That was a matter for the substance of hearing before a panel following any refusal by a claims officer or on review. The only possibility of an oral hearing would be on appeal pursuant to paragraph 70(b) of the scheme, where the facts were substantially in dispute. The issue before the Adjudicator was whether it was reasonable and in the interests of justice to waive the time limit. Ms Cotton QC was not in a position to conclude that it was too late to verify his statement, when she was in no position to assess his credibility.

Certainly, it was not open to her to disagree with the conclusions of Ms Cohen without give cogent reasons for doing so.

24. It seems to me that the claimant's submission, clearly and forcefully though it was expressed, fails to have sufficient regard to the nature of the decision the Criminal Injuries Compensation Appeal Panel was required to make on preliminary consideration of whether to waive the time limit. The issue before the Adjudicator of the panel was whether it was reasonable and in the interests of justice to waive the time limit, as indeed Mr Barnes himself stresses. This issue turns primarily on whether there was good reason for failure to bring a claim with greater expedition, and whether it was reasonable and in the interests of justice, in the light of that explanation, to waive the time limit.
25. Ms Cotton QC was not purporting to disagree with Dr Cohen as to the credibility of the claimant. She focused upon a different question: namely, whether it was right in the context of the scheme as a whole to permit him to bring the claim relating to events which had occurred so long ago. If Ms Cotton QC's decision was based upon the conclusion that the claimant was not to be believed, then, as is submitted on behalf of the claimant, she ought not to have reached that conclusion without explaining why she differed from Dr Cohen, who had, after all, seen the claimant over a period of three and a half hours.
26. There is clear authority for the proposition that where in this field a judge is differing from an expert on questions of fact, he should make clear his reasons for doing so. I was helpfully referred by Mr Barnes, on behalf of the claimant, to the decision of the President in the Court of Appeal in Re B (A minor) (Split Hearings: Jurisdiction) [2000] 1 WLR 790, but that case concerned a question where the judge had differed from two experts, who were unanimous as to the time when certain fractures had been caused. Both agreed that they had taken place more than 48 hours before examination of the child, whereas the judge's findings of fact were inconsistent with those conclusions. The President pointed out that it was not open to the judge to differ from the experts without giving cogent reasons as to why the opinion of both those experts was incorrect.
27. Nearer this is a decision of Wilson J, a judge of enormous experience, and commanding particular respect in the field of child abuse, sitting as he does, not only in this jurisdiction, but in the Family Division. In Re B v The Criminal Injuries Compensation Appeals Panel [2001] EWHC Admin 1147, a decision of 19th December 2001, Wilson J was considering, not the waiver of time limits, but a decision of the appeal panel on a substantive hearing in which child abuse had been alleged. He was prepared to accept that the panel could differ as to the truthfulness of the allegations of sexual abuse from the experts without full analysis of why they were differing, but he was not prepared to accept that it was open to the panel to differ without giving reasons from the expert's conclusion as to the reason for the lateness of the articulation of those allegations. The panel, it appears, had rejected the truth of the claimant's account because of that delay. Wilson J pointed out that there is what he described as "a complex psychological dynamic" in such cases of sexual abuse in childhood. He continued at paragraph 43:

"It seems to me, however, that, if it was minded to reject the truth of the claimant's account on this ground [namely the lateness of the articulation of the allegations], it had to show that it had considered the specific professional evidence which addressed this point in relation to him."

He continued:

"Making every allowance for the right of the panel to express its decisions succinctly, I hold that it was improper and insufficient to reject the claimant's claim of sexual abuse without at least referring to the specific professional evidence which purported to rebut the point upon which the rejection was cast."

28. I repeat that this case concerned a challenge to a decision on a substantive hearing. It was not a question of whether the time limit should be waived. In the instant case Ms Cotton QC was not purporting to pass judgment on the credibility of the claimant. Credibility might be relevant in some cases where waiver is being considered as a preliminary issue where there are strong grounds for doubting it. But in the instant case, it was not the basis of Ms Cotton QC's decision. The question for her was whether the explanation for delay should be accepted, and if accepted, whether it was reasonable in the interests of justice to waive the time limit.
29. In his application the claimant has, as I have said, explained the delay "because of psychological problems only now coming to the forefront in my mind", and when asked why he had not reported the matter to the police, as I have said, recorded that the matter had "only just come to light in that it is only now I can bear to discuss this matter". In those circumstances it was open to Ms Cotton QC to regard the explanation as being one of suppression of memory. Yet, as she recorded, this claimant had reported the matter not only to his General Practitioner, but also to a mental health team, and had earlier reported it, although his complaints had not been accepted, to his social worker. In his claim, when asked when he had first reported it, he had said, "In 1973." True it is that the claimant had himself set out the reaction of the social workers to whom he had first complained in 1975 in his statement dated 23rd August 2001.
30. It is important equally to appreciate that the question for Dr Cohen was not whether the explanation for the delay was reasonable. She reports the claimant's inhibitions he felt in reporting the case, but makes no further comment about it. She makes no further comment on why, having reported the matter to his General Practitioner and mental health team, a further four years elapsed before he went to see a solicitor. It was suggested that it would be more difficult to go to a solicitor than a doctor, perhaps not least because a solicitor might represent authority in the same way as the police represent authority. It was, after all in the eyes of the claimant, authority that had so badly let him down.
31. I well understand and sympathise with that argument, but the matter is not for my decision. It was a matter for the Adjudicator, Ms Cotton QC. She took the view that his explanation for the delay, namely, suppressed memory, was not made out. It was reasonable, as I have said, for her to conclude from the application that that was his explanation for the delay, and it was equally open to her to conclude that it was not an adequate explanation. This was not a case where she was differing from an expert

without a cogent explanation. Rather, to my mind, this case demonstrates the different function of the Criminal Injuries Compensation Appeal Panel in considering the preliminary issue of waiver without hearing the claimant to that of an expert. The Criminal Injuries Compensation Panel is required to consider the wider interests of justice in the context of management of a scheme where it has to consider the payment of compensation out of public funds. After all, the authority is not the tortfeasor. There is helpful guidance to the panel in Mr Dennis Foster's book "Claiming Compensation for Criminal Injuries". At page 10 he writes:

"Late applications made by young persons on attaining their majority, in respect of injuries sustained in childhood, should be made as soon as possible after reaching full age. These cases have generally been considered sympathetically under the 1990 Scheme and the time limit may be waived where there is a good reason why the application could not have been made before, and substantial injustice would result from not waiving the time limit. The reasons for the time limit must be kept in mind, however, especially the practical difficulties of obtaining reliable evidence long after the event."

32. The claimant sought to draw an analogy with the Limitation Act 1980 at section 333(b). My attention was drawn to examples of group actions which had been brought in respect of sexual abuse which took place long ago, but the case to which my attention was drawn was one where the judge had heard the witnesses, of which there were many more than the claimant himself, and after forming a view as to credibility, having decided that the claims were substantiated, the judge then considered the question of limitation. It is not surprising, having accepted credibility, that he the extended the time limit. Such a case in a different jurisdiction is very different from consideration by the appeal panel as to a preliminary issue when, as the scheme inevitably provides, it is inevitable that the Adjudicator will not hear the witness and cannot reach any concluded view as to credibility.
33. The appeal panel must consider the case in the context of the provision of the scheme that there should be a time limit, and in the context of damage to the operation of the scheme if fresh cases are delayed by difficult investigation into events long ago. Those considerations are relevant factors for the panel to weigh. It is plain that the Adjudicator did so in this case, having regard to those considerations to which she refers. An investigation would be necessary. Such an investigation would be hampered by discrepancies as to the dates given by the claimant. That is not to criticise the claimant for such discrepancies, but it merely does make any investigation inevitably more difficult. Those were views she was perfectly entitled to take. It is impossible to suggest that she did not read the report or take it into consideration when she refers to it, but, as I have sought to stress, her function, namely whether it was reasonable and in the interests of justice to waive the time limit, was wholly different from that of the expert, and quite different from the considerations a panel would have to take into account on a substantive hearing.
34. It is very important that the claimant himself, for whom I have great sympathy, should understand that the decision by the appeal panel was not a decision that he should be disbelieved. His credibility was not impugned.

Irrationality

35. In the light of my comments under the previous ground, there remains little to be said under this ground. True it is that there have been criminal prosecutions in relation to equally old cases, in which defendants have been convicted. There is no time limit in relation to such prosecutions, save for the power of the court to stay where the delay has rendered a fair trial impossible. But it is plain that some investigations have taken place with success. Civil actions have proceeded and are successful where evidence substantiates the complaint. To my mind, those factors do not demonstrate that the response of Ms Cotton QC was not within the range of reasonable responses to the question she had to ask: namely, whether it was reasonable and in the interests of justice to waive the time limit. She was faced with a claimant who had previously complained, but not to a solicitor. Different views may be taken as to whether it would be more difficult to do so, and was more difficult for this complainant to do so than to complain to his doctor and to a mental health team, particularly in the absence of any expert opinion on that particular point. It was open to Ms Cotton QC to reach the conclusion that it was no longer possible for reliable investigation to take place. That was clearly a relevant factor, and Mr Barnes has not sought to argue to the contrary. The weight of that factor was matter for the Adjudicator. There had been no complaint to the police. There was no record of previous complaints. All the claimant could point to was, so Mr Barnes said, the conviction of the care worker, Mr Bennett, for similar offences, although at the time the authority and the panel were considering this the solicitors merely informed them that Mr Bennett had been charged: see the letter dated 16th January 2002. Ms Cotton QC was entitled to reach the conclusions she did despite the acceptance by Dr Cohen of the claimant's credibility.
36. The application fails.
37. MR JOHNSON: The claimant is (inaudible) funded. Formally, I ask your Lordship for the costs of the detailed assessment (inaudible).
38. MR JUSTICE MOSES: I will make that order. Have you anything to say about that, Mr Barnes?
39. MR BARNES: I am not in a position to oppose that order. I would ask for detailed assessment of the claimant's costs in addition.
40. MR JUSTICE MOSES: I will make both those orders.
41. MR BARNES: I am grateful, my Lord.
42. MR JUSTICE MOSES: Two things, Mr Barnes. As you appreciate, I was very grateful for your submissions. You need permission to appeal if you want to appeal. You have not as yet asked.
43. MR BARNES: I know, my Lord.
44. MR JUSTICE MOSES: Secondly, I do want to stress what I have said in my judgment to your client about the difference in jurisdiction of Ms Cotton and anybody considering the merits. I really do not want him go away thinking here is yet another

body that has not believed what he said. Right or wrong, that was not the basis of my decision, and I do not believe that it was the basis of Ms Cotton's decision. It is very important, and I do hope you and your solicitor can have a word with him to explain that to him. I know it is very hard for him. I do not want him to think, "Here is someone else who is not interested in what I have to say". That is not the position, but not my function, I am afraid. Thank you very much.