

**Neutral Citation Number: [2018] EWCA Civ 3032**  
**Case No: C3/2016/4448**  
**IN THE COURT OF APPEAL (CIVIL DIVISION)**

The Royal Courts of Justice  
Strand, London, WC2A 2LL

Thursday, 8 March 2018

**Before:**

**LADY JUSTICE SHARP**  
**LORD JUSTICE FLAUX**

**Between:**

**QA MONGSON**

**Applicant**

**- and -**

**FIRST TIER TRIBUNAL**  
**(SOCIAL ENTITLEMENT CHAMBER)**  
**AND ANOTHER**

**Respondent**

Transcript of Epiq Europe Ltd 165 Street London EC4A 2DY  
Tel No: 020 7404 1400 Email: [TTP@epiqglobal.co.uk](mailto:TTP@epiqglobal.co.uk) (Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

If this transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.)

**Mr James Purnell** (instructed by Criminal Injuries Compensation Authority (CICA) appeared on behalf of the **Applicant**

The **Respondent** did not appear and was not represented

-----  
**Judgment**

**(Approved)**

**Crown Copyright©**

LADY JUSTICE SHARP:

### **Introduction**

1. The respondent in this case accepted an award of compensation under the Criminal Injuries Compensation Scheme 2012 (the Scheme). He then appealed against the award to the FTT. The FTT considered that as the respondent had accepted an award, it was not open to the respondent to appeal. It refused jurisdiction and struck out his appeal. The Upper Tribunal, then quashed the decision of the FTT on an application for judicial review and remitted it for reconsideration by the FTT. In my judgment the decision of the FTT was correct, the Upper Tribunal was in error in quashing the decision of the FTT and I would allow this appeal.

### **The Relevant Scheme**

2. The Scheme is a statutory scheme established under the Criminal Injuries Compensation Act 1995. The Scheme in its current form was issued in 2012 and provides for compensation to be paid to eligible victims of crime. The Scheme provides as follows. Under paragraph 99, a claims officer will notify an applicant in writing of the determination of the application. Paragraphs 101 and 103 of the Scheme then provides for three possible outcomes. Either, (a) the applicant accepts the determination by sending written notice of their acceptance within a set time period: see paragraph 100 or, (b) the applicant does not accept the determination in which case it is to seek a review by sending an application for review within a set period of time: see paragraph 101 or, (c) the applicant fails to respond within a set time period following which the claims officer may withdraw the determination: see paragraph 103.

3. Acceptance of the award determines the application. The wording of the Scheme does not permit an applicant to seek the determination of an award, then apply to review it. In the event an award is accepted a number of other provisions come into play. The Scheme provides (a) by paragraph 106 for the giving of directions and for the payment of administration of the award; (b) by paragraph 109 for the reconsideration of a determination before final payment of an award where the claims officer becomes aware of evidence or a change in circumstances; (c) by paragraph 110 for the payment of all or some of the award; (d) by paragraphs 114 to 116 for the reopening of an application after a final award has been made.
  
4. The circumstances in which an application may be reopened pursuant to paragraphs 114 to 116 after a final award has been made are narrowly circumscribed.

"114. A claims officer may re-open an application after a final award has been made, including where the award followed a direction by the Tribunal, in order to make an additional payment where a condition in paragraph 115 is satisfied.

115. The conditions referred to in paragraph 114 are:

- a) a person who has accepted an award subsequently dies as a result of the criminal injury giving rise to the award; or
  
- b) there has been so material a change in the medical condition of the applicant that allowing the original determination to stand will give rise to an injustice to the applicant.

116. An application may only be reopened under paragraph 114,

- a) within two years after the date on which the authority received, notice of acceptance of the determination or the date of a tribunal direction to make an award; or

b) If later, with supporting evidence, which means that the application can be determined without further extensive enquiries by a claims officer."

Those various circumstances do not arise on the facts in this case.

5. If the applicant wishes to challenge the Criminal Injuries Compensation Authority (CICA's) determination, the Scheme requires him not to accept the award, but to seek a review of it. By paragraph 117 the applicant may seek a review of a number of matters, including by paragraph 117(a) of a decision as to the determination of an award or its amount including, on a reopening under paragraph 114. Paragraphs 119 to 121 make provision for the process and timescale of a review. Paragraph 112 says that the claims officer conducting the review must send the applicant written notice of the decision on the review. Paragraph 118 says in terms that an applicant may not seek a review of a decision made on a review or appeal. After a review, the applicant is faced with a choice. By paragraph 123 the applicant can let the claims officer proceed to determine the application in accordance with the review decision or in the alternative, an applicant can appeal the review decision to the FTT, see paragraph 125. If the claims officer processes the application in accordance with the review decision and the award is paid to the applicant, this determines the application. The payment of the award is final and disposes of the application. There is no provision in paragraph 125 for the acceptance of the award and for the making of an appeal.
6. Paragraphs 126 to 134 make provision for various eventualities, which may occur in the event there is an appeal. The Scheme, for example, provides for a claims officer, upon receipt of a notice of appeal, to revise the review decision. When this occurs, paragraph 127 requires the applicant to either accept the revised review decision or to reject it. Finally, the definition of a final award for the purposes of the Scheme is to found in annex 8 of the

Scheme. It is defined as, "An award which but for the possibility of being reopened in accordance with paragraph 114 disposes of the application.

### **The Facts**

7. The facts are very helpfully set out in the skeleton argument of Mr Purnell, who appears on behalf of CICA this morning. The respondent, Mr Mongson, was the victim of a criminal assault in July 2013, following which he applied for compensation to seek, pursuant to the Scheme. A determination was then made by CICA that Mr Mongson was entitled to £1,500, (the Award). Pursuant to paragraph 117(a) of the Scheme, Mr Mongson requested a review of CICA's determination. In its review, CICA assessed whether Mr Mongson was eligible for a loss of earnings payment under the criteria set out in paragraph 43 of the Scheme, namely whether as a direct result of his injury, he had no or very limited capacity for paid work. To this end CICA consulted Mr Mongson's GP who confirmed that Mr Mongson would be able to return to normal employment. CICA concluded that an award should not include payment for loss of earnings and maintained the original determination of £1,500. CICA sent Mr Mongson a form to sign to accept its determination. The form was as follows:

"Criminal Injuries Compensation Authority.

Our Ref No: X/13/719385-TM6B

ACCEPTANCE OF FINAL AWARD.

I, DAVID MONGSON of FLAT 25, KINGSGATE HOUSE,  
GOSLING WAY, LONDON SW9 6JX

accept an award of £1,500.00 from the Criminal Injuries Compensation Authority in full and final settlement of my application.

I understand that the Authority may ask any criminal court responsible for enforcing the compensation order in my favour to pay all further sums received directly to the Authority. I promise to advise and repay the Authority from any damages, settlement or other compensation I may receive from the same injuries, including any future monies received from a criminal court. I understand if I do not advise and repay in full any such payment the Authority will take court action to recover same."

There followed a space for a signature of the applicant and for the date of signature and then this:

"PAYMENT INSTRUCTIONS.

Please note that payment will be paid directly into your nominated bank/building society account. You will need to provide your nominated bank/building society details on the next page."

On 1 June 2015, Mr Mongson duly signed the form and provided his bank details in writing on the following page. CICA had sent with the form a covering letter, which explained why it had declined to include a loss of earnings payment in the award. Mr Mongson sent with his signed form a letter, which included the following:

"I am writing in response to your reviewed offer of the same £1,500. I am accepting your offer reluctantly because it is obvious I will never get the just financial compensation I deserve. I have been more frustrated by CICA than my attack through your delays and in your determined effort not to pay me for my loss of income. My Doctor gave me 9 months of sick leave and I couldn't go back to work after that because my SIA Licence was expired, it was the Job centre that helped me retain and regained my licence to enable me to come back to work. To allege I could have gone back to work immediately after the attack is unfortunate and a deliberate attempt to deny me the very assistance due to me by CICA. I will accept your offer to enable me to find a place to rent on my own."

CICA received this documentation from Mr Mongson on 15 June 2015 and it made the payment of £1,500 to Mr Mongson on the following day.

8. On 20 June 2015, Mr Mongson lodged an appeal with the FTT saying this was “for loss of income.” Mr Mongson said he had been out of work for 18 months after the attack and requested an oral hearing before the FTT. It appears that Mr Mongson's appeal was withdrawn but then subsequently reinstated. Mr Mongson then repeated his request for an oral hearing in a letter dated 7 October 2015. On 20 November 2015, the FTT issued a directions notice giving Mr Mongson the opportunity to make written representations in relation to the proposed striking out of the whole of his proceedings. The direction notice gave particulars of the reasons why the FTT considered there was no reasonable prospect of Mr Mongson's case succeeding. This was that Mr Mongson had already been offered and accepted an award of compensation. By accepting that award, the matter had come to an end. Mr Mongson did not reply to those directions.
  
9. By a decision notice dated 6 January 2016, the FTT struck out Mr Mongson's case on the basis it did not consider there was any reasonable prospect of Mr Mongson's case succeeding. The FTT judge concluded as follows:

"6. I do not consider that there is any reasonable prospect of the appellant's case succeeding. Indeed, I consider that the prospects of the appellant being made a further award of compensation in these proceedings are virtually non-existent for the following reasons,

- a) the Appellant has already received compensation for the index assault in respect of which he claimed. He states to the effect that he was always unsure of the merits for trying to claim for any loss of earnings and so he did not pursue that. He has mentioned that he feared that by appealing and pursuing losses, there was a risk of losing what had been offered. It seems that he has attempted to secure the Tariff award first and then subsequently has put forward

the issue of loss of earnings again, but this is not allowed under the Scheme,

- b) Paragraph 109 of the 2012 Scheme states that the authority can only reconsider their determination on a claim BEFORE final payment has been made,
- c) the Appellant accepted the award in full and final settlement;
- d) in these circumstances, there is no possibility of reopening the claim."

In a letter dated 19 January 2016, Mr Mongson said he was dissatisfied that his previous request for an oral hearing had been ignored and made another request for an oral hearing.

In a letter dated 5 February 2016, Mr Mongson's request for an oral hearing was denied.

10. On 24 May 2016, the Upper Tribunal granted Mr Mongson permission to apply for judicial review of the FTT's decision of 6 January 2016 on the following grounds:

"Would not an applicant who signed to accept or qualify this by expressing dissatisfaction not come within paragraph 125 and be entitled to appeal?"

By way of a decision dated 8 September 2016 the Upper Tribunal judge, criticised the finding of the FTT that Mr Mongson's appeal could not succeed because he had already accepted the award in full and final settlement as follows:

“At 13, again the judge did not explain the relevance of this reason and it cannot work as a standalone justification. If it did it would subvert the appeal system. It can only have been intended to bolster the analysis that the applicant was, in effect, seeking to subvert the scheme to his advantage.”



The Upper Tribunal also considered that the FTT had been wrong to conclude that Mr Mongson was engaging in tactical manoeuvring in order to obtain an injury payment before trying to obtain a loss of earnings payment.

11. According to CICA's review documentation, loss of earnings had been before CICA and considered by the officer. The Upper Tribunal went on:

"14. The decision to strike out the proceedings was made on a false assumption that loss of earnings had not been considered before the appeal. That was not consistent with the terms of the review notification. CICA's submission to the Upper Tribunal confirms that the passage I have quoted from that letter was not only a recitation of the legal position but the result of a decision based on enquiries into the evidence. This mistaken assumption led to a further unfounded criticism of the applicant's tactics.

15. In the circumstances, it is not necessary to deal with any other issues discussed in the CICA's submission to the upper tribunal. I do, however, record CICA's submission that the First Tier Tribunal was also wrong to strike out the proceedings without allowing the applicant an oral hearing which he said he wanted. He was entitled to a hearing under rule 27.4 of the Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008 [the Tribunal Rules], pursuant to the decision of the upper tribunal in NT v First Tier Tribunal [2014] UKUT 0210 (AAC)."

12. The submission of the appellant is crystallised into two grounds. Ground 1 is that Mr Mongson's appeal to the FTT was misconceived and hopeless. Furthermore, the FTT had no jurisdiction to entertain it. The FTT was correct to strike it out. The Upper Tribunal was wrong to focus on the FTT's criticism of Mr Mongson's "motives" or "tactics" as these are irrelevant to the legal test which has to be applied. Ground 2 is that while Mr Mongson was entitled to an oral hearing under rules 27.4 of the Tribunal Rules, in the circumstances of this case, no purpose was served by remitting the matter back for reconsideration at an

oral hearing and the Upper Tribunal should not have exercised its discretion to interfere with the FTT's process.

### **Discussion**

13. On the facts of this case, the respondent applied for an award. He was dissatisfied with the determination. He asked for a review, which then took place and he then accepted the determination pursuant to that review, albeit with some reluctance. An award was duly made and then paid to the respondent. On my reading of the Scheme, this was the end of the matter. The common thread running through these provisions and the procedural regime they create is the demarcation between acceptance of a determination and payment of the award on the one hand and rejection of the determination and review/appeal on the other. See in particular paragraphs 100, 101, 123 and 127 of the Scheme. The sense of this is obvious from an administrative and legal perspective for reasons of finality and certainty as Mr Purnell submits. In this context he draws attention to the observations of Moses LJ in Law Society v LSC [2010] 2550 EWAC (Admin), at paragraph 116 where he says:

"Good public administration requires finality. This is because public authorities need to have certainty as to the legal validity of their decisions and actions and third parties need to be able to rely on those decisions and actions."

Mr Purnell gives an example. On receipt of a signed acceptance form, CICA must be able to know that any award based on such an acceptance is final, in circumstances where the scheme itself provides for a definition of "final award" as meaning an

award which, but for any possibility of being reopened in accordance with paragraph 114, disposes of the application.

14. Quite apart from those considerations, however, in my view this is the position that emerges from the clear wording of the Scheme itself. If the respondent was satisfied with the review decision and wanted to appeal it, that route would have been open to him. But under the rules of the Scheme, he could not both accept the award and then appeal it. With respect to the Upper Tribunal judge, he did not grapple with this fundamental issue but seemed to be diverted by a point that was not material, either to the decision made by the FTT or by him, namely whether the respondent's decision to accept the award was a tactical one, or not. The motives of the respondent were, however, irrelevant. Once he had accepted the award, however reluctantly, and a final award had been made, the application had been disposed of. It follows that the appeal to the FTT was a nullity and the FTT had no jurisdiction to deal with the matter on appeal. Though this is not material for present purposes, I should add that the appeal should have been struck out under the tribunal rule 8.2 of the Tribunal Rules rather than under the rule used by the FTT, that is rule 8.3(c) which permits a claim to be struck out on the ground it has not reasonable prospect of success. The material part of rule 8.2 provides that, "The tribunal must strike out the whole or a part of the proceedings if the tribunal, a) does not have jurisdiction in relation to the proceedings or that part of them ..."

15. In this appeal it is accepted by CICA that the FTT was in error in failing to convene the oral hearing that the respondent had asked for, for the strike out to be reconsidered. However that may be, CICA is right to say, so it seems to me, that in the present circumstances where, as I would find, the FTT had no jurisdiction, any reconsideration

would be bound to result in the strike out of the respondent's appeal. For the reasons I have given, I would quash the decision and allow this appeal.

**Flaux J**

16. I agree.

**Order: Application granted.**

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

165 Fleet Street, London EC4A 2DY  
Tel No: 020 7404 1400  
Email: [civil@epiqglobal.co.uk](mailto:civil@epiqglobal.co.uk)