IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. UA-2019-002632-CIC
(previously JR/2625/2019)

Between:

NM

Applicant

- v –

First-tier Tribunal (Social Entitlement Chamber)

Respondent

and

Criminal Injuries Compensation Authority

Interested Party

Before: Upper Tribunal Judge Ward

Hearing date: 21 September 2021

Representation:
Applicant: Did not attend
Respondent: Robert Moretto, instructed by Legal Advisor, CICA

DECISION

The application for judicial review is dismissed.

REASONS FOR DECISION

1. The Applicant was the victim of sexual abuse between 1995 and 2002. In or around January 2005 she claimed compensation under the Criminal Injuries Compensation Scheme 2001. In October 2005 the Interested Party (hereafter "CICA") made an award of £8,200. This was a Level 12 award which was the rate provided by the Tariff for the matters set out in [10] below. The file, including any supporting evidence for that award, was subsequently destroyed by CICA.

2. No award was made for loss of earnings or any other additional element.

3. The Applicant accepted that award.

4. On 21 September 2016 the Applicant applied to re-open the award and she provided further information on 28 March 2017.

5. On 19 May 2017 CICA refused to re-open the award, relying on paras 56-57 of the Scheme (see [9]). That decision was confirmed by a review decision dated 19 February 2018.

6. The Applicant's appeal to the First-tier Tribunal ("FtT") was dismissed on 26 July 2019.

7. Upper Tribunal Judge Levenson directed an oral hearing of the Applicant's application for permission to bring judicial review proceedings but on 4 May 2020 in view of the COVID-19 pandemic he revoked that direction and refused the application on the papers. In July 2020 the Applicant sought to "appeal" against the refusal to be reconsidered and in September 2020 the file was transferred to me. I treated the request to appeal as being a request for reconsideration at an oral hearing and gave directions accordingly. When the Applicant then indicated that her poor mental health would not permit her to attend, either in person or remotely, I held a purely formal hearing with no parties present and on 28 January 2021 gave permission, setting out the reasons in some detail. Following receipt of a response from CICA and written submissions in reply from the Applicant, I directed a further oral hearing, indicating where the Applicant might be able to obtain pro bono representation if she wished. She either did not seek, or did not obtain, representation but provided further written submissions herself. She was once again excused from attending the hearing at her request. I considered it was in the interests of justice to proceed with the hearing and accordingly heard only from Mr Moretto.

8. It is right here to express regret to the parties for the very considerable delay affecting this decision. Along with the impact of Covid-19, there have been other staffing and operational issues affecting the Chamber over the last year and I am sorry that the parties have had to be so patient.

<u>Relevant provisions of the 2001 Scheme</u>

9. Paras 56 and 57 of the Scheme provided as follows:

> "56. A decision made by a claims officer and accepted by the applicant, or a direction by adjudicators, will normally be regarded as final, except where an appeal is reheard under paragraphs 79-82. A claims officer may, however, subsequently re-open a case where there has been such a material change in the victim's medical condition that injustice would occur if the original assessment of compensation were allowed to stand, or where he has since died in consequence of the injury.
>
> 57. A case will not be re-opened more than two years after the date of the final decision unless the claims officer is satisfied, on the basis of evidence presented in support of the application to re-open the case, that the renewed application can be considered without a need for further extensive enquiries."

10. The available awards under the 2001 Scheme to victims of sexual offences who, like the Applicant, were under 18 at the time of commencement of the offences were

set out in the Tariff. The sum paid to the Applicant (£8,200) was the rate provided in the Tariff for

> "Indecent assault
> non-penile penetrative and/or oral genital acts
> – pattern of repetitive, frequent incidents
> – over a period exceeding 3 years".

11. General Note 5 to the Tariff provides:

> "5. 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."

12. Other entries in the Tariff so far as sexual assaults are concerned relate to matters which are not in issue in the present case. If the Applicant could get over the hurdle posed by paras 56 and 57, the only basis on which she could receive any more compensation which might fall for consideration would either be (a) loss of earnings or (b) a claim for mental illness (but in the latter case she would come up against the terms of General Note 5).

The FtT's decision

13. The FtT, in summary:

a. did not accept the Applicant's evidence about her mental health, which it considered to be contradictory and inconsistent with evidence from GP records;

b. considered that the Applicant's evidence about when her mental health had deteriorated so as to be disabling could not be relied upon and it was not satisfied that her condition had materially changed since the award;

c. concluded that she had experienced "other distressing and traumatic life events" (which were detailed in the evidence and do not need to be set out here);

d. despite these she had managed to complete secondary education and gain a university place;

e. more evidence would therefore be required about her education, work and social security benefit history;

f. a report - by a psychiatrist or clinical psychologist (in order to comply with Note 10 to the Tariff) - would be required in order to decide whether the Applicant's symptoms were "directly attributable" (Scheme, para 8) to the sexual assault and are permanent;

g. noted that the Applicant had been made a time-limited award of PIP, suggesting that her disability was not thought to be permanent;

h. in its specialist opinion, considered that determining the causal relationship between the childhood sexual abuse and the Applicant's present symptoms would be complex and difficult;

i. directed itself that "The law says that the case should not be re-opened where it is not known how much (if anything) the further award will be (R(SB) (paragraph 23)" (*sic)*;

j. assessing the Applicant's entitlement under the Tariff would involve further extensive inquiries; and

k. in any event, injustice would not occur if the original assessment were allowed to stand as Note 5 precluded a separate Tariff award for mental injury.

<u>CICA's case</u>

14. Mr Moretto submits that the FtT was entitled to conclude that the evidence before it did not establish a change in the Applicant's medical condition since the original award and that of itself provides a complete answer to the judicial review.

15. However, the FtT also found that further extensive enquiries would be needed, which would mean that reopening the award was precluded by para 57.

16. These submissions were supported by detailed references to the evidence, to which I return when considering the competing submissions below.

17. When giving permission, I had flagged up a number of issues, on which Mr Moretto's position was as set out below.

Was the FtT entitled to draw the inference it did from the fact that the Applicant had received a time-limited award of PIP?

18. Mr Moretto submits that it was. Section 88 (2) and (3) of the Welfare Reform Act 2012 provides:

> "(2) An award of personal independence payment is to be for a fixed term except where the person making the award considers that a fixed term award would be inappropriate.
>
> (3) In deciding whether a fixed term award would be inappropriate, that person must have regard to guidance issued by the Secretary of State."

19. Paras. P2061 and P2062 of the DWP's *Advice to Decision Makers* provide (statutory references omitted):

> "P2061 Awards for PIP are by default to be for a fixed term. There are exceptions to this, where it is considered that such a period would be inappropriate.
>
> P2062 Where following an assessment consultation, it is considered that the claimant has a level of functional ability which is not likely to change in the long-term or high levels of functional impairment which are only likely to increase a fixed term award will be inappropriate and an on-going award with a PIP Award Review date after 10 years will be applicable.
>
> Note: This is the guidance issued by the Secretary of State in accordance with legislation."

20. He submits that an ongoing permanent award can be made where a claimant's health condition and needs are unlikely to improve, with a review date set 10 years from the date of assessment. Here however, the award was for 2 years only, so the FtT was entitled to conclude as it did.

"Further extensive enquiries"

21. CICA are unaware of any authority on what "extensive" means in this context. Mr Moretto submits that whether further "extensive" enquiries are required (as opposed to, as he puts it "only limited" or "some" further enquiries) is a matter for the relevant decision-maker and a question of judgement or assessment that cannot be disturbed unless it is one which no reasonable decision-maker could reach. For reasons he gives in some detail, the FtT was entitled to conclude that enquiries in this case would indeed be "extensive".

Whether a case should be re-opened if it is not known how much (if anything) an award should be

22. Mr Moretto agrees with my observation when giving permission that the case referred to by the FtT i.e. *R(SB) v FtT and CICA* [2014] UKUT 0497 is not authority for the proposition for which the FtT cited it, i.e. that a case should not be re-opened in the circumstances summarised in italics above. As the limitation concerning further enquiries is that they must not be "extensive", then the inference is that a case may be reopened if <u>some</u> further enquiries remained to be made, from which it may be inferred that an FtT need not know exactly what any increased award will be before the case can be re-opened. However, in his submission, the FtT does need to be satisfied that the award would be increased, for if it would not be, the FtT could not be satisfied that an injustice would occur if the award were not re-opened, which is a necessary precondition to reopening it.

23. If the FtT's reliance on R(SB) were to amount to an error of law, either:

> (a) it was not material, as the FtT had been entitled to conclude there had been no change in the Applicant's condition (see above) or
>
> (b) the outcome was highly likely to be the same in any event, in which case the decision could not be quashed: Tribunals, Courts and Enforcement Act 2007 s.15(5A) and (5B) and Senior Courts Act 1981 s.31(2A) and (2B).

Whether the FtT erred in determining whether injustice would occur

24. I observed when giving permission:

> "When addressing whether injustice would occur if the existing award were allowed to stand, the FtT appears only to have considered the Tariff award. Whether it was correct in that regard depends on these issues above about whether and to what extent an award may be made for mental illness at all in the circumstances of this case.
>
> There is no indication that the FtT considered whether there would be injustice if (were it to be established) the applicant's mental health had deteriorated in consequence of the index incidents so that she was no longer able to work, leading to a loss of earnings. This was something which had not been taken into account in the original award."

25. Mr Moretto submits that the FtT did have the possibility of a loss of earnings award in mind, in that it set out in terms CICA's submission that the Applicant was

seeking loss of earnings and when considering what further evidence would be required, referred to her education, work and social security benefit history, all matters which go to the loss of earnings.

General Note 5 to the Tariff

26. When giving permission, I observed:

> "Further, because of General Note 5, it is not possible to add on a claim for mental injury, unlike in the case of physical injury where an award may be possible on the basis set out in the General Note where the level of compensation for mental injury would be at least the same as that for the physical injury. Whilst the 2001 Scheme is not a statute, General Note 5 makes a very clear distinction between where compensation is paid "for physical injury" on the one hand and "for any sexual offence" on the other. That this is the effect of General Note 5 was confirmed by Upper Tribunal Judge Bano in *CICA v First-tier Tribunal and ML* [2017] UKUT 206 at [13].
>
> However, I note that in "Criminal Injuries Compensation Cases", Begley, 2nd edition, at para 8.15, the author observes;
>
> > "It is unclear on the face of the tariff whether the applicant could elect to pursue a claim solely for the psychiatric injury arising out of sexual abuse if this proved to be a lasting injury of a higher value than the incident of abuse considered in isolation would achieve. However, historically both the Authority and the Panel (the predecessor to the First-tier Tribunal) have informally indicated that this would be a legitimate and acceptable approach in appropriate cases. In our experience it continues to be the practice with the Authority and the First-tier Tribunal under the 2012 Scheme."
>
> I can see that that might be a justifiable approach where there is a new claim, as compensation would never have been "paid" (in the words of General Note 5) for the sexual offence. Here, however, it has been and the approach adopted by the FtT appears to go a stage further in contemplating that in principle a review leading to an award based on mental illness – possibly by way of top-up of the existing award – might be feasible. Whilst I can see compelling considerations in terms of equity between those whose mental health problems are of prompt onset and those where onset is delayed, I am having difficulty in reconciling such an approach with the wording of the Scheme.

27. Mr Moretto submits:

> a. the effect of General Note 5 in this case is that a further separate award for mental injury could not be made, given that compensation for "any sexual offence described in the tariff" had already been paid.
>
> b. "in theory" a payment for loss of earnings could still be available upon re-opening. However, as noted above, that possibility was within the contemplation of the FtT.

The Applicant's submissions

28. These take the form of a commentary on CICA's observations. In substantial measure they argue (as did her original Grounds) that a different conclusion should

have been reached on the evidence. Judicial review, though, is not a fresh look at the issues – it looks at whether the decision-maker (in this case the FtT) could legitimately reach the conclusions it did on the evidence it had (even if a person might disagree with them). For that reason also, it is only in very limited circumstances that it will be appropriate when the Upper Tribunal is deciding a judicial review case for it to look at evidence that was not before the FtT. The Applicant has included further evidence with her application and her subsequent submission but it does not fall within any of the exceptions to the general rule and so I cannot take it into account. For these reasons I do not set out point by point the matters on which she takes issue, but summarise them broadly below

29. Her case, as put in her submission to the Upper Tribunal, is that her mental health declined in 2014. Before that she had been working for 3 years in a supermarket and was being trained for team leader. Her mental health had caused her to resign. Before then she had been outgoing and had paid attention to her appearance but that had changed. Before 2014 she travelled abroad. Her PTSD was treated after 2014, but not before. She reiterates the flashback she gets of the original incidents, which did not occur before 2014. The other traumatic events to which the FtT referred had nothing to do with the onset of her PTSD, which arose from the original crime.

30. She would have provided further information about work, study and benefits, but nobody asked her to and she gives some details of them now.

31. A time-limited award of PIP does not guarantee that she would get better.

32. She submits that there would be injustice if the award were not to be re-opened because the original award was for the physical part of the abuse and had no mental element and at the time she did not have any mental trauma symptoms. (She does not offer any comment on the issues around General Note 5).

<u>Conclusions</u>

33. I accept Mr Moretto's submission that the FtT was entitled, on the evidence it had, not to be satisfied that there had been a material change. In 2017 the Applicant wrote in support of her application for the claim to be reopened how in 2005 she started to experience anxiety and depression, became paranoid and displayed symptoms of OCD and "also suffered from insomnia, flash backs and nightmares of my childhood abuse and many symptoms of PTSD. I felt like I was re-living the abuse." She wrote that in March 2010 she was starting to suffer from tension headaches every day and was advised by doctors that "I should try to decrease anything that was causing stress which was the flashbacks, memory of the bad times and PTSD". Later in the same letter she wrote that she would like to claim from mental trauma from 2005 as she had been suffering from 2005, which she confirmed when responding to a request for further information in March 2017, indicating that the symptoms started in 2005 and gradually got worse by 2014. In her application dated 29 October 2017 for review of CICA's initial negative decision, she wrote that she "started to get some symptoms of anxiety and PTSD from 2010".

34. Her medical records were in evidence from 2005 onwards. Earlier records had been sought but were unobtainable. The Applicant was offered counselling in February 2006 following a discussion with the doctor which had included "many past issues come to light including sexual abuse and self-harm", was recorded in April 2007 as having experienced a panic attack and to have a "stress-related problem" in

2007. She told a counsellor in 2015 about the abuse, stating that she had taken sleeping tablets in the day and had cut herself 7 years ago (i.e. in 2008), not since.

35. The FtT concluded that the Applicant's evidence was contradictory and inconsistent with the medical records and that her evidence about when her mental health had deteriorated so as to become disabling could not be relied upon. It relied on the medical records showing anxiety and depression in August 2005, shortly before the Applicant accepted the original award, and considered that it was likely that she would have had the symptoms for some time before going to the doctor.

36. It was for the FtT, as the tribunal of fact, to decide what to make of the evidence that was available to it. There were certainly passages which might properly be viewed as contradictory regarding the symptoms experienced and the date of their onset.

37. As to whether "further extensive enquiries" would be needed, the FtT observed that more evidence would be required about education, work and social security benefit history. They also concluded that an expert assessment would be required to decide whether the Applicant's symptoms are directly attributable to the crime of violence and are permanent, and expressed the view that in their specialist opinion, the passage of time and the other life events experienced by the Applicant meant that determining the causal relationship between the childhood sexual abuse and the Applicant's present symptoms would be complex and difficult.

38. Paras. 56 and 57 doubtless reflect a concern that the more resources that are devoted to administration, the less is available for compensation, but proper weight must be given to the word "extensive". Once there has been found to have been a material change, whether further extensive enquiries are likely to be required has to be determined at the outset of deciding whether to reopen but matters such as education, employment history and benefits history will often not be difficult to obtain. If someone had asked the Applicant, she could have provided some details (as she has latterly done). Further it occurs not infrequently in mainstream social security cases that the Department for Work and Pensions and/or HM Revenue and Customs are approached for historic information and can often provide it. However, the FtT's reason for concluding that further extensive enquiries would be needed turned on the difficulty of establishing the casual relationship between the abuse and the symptoms. Read in context in the FtT's Reasons, its reference to the Applicant's "education, work and social security benefit history" in my view occurs in the context not of discussing loss of earnings but of whether a change in her medical condition could be demonstrated. Clearly a person's ability to work or to study may provide evidence going to mental health, as may their record of claiming benefits, and the FtT's concern for that material formed part of a wider difficulty of disentangling the effect of the abuse from other matters. There was sufficient material unrelated to the abuse that was in evidence before the specialist panel for the FtT to be entitled to conclude as it did.

39. It follows that on both the fundamentals – was a change established? And were further extensive enquiries needed? – the FtT was entitled to reach the conclusion it did.

40. I am very doubtful that the FtT had in mind to the extent that it might have done the potential for a loss of earnings claim. As noted, its concern for education, work and benefits records appears to have been in the context of assessing the progression of the Applicant's health. Further, the FtT noted (emphasis added) that

"assessing [the Applicant's] entitlement under the Tariff would involve further extensive enquiries". In fact, it would not, for there was no greater entitlement under the Tariff that was available to her for the sexual abuse, as explained above, while the terms of General Note 5 precluded an additional award for mental illness, once compensation had already been paid for the sexual abuse itself. (As noted above, the position may be different where a person opts to claim based on mental ill-health from the outset). Similarly, the FtT's reasoning for concluding that injustice would not occur if the original assessment were allowed to stand was based solely on the effect of General Note 5, which does not affect a loss of earnings claim, as Mr Moretto acknowledged. However, though the FtT failed to acknowledge the point, a loss of earnings claim would be just as subject to the requirement for the causation of the mental illness to be established as a Tariff-based award would be (in circumstances where the latter was available) and so the FtT's concern that further extensive enquiries would be involved was just as applicable to that.

41. The FtT, (as I have held) legitimately, found that (a) the Applicant had not adequately demonstrated a change and (b) further extensive enquiries would be required. Either of those conclusions would be enough to mean that the Applicant's appeal was properly turned down. As I have concluded that the FtT was entitled to reach the conclusion it did on (b) and that (b) would have been equally relevant had it approached the possibility of a loss of earnings claim adequately, I conclude that if, as seems likely, the latter would otherwise have amounted to an error of law, it was not a material one. Even if, contrary to my view, the FtT's finding on (b) was fundamentally flawed, the FtT's decision would still be valid because of the unassailable finding on (a).

42. Before ending this decision, there are two matters to which I must return.

43. Para 23 of R(SB) does not concern when an award should be re-opened and nor is any other paragraph in that decision authority for the proposition for which the FtT cited it. Nor however should I be thought of as accepting, in a case where the point has not been fully argued, Mr Moretto's submission that the FtT must be satisfied that there will be some change to the award. I leave open the possibility that there may exceptionally be other forms of "injustice" that can be relied upon.

44. As regards the relevance of the time-limited PIP award, what inference can permissibly be drawn may be affected by whether the Guidance cited by Mr Moretto can properly be applied, which in turn may depend on whether the award is made by the DWP or by the FtT (see the recent decision of a Tribunal of Social Security Commissioners in Northern Ireland on the equivalent provisions in *DT v Department for Communities (PIP)* [2021] NICom 54). Even where the Guidance does apply, though, the duty is only to have regard to it. Further, in the present case, the Applicant's PIP award was made by a (different) First-tier Tribunal on 17 April 2018. We do not have a statement of reasons for its decision (probably none was obtained), merely a letter from the DWP giving effect to it, so we do not know what weight, if any – and whether or not correctly – that First-tier Tribunal placed on the Guidance in reaching its conclusion. Nonetheless, the fact remains that it did make a time-limited award – for 3 years – when other options, including an open-ended award, were open to it. In those circumstances, while it is in my view possible to draw an inference, only limited weight can properly be placed on it. The decision of the FtT in the present case – which did not have the benefit of the decision in *DT* - does not show reasoned consideration of the weight to be given to the PIP award, but it relied on that alongside relying (as it was entitled to) on the fact that the Applicant

had latterly been referred for treatment to secondary mental health services and that her condition might improve in consequence. Even without taking into account the time-limited nature of the PIP award, the FtT would in my view have reached the same conclusion that uncertainty over prognosis was a contributing factor to why there would be a need for further extensive enquiries and thus, if the FtT was in error over relying on the PIP award – or in failing to provide reasons in respect of such reliance – in my judgment it was not a material error.

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 14 April 2022