Neutral Citation Number: [2006] IEHC 115

THE HIGH COURT

[2002 No. 7ct]

IN THE MATTER OF THE HEPATITIS C COMPENSATION TRIBUNAL ACT 1997
AND IN THE MATTER OF SECTION 5 (15) OF THE HEPATITIS C COMPENSATION TRIBUNAL ACT 1997

BETWEEN

D. F.

APPELLANT

AND
THE MINISTER FOR HEALTH AND CHILDREN

RESPONDENT

Judgment of O'Neill J. delivered the 6th day of April 2006.

1. The appellant in this case is the husband of MF who was a person who contracted Hepatitis C and was awarded compensation by the Hepatitis C Compensation Tribunal pursuant to the terms of the Hepatitis C Compensation Tribunal Act 1997. The appellant brought a claim for compensation to the Tribunal pursuant to Section 4 (1) (d) of the Hepatitis C Compensation Tribunal Act 1997 (hereinafter referred to as the Act) for losses suffered by him as a result of being obliged to give up work in 1990 in order to care for his son DF.

2. Section 4 (1) of the Act provides as follows

> "*The following persons may make a claim for compensation to the Tribunal –*
>
> *(a) a person who has been diagnosed positive for Hepatitis C resulting from the use of Human Immunoglobulin Anti D in the State.*
>
> *(b) a person who has been diagnosed positive for Hepatitis C as a result of receiving blood transfusion or a blood product within the State.*
>
> *(c) children or any spouse of a person referred to at paragraph (a) or a person referred to at paragraph (b) who have been diagnosed positive for Hepatitis C.*
>
> *(d) any person who was responsible for the care of the person referred to in paragraph (a), (b) or (c) who has incurred financial loss or expense as a direct result of providing such care arising from the person being cared for having contracted Hepatitis C …".*

3. The case which was made by the appellant to the Tribunal was that he was a person who was entitled to bring a claim under Section 4 (1) (d) on the basis that the giving up of his job in 1990 for the purposes of caring for his son was in essence caring for his wife who had Hepatitis C because she on account of her Hepatitis C was unable to provide this care which she would otherwise have done and therefore in reality he was caring for her in this way. Alternatively it was claimed that there was a subrogation, of his wife's right to compensation in his favour, in respect of an notional claim on her part for acquiring his services to look after their son the cost of which being the loss to him of having to give up his job.

4. In its decision delivered on the 5th of April 2001 the Tribunal rejected the appellant's claims, concluding that the appellant was not a person who was entitled to bring a claim under Section 4 (1) (d).

5. By letter dated 23rd April 2001 the appellant was informed by the Tribunal of his entitlement to appeal the decision of the Tribunal to the High Court. On the 22nd day of August 2001, the proposed appeal was lodged and served on the respondent. It was an appeal under Section 5 (15) of the Act. The notice of motion thus appealing was returned to the solicitor for the appellant on the grounds that over one month had elapsed from the determination of the Tribunal and that the appeal was out of time. This information was imparted to the solicitor for the appellant by the Registrar of the Central Office on the 15th January 2002 and the appellant's papers were returned on the 16th January 2002. In response to this the appellant by way of a notice of motion dated the 10th July 2002 applied to this court for an order pursuant to Order 122 Rule 7 of the Rules of the Superior Court to enlarge the time prescribed by Order 105A of the Rules of the Superior Court for the bringing of this appeal. This application was grounded on the affidavit of Aileen Walsh the solicitor for the appellant sworn on the 18th day of June 2002 and also the affidavits of the appellant sworn on the 10th day of January 2002 and 10th day of June 2004. In the affidavit of Aileen Walsh she deposes to the events set out above and contends that the appellant is entitled to an extension of time as claimed. In his second affidavit the appellant explains the reason for his delay, namely that after the Tribunal, he was greatly distressed, and it was submitted by Mr. Cross S.C. for the appellant that the family circumstances as revealed in the evidence to the Tribunal demonstrates that his family was a very vulnerable family and that this court should not seek to look behind the simple explanation given by the appellant in his affidavit. In his second affidavit the appellant avers that he formed the intention to appeal within the period of one month from notification of the decision.

6. For the appellant it was submitted that the ruling of the Supreme Court in the case of *DB v. The Minister for Health and Children* in which the judgments of the Supreme Court were delivered on the 26th day of March 2003 did not apply to the circumstances of this case because this was not an appeal under Section 5 (9) of the Act not being an appeal against an award of the Tribunal but was an appeal against a "decision" of the Tribunal and hence the appeal fell to be dealt with under Section 5 (15) of the Act. It was submitted that Section 5 (15) of the Act did not contain any time limit and that the time for appeal was regulated by Order 105A of the Rules of the Superior Court and in particular subsection 2 (2) of the same and this being a rule of court was capable of extension within the discretion of the court. It was further submitted by Mr. Cross that the circumstances of the appellant's family were very very difficult and compelling and that the court should exercise its discretion in his favour in order to do justice in the case.

7. For the respondent it was submitted that the appeal was one which fell to be dealt with under Section 5 (15) of the Act and not Section 5 (9) of the Act. It was submitted that under the provision of Rule 2 (2) of Order 105A of the Rules of the Superior Court a period of one month was permitted from the date of the decision for the bringing of an appeal and that the appellant was now out of time. It was submitted that the courts ought to construe the time limit as contained in Rule 2 (2) of Order 105A as not being capable of extension on the basis that a similar provision in respect of Section 6 (3) of the Act as contained in Order 105A Rule 2 (3) was expressly said to be capable of extension and the absence of such an express provision for extension in Rule 2 (2) should lead to an interpretation that it was intended that Rule 2 (2) must be treated as not extendable. Reference was made to paragraph five of the judgment of Geoghegan J. in the case of *DB v. The Minister for Health and Children* and it was submitted that as an appeal under Section 5 (9) of the Act was to be deemed an appeal under Section 5 (15) of the Act, that must lead to a conclusion that the

statutory time period prescribed in Section 5 (9) by necessary implication extended into Section 5 (15), and that this view should inform an interpretation of Rule 2 (2) of Order 105A. It was further submitted that there was no evidence that such error as was made occurred within the one month period prescribed. It was further submitted that the appellant had not demonstrated an arguable case for appeal, it being clear, that the care provided by the appellant was for his son and not his wife who had Hepatitis C, and hence the appellant was not a person who would be a claimant under s. 4(1)(d) of the Act of 1997.

8. In reply Mr. Cross submitted that in the absence of an express provision in Rule 2 (2) to the effect that it was not to be capable of extension, as part of the Rules of the Superior Court it had to be construed as capable of extension like other time periods prescribed in the Rules. It was further submitted that the relevant mistake or error does not have to occur within the one month period. He further submitted that the care provided by the appellant in looking after his son was in reality care provided to his wife.

Decision

9. In my view Rule 2 (2) is capable of extension in the ordinary way as part of the rules of the superior court. Were it the case that it was intended that this rule was not capable of extension it would in my view have been necessary to have so provided expressly. Otherwise as part of the Rules of the Superior Court it must be interpreted as capable of extension in the same way as other time periods prescribed by those rules. I cannot accept the submission of the respondent to the effect that the express provision for extension in Rule 2 (5) and the absence of a similar expression in Rule 2 (2) should lead to a conclusion that Rule 2 (2) was not extendable. Clearly Order 122 Rule 7 of the Rules of the Superior Court applies unless expressly excluded. In the absence of such an express exclusion in my view, one is compelled to the conclusion that Rule 2 (2) can be extended under Order 122 Rule 7.

10. Section 5 (9) applies in relation to a decision which is an award of compensation. Manifestly there is a distinction made between a decision to award compensation and a decision to refuse an award. Section 5 (9) in its terms is confined to a decision to award. The statutory time limit in Section 5 (9) does not apply to a decision, as in this case, to refuse an award. Section 5 (15), under which the appeal in this case is taken does not contain a time limit. The time for the bringing of an appeal under Section 5 (15) of the Act in relation to a decision to refuse is regulated solely by Order 105A Rule 2 (2).

11. I have come to the conclusion that it cannot be said that because an appeal under Section 5 (9) is expressed to be an appeal under Section 5 (15), that by necessary implication the time limit contained in Rule 2 (2) is to be construed as not extendable. There is a clear distinction made in the Act of 1997 between the treatment of appeals against decisions to award and decisions to refuse, and the necessary implication contended for by the respondent does not carry through from one to the other.

12. In short therefore I conclude that the time limit provided for in Order 105A Rule 2 (2) is capable of extension under Order 122 Rule 7 of the Rules of the Superior Court.

13. I am satisfied having considered the evidence both revealed from the affidavits filed for the specific purpose of this application and also the transcript of evidence of the proceedings before the Tribunal, that I should exercise my discretion in favour of extending the time to enable this appeal to be brought.

14. In particular I am satisfied that the appellant did form the intention to appeal within the period of one month as prescribed by Order 105A.

15. There is no doubt that there is a discrepancy between the affidavit of Aileen Walsh and the second affidavit of the applicant as to when the notice of motion to appeal the decision of the Tribunal was lodged. There is no doubt of course that it was lodged out of time and therefore rejected by the Central Office. The averment in the second affidavit of the applicant to the effect that the appeal was lodged on the 22nd day of August, 2001, is not contradicted in evidence or otherwise by the respondents so I take that as being the date when the appeal was sought to be lodged.

16. I am satisfied that I should draw the inference from the material available on affidavit that an error was made on the part of the appellants solicitor as to the appropriate time limit governing the making of appeals against decisions of the Tribunal, and I am also satisfied that there was at that time some confusion or to put it another way a lack of certainty or clarity as to precisely what course to pursue in order to obtain a remedy for the appellant having regard to his dissatisfaction with the decision of the Tribunal. I would be inclined to draw the inference from the evidence on affidavit that this state of uncertainty arose within the one month period following notification of the decision of the Tribunal and continued for some time thereafter until finally resolved by the opinion of Senior Counsel.

17. As to the question of whether the appellant has demonstrated an arguable case for appeal, I am satisfied that he has. The Tribunal based its decision on a narrow construction of s. 4(1)(d) of the Act of 1997. I am satisfied that it is at the very least arguable that they erred in that regard and that caring for the appellants son who had a particular condition which clearly required a great deal of parental care, in circumstances where the wife of the appellant, the mother of the child, was unable by virtue of her Hepatitis C to provide that care was in reality the provision of care for the appellants wife. It would seem to me to be at the very least arguable that the exclusion of the care provided in this case is based on an unreal distinction between the many tasks that make up the concept of care, where that care is being provided by a husband for a wife suffering from Hepatitis C. There is no doubt that the appellant as the husband of a sufferer from Hepatitis C was a person who in the words of s. 4(1)(d)

> "is responsible for the care of a person referred to in paragraph (a)…"

18. In the case of *M.O.C. v. The Minister for Health and Children* in which I delivered judgment on the 28th July, 2000, I held that a husband who gave up a variety of employments and thereby suffered financial loss, in order to care for his wife who was suffering from Hepatitis C was entitled to recover his aforesaid losses. In that case the primary care being undertaken by the husband in question was of that of looking after children in circumstances where by reason of her Hepatitis C, she was disabled from that parental duty.

19. For the reasons set out above I have come to the conclusion that I should exercise my discretion to extend the time for the bringing of the appeal in this case.