

THE HIGH COURT

[2012 No. 5 C.T.]

IN THE MATTER OF THE HEPATITIS C COMPENSATION TRIBUNAL ACTS 1997 - 2006

BETWEEN

P.B.

APPELLANT

AND

MINISTER FOR HEALTH AND CHILDREN

RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 31st May, 2013

Introduction

1. This is an application pursuant to s. 4(15) of the Hepatitis C Compensation Tribunal Act 1997 ("the Act of 1997"), to extend the time within which the appellant may make a claim for compensation to the Hepatitis C Compensation Tribunal ("the Tribunal"). The matter comes before this Court by way of an appeal against a decision of the Tribunal dated the 24th May, 2012, which refused such relief.

Background

2. It is common case that the appellant was born in November, 1960 and that he currently lives at North Great Charles Street, Dublin. Tragically, he appears to have contracted Hepatitis C before he was ten years of age as a result of a blood transfusion in the course of medical treatment which he received following an accident.

3. The appellant was informed of having contracted Hepatitis C on the 16th June, 1999. Under s. 4 (14) of the Act of 1997, he was obliged to make his application for compensation within three years of that date.

Proceedings before the Tribunal

4. The appellant was not aware of the government's scheme to compensate those infected with Hepatitis C until October, 2002 and as a result he did not make his application until the 2nd December of that year.

5. The appellant applied to the Tribunal to extend the time to make his application claiming that there were "exceptional circumstances" which would justify the Tribunal extending the statutory period. However the Tribunal in its decision of the 24th May, 2012 refused that application.

The appellant's claim

6. The appellant now, by way of an appeal, seeks to invoke the High Court's discretion under the provisions of s. 4(15) of the Act of 1997, as amended by the Hepatitis C Compensation Tribunal (Amendment) Act 2002, which provides as follows:-

"The Tribunal may, at its discretion and where it considers there are exceptional circumstances, extend the periods referred to in subsection (14) and in subsection (14A)."

7. For the purposes of this appeal, the Court had the benefit of the affidavits sworn in support of the appeal and the exhibits thereon referred to. It also heard oral evidence from the appellant himself and it received into evidence, by agreement with the respondent, the report of Dr. Mona Kilduff, consultant psychiatrist, dated the 1st February, 2013.

8. Based upon the evidence received by the Court, the appellant submits that there are exceptional circumstances within the meaning of s. 4(15) which would justify the Court extending the three year statutory time limit provided for in the section.

Facts

9. I do not intend to set out all of the evidence heard by the Court on the present appeal. However, the following are some of the undisputed facts which I consider most material to my decision and for this reason I will refer to them at this juncture.

10. The appellant was born in 1960 and lived with his mother in the Regina Coeli Hostel, North Brunswick Street, until he was approximately thirteen years of age. The appellant remained in formal education until he was sixteen or seventeen years of age but did not complete any formal State examinations. At some stage after he left school, the appellant took up employment with Dublin City Council where he worked as a general operative in the cleaning department for approximately thirteen or fourteen years.

11. The appellant's life has been complicated by a range of psychiatric problems which have been apparent since he first attended the North Strand Outpatient Psychiatric Services in September, 1991. His problems include manic depression, bipolar disorder, panic attacks, and agoraphobia. These conditions have required the appellant to take significant amounts of medication over the years. Dr. Kilduff in her report dated the 1st February, 2013, records in some detail the difficulties encountered by the appellant arising from the death by suicide of a very close friend in December, 1999 which triggered unresolved grief over the deaths of his brother, nephew and parents. She believes that this provoked an escalation in his anxiety and panic attacks. These symptoms, she contends, were compounded by alcohol abuse and benzodiazepine dependence and provoked the appellant's admission to hospital for four days on a crisis basis in February, 2000.

12. Dr. Kilduff's evidence as to the significance of the appellant's psychological problems, particularly throughout the year 2000, appears to be borne out to a certain extent by his work records. These show that he was out of work between September, 1999 and March, 2001. He was then back at work between March, 2001 and May, 2001 after which he was again out on sick leave until he was

ultimately retired on health grounds in June, 2003. Accordingly, it appears to be the case that for the greater part of the three year statutory timeframe within which the appellant was obliged by statute to maintain his claim for compensation under the Act of 1997, he was in fact unfit for work. The records exhibited within the proceedings establish that the grounds for his being out of work over this period of time include the effects of Hepatitis C and psychological disturbances of one type or another.

13. The appellant in his own evidence told the Court that he was of modest intellect and quite disorganised. He also stated that he lived a relatively isolated existence. He does not buy newspapers and his television viewing is limited to soap operas. Neither does he have any interest in politics or current affairs.

14. The appellant told the Court that he was only advised of the existence of the compensation scheme by a senior member of the nursing staff at St. Vincent's Hospital in Fairview, some time in October, 2002. The nurse in question gave him the name of Mr. Tom Hayes, of Arthur McLean Solicitors and as a result he made his application to the Tribunal in December, 2002, albeit that the same was then outside the statutory time limit.

Submissions on behalf of the appellant

15. Dr. Craven, B.L., on the appellant's behalf, submitted that there were "exceptional circumstances" which would justify the Court extending the time under section 4(15). As a matter of law, he submitted that the appellant's lack of knowledge of the scheme itself could in the circumstances of the present case amount to "exceptional circumstances" within the meaning of the section. However, he submitted that if the Court was against him on that point, he was satisfied that the appellant's other difficulties such as his social isolation, educational disability, long standing mental health difficulties would be sufficient to justify the Court exercising its discretion in the appellant's favour and in this regard, he relied upon a number of decisions of the High Court including *J.O'B v. Residential Institutions Redress Board* [2009] IEHC 284 (Unreported, High Court, O'Keeffe J., 24th June, 2009); *M.G. v. Residential Institutions Redress Board* [2011] IEHC 332 (Unreported, High Court, Kearns P., 9th August, 2011), *A.G. v. Residential Institutions Redress Board* 2012 IEHC 492 (Unreported, High Court, Hogan J., 6th November, 2011) and *Mc G. v. Minister for Health and Children & Anor* (Unreported, *ex tempore*, Hanna J., 28th July, 2005).

Submissions on behalf of the respondent

16. Mr. Carson, S.C., counsel for the respondent, submitted that on the evidence in the case the appellant had not proved that there were any "exceptional circumstances" which would justify the Court exercising its discretion. On the facts, he submitted that the appellant was not particularly isolated from a social prospective having regard to his ongoing engagement with a range of doctors pertaining to his Hepatitis C infection and with other doctors concerned with his employment status. He relied upon the fact that the appellant appeared to be capable of looking after himself regardless of any mental health difficulties and that he had only been hospitalised for a total of five days during the three year period under the Court's scrutiny. He also relied upon the fact that once told of the existence of the scheme, the appellant, regardless of his mental health, social isolation or educational disabilities, had demonstrated himself well capable of attending with his solicitors and engaging with the legal process regardless of any ongoing mental disability.

17. Mr. Carson accepted that an applicant's lack of knowledge of the existence of the compensation scheme might in rare circumstances entitle him to the extension of time under the Act but that the circumstances of this case did not fall into that category. He relied upon the same body of case law as that relied upon by the appellant. Counsel for the respondent also suggested to the Court that had the Oireachtas intended that lack of knowledge be a ground for extending the statutory time period it would have so provided as it had done, for example, in the Statute of Limitations.

The law

18. The decisions of the Court in *J.O'B v. Residential Institutions Redress Board* [2009] IEHC 284; *M.G. v. Residential Institutions Redress Board* [2011] IEHC 332 and *A.G. v. Residential Institutions Redress Board* [2012] IEHC 492 all concern s.8 (2) of the Residential Institutions Redress Act 2002, which is a provision entirely similar to that provided for by s. 4(15) of the Act of 1997. In each of those decisions, the High Court, on a judicial review application, was asked to consider the validity of decisions made by the Residential Institutions Board wherein it had refused the applicant's application for an extension of time based upon the alleged existence of "exceptional circumstances".

19. In *J.O'B v. Residential Institutions Redress Board* [2009] IEHC 284, the applicant had learned about the existence of the statutory scheme only two weeks prior to the expiry of the relevant period when he saw an advertisement regarding the scheme in the English national newspapers. The Board dismissed his application for an extension of time being satisfied that on the facts of his case, he had not established that there were "exceptional circumstances" which would justify its exercising its discretion to extend the time under the section. The applicant sought, *inter alia*, a declaration that the Board's decision was unlawful and that its decision to the effect that there were no exceptional circumstances was wrong in fact and in law.

20. O'Keeffe J. dismissed the application for the relief sought and found no fault with the manner in which the Board had exercised its jurisdiction or with its conclusions. Hence it is relevant for the purpose of the present proceedings to note those aspects of the Board's decision which were endorsed by the trial judge in the course of his decision. O'Keeffe J. referred firstly to the fact that the Board had considered the Oxford English Dictionary's definition of "exceptional circumstances" and an "exceptional case" before concluding that the word exceptional should be considered to refer to circumstances out of the ordinary, probably quite unusual but not necessarily highly unusual. In such circumstances it would therefore be inappropriate for the Board to apply a test of uniqueness to an application to extend time to make a claim. Secondly, the trial judge noted that the Board had decided that it should determine each application according to its individual merits and particular circumstances. It should not seek to define in advance what circumstances might be considered exceptional as to do so could have the effect of severely restricting the discretion of the Board and operate an injustice in a case where there were exceptional circumstances but these did not fall within the list of stated or prescribed exceptions. Thirdly, the Court noted that the Board had stated that it could envisage circumstances in which the effect or impact of mental or physical health problems or other personal circumstances on an individual could have the effect of preventing or inhibiting an applicant from making an application within the prescribed period. Finally the trial judge referred to the Board's views that "ignorance of the existence of the scheme and/or closing date, in and of itself, does not constitute exceptional circumstances" but that "lack of knowledge may have arisen in the context of other factors such as those described above, and in that sense, exceptional circumstances may arise".

21. O'Keeffe J. made no criticism of the Board's interpretation of what might constitute exceptional circumstances within the meaning of s. 8.(2). Furthermore, insofar as the Board had expressed its view as to whether lack of knowledge of the scheme could amount to exceptional circumstances O'Keeffe J. stated that this issue was not relevant on the facts of the case given that the applicant in the course of his evidence had stated that he had been aware of the scheme in sufficient time to allow him make his application.

22. In *M.G. v. Residential Institutions Redress Board* [2011] IEHC 332, the applicant also sought to quash a decision of the Residential

Institutions Redress Board, once again based upon its refusal to consider the applicant's circumstances to be exceptional within the meaning of section 8(2). The Board had concluded that ignorance of the existence of the scheme and/or closing date in and of itself did not constitute exceptional circumstances, noting that a substantial majority of late applicants maintain that their applications are late because they did not know about the redress scheme in time. The Board concluded that had the Oireachtas intended that all such applications be accepted then the legislation would have included a state of knowledge test in s. 8(2) rather than the test of exceptional circumstances. The Board nonetheless set forth its considered view that lack of knowledge could arise in the context of other factors and in that sense, the applicant's lack of knowledge might amount to exceptional circumstances.

23. Kearns P. having considered decision of the Board was satisfied that the Board had not in fact concluded that a lack of knowledge of the scheme on the part of an applicant was incapable of amounting to exceptional circumstances. He stated that the Board was entitled to consider an applicant's state of knowledge when considering whether or not exceptional circumstances existed. By way of example, he referred to a situation where an applicant might have been residing in a far away jurisdiction or for some other reason found themselves entirely cut off from all sources of communication such that the existence of the scheme could only have come to their knowledge after the time limit had expired. He indicated that in such circumstances the Board would regard the claimant's situation as exceptional. The trial judge then went on to conclude that the Board had given careful consideration to the applicant's intellectual ability, which had been highlighted by her advisers in the context of seeking to establish the existence of exceptional circumstances, prior to dismissing the claim.

24. In *A.G. v. Residential Institutions Redress Board* [2012] IEHC 492, Hogan J. dealt with an application to challenge a decision of the Board where it had refused to grant an extension of time under the provisions of s. 8(2) of Act of 2002. In the course of that judgment, he expressed some reservations as to the manner in which the Board and the Court in the above cases had interpreted the provision. He contended that the Board had interpreted exceptional in a conceptual fashion instead of having regard to the empirical experience of the Board. The Board had noted that a significant number of potential applicants had not applied for redress simply by virtue of lack of knowledge of the Board. This, it suggested, rendered the circumstance where an individual fails to apply in time as he was unaware of the provision, unexceptional. He also did not agree with the Board's conclusion that the failure of the Oireachtas to employ a state of knowledge test in s. 8(2) should be interpreted as demonstrating an intention that applicants who were unaware of the existence of the scheme during the currency of its operation should have their applications rejected. He was of the view that the use of the words "exceptional circumstances" by the Oireachtas was simply intended to leave the Board with the greatest possible flexibility to deal with the wide variety of possible circumstances in which late applications might be made. The failure of a potential applicant to apply within the time frame was just one possible category of exceptional circumstance. However, having regard to the previous High Court authorities, given that the facts of his own case were relatively indistinguishable from those in *M.G. v. Residential Institutions Redress Board* [2011] IEHC 332 he did not feel justified departing on a point of pure statutory interpretation not raising a fundamental question of law. Accordingly, he dismissed the application.

25. The Court was also referred to the ex tempore decision of Hanna J in *Mc G. v. Minister for Health and Children & Anor.* That was application for relief under s. 4(1)(d) of the Act of 1997 brought by the spouse of an individual who had been infected by Hepatitis C. The spouse had failed to apply within the three year statutory limit and sought relief from the High Court. In dealing with the issue of whether the applicant had established the existence of exceptional circumstances Hanna J advised as follows:

"In my view 'exceptional' in that context, must mean, for example, out of the country, or ill or physically disabled. Something that sets this case apart not from society as a whole where of course this is exception in that sense, but from other claimants in the same position."

As this judgment predated the other judgments to which I have earlier referred and in circumstances where the observations of the trial judge are not particularly exhaustive I feel that the judgment adds little to the body of case law earlier referred to in terms of assisting the court as to the merits of the present appeal.

Analysis

26. From the aforementioned decision, it is clear to me that the Court has a significant discretion as to the matters it may take into account when deciding whether or not the applicant has established the existence of "exceptional circumstances" that would warrant the exercise by the Court of its discretion. These include the physical and psychological health of the applicant, their intellectual capacity, their ability to engage with society in general and in certain circumstances their state of knowledge as to the existence of the compensation scheme. However, it must be remembered that this compensation scheme was designed to cater to the population in general within which there are people of all levels of intellectual capacity and to permit claims to be brought by people who might be suffering severe physical or psychological consequences of an infection such as Hepatitis C and who equally on learning of their condition and potential prognosis might become fragile or volatile.

27. The evidence before me established that the appellant undoubtedly had a relatively deprived upbringing. He may well be somewhat unusual insofar as he claims to be antisocial, being disinterested in politics and the media. However, the fact that any potential claimant may not be interested in politics or does not follow the news on the television or indeed buy a daily newspaper, would not to my mind constitute exceptional circumstances such as to justify a special case being made. Furthermore, the Appellant did stay within the education system until he was sixteen or seventeen years of age and thereafter managed to hold down employment with Dublin City Council for approximately thirteen years. In these circumstances, I do not believe that there is anything particularly unusual within his background that should be put into the scales in seeking to evaluate whether or not "exceptional circumstances" exist.

28. The appellant, when he gave his evidence, presented as well groomed, articulate and relatively insightful as to his own condition. He gave his evidence in a rational fashion being well able to describe the emotional difficulties he has had since the late 1990s. Further, when he learned in October, 2009 of the existence of the compensation scheme, he had no difficulty in making contact with his present solicitors and engaging with the compensation process such that an application was made to the Tribunal on his behalf on the 2nd December, 2002.

29. I have no difficulty in accepting all of Dr. Kilduff's evidence as to the nature and extent of the appellant's psychological problems from the early 1990s. I acknowledge that the appellant has been prone to anxiety and panic attacks and that these escalated during the year 2000 which is one of the three years within the period during which the appellant was required to make his application for compensation. I also accept that for the greater part of that period, he was out of work as a result of symptoms referable to his Hepatitis C infection and his psychological health. However, once again, I think the applicant's position has to be measured against the likely health of those whom this compensation scheme was designed to benefit, many of whom would have been expected to have been suffering from a wide range of symptoms referable to this potentially life threatening liver disease.

30. The applicant in the present case did not psychologically decompensate when he was advised of his infection. He fully engaged

with the gastroenterology team in Beaumont Hospital albeit that there were several appointments which he did miss presumably due to the tragic deaths of his friend and nephew to whom I have already referred. However, he participated in blood tests, liver biopsy etc. and was able to engage with his general practitioner, his consultant gastroenterologist, and the occupational health physician attached to Dublin Corporation. He was able to attend for examinations when required in relation to his sick leave and seemed to be to that extent at least in control of his day to day activities. I accept that he was hospitalised on two occasions for a total of five days in the year 2000 as a result of mental health issues but I am not satisfied that his health issues in any way impacted upon his ability to learn or know of the existence of any compensation scheme.

Decision

31. I am satisfied as a matter of law particularly having regard to the decisions in *J.O'B v. Residential Institutions Redress Board* [2009] IEHC 284 and *A.G. v. Residential Institutions Redress Board* [2012] IEHC 492 that in certain circumstances the mental or physical state of health of an applicant may be such as to amount to exceptional circumstances within the meaning of section 4(15). Undoubtedly the appellant in the present case had very significant mental health problems during the three year period in which he was obliged to maintain his claim. However, these problems were not the reason why he did not become aware of the scheme. He told the Court that he has never engaged with newspapers, television or politics regarding current affairs and this is clearly why he did not know of the compensation scheme.

32. I believe that an applicant who wishes to rely upon his mental or physical health as a reason for his failure to know of the existence of the scheme or make his application within the prescribed period must be in a position to demonstrate on the balance of probabilities that but for those health problems he would have made his application within the time prescribed. In other words he must show a causative connection between that physical or mental condition and his failure to maintain his claim within the prescribed period of time. In this case, the appellant's failure to maintain his claim was entirely due to his lack of knowledge of the existence of the scheme. This is proven by the fact that when he became aware of the scheme he was able to expeditiously bring forward his claim. The lack of knowledge was not as a result of his physical or mental condition over the relevant period. The fact that he had contemporaneous psychiatric problems is a separate matter and in that I believe they do not impact upon his ability to engage with the compensation process or to know of its existence. Accordingly, regardless of the appellant's undoubtedly troubled upbringing and difficult life from a social, family and health perspective, I am not satisfied that he has established "exceptional circumstances" such as would justify the Court granting the extension of time sought.

33. For all of the aforementioned reasons, I must dismiss this appeal.