

THE HIGH COURT

[2010 No.9 C.T.]

IN THE MATTER OF THE HEPATITIS C COMPENSATION TRIBUNAL ACT 1997 AND IN THE MATTER OF SECTION 5(9){A} AND IN THE MATTER OF SECTION 5(15) OF THE HEPATITIS C COMPENSATION TRIBUNAL 1997 (AS AMENDED) BY THE HEPATITIS C COMPENSATION TRIBUNAL (AMENDMENT) ACT 2002

BETWEEN

J.M.

APPELLANT

AND

MINISTER FOR HEALTH AND CHILDREN

RESPONDENT

AND

THE HEPATITIS C AND HIV COMPENSATION TRIBUNAL

NOTICE PARTY

JUDGMENT of Ms. Justice Irvine delivered on the 6th day of March, 2012

1. In my judgment delivered on 23rd February, 2012, I dealt with J.M.'s appeal against a decision of the Hepatitis C and HIV Compensation Tribunal ("the Tribunal") made on 26th July, 2010. That appeal concerned itself both with the general damages which had been awarded by the Tribunal and also the sum which had been awarded in respect of J.M.'s loss of earnings claim. Accordingly, the hearing before me was a rehearing of his claim for compensation.

2. It is common case that in serving his notice of appeal, J.M. rejected the award made by the Tribunal and this Court accordingly proceeded *de novo* to assess his claim for both general and special damages. Further, shortly before the hearing of the appeal before me, the respondent notified J.M.'s solicitors that it was his intention to argue, on the appeal, that the general damages to be awarded to J.M. should in fact be less than that which had been awarded by the Tribunal.

3. Having considered the evidence on the appeal, I awarded J.M. the same sum in respect of general damages as had been awarded by the Tribunal. In respect of his claim for loss of earnings, I made an additional award of €25,000 in respect of the period 1988 to 1992, a sum of €62,000 in respect of losses which had in fact been covered by the earlier award of the Tribunal and finally a further sum of €42,000 in respect of future earnings which had not been covered by the award of the Tribunal. Accordingly, the overall effect of my award was to uplift the special damages awarded by the Tribunal by approximately €70,000.

4. Mr. Mac Eochaidh, S.C. on behalf of the respondent has submitted that in circumstances where the appellant failed on his general damages appeal that he should not be awarded any costs in relation to that issue. He submitted that the court should try to fashion an order for costs which would reflect that outcome. This could be done in a number of ways. The court could make no orders as to costs in relation to the general damages aspect of the claim. It could disallow the costs and expenses of various witnesses and their reports in relation to that issue. The court could measure the appellant's costs or could make an order reducing or restricting the legal fees of J.M.'s solicitor and counsel in a manner to reflect the overall outcome. In support of his application, counsel submitted that it was clear from the court's judgment that it largely accepted the argument of the respondent as to how general damages should be assessed in the case of a co-infected claimant who had received a prior award of damages in respect of a different infection. The court had also rejected the submissions made on behalf of J.M. that the court should, whilst having some regard for the earlier award, effectively treat the two infections as separate injuries with different consequences and should not impose any restriction on the damages in the second case by virtue of the earlier award.

5. Mr. Hayden, S.C., on behalf of J.M., submitted that the medical evidence which was required to deal with the appeal in respect of general damages was equally necessary in the context of the loss of earnings claim. It would not have been possible to run the special damages appeal without that evidence. Further, in the light of the notification received by J.M.'s solicitor that the respondent intended to argue for a reduction in general damages on the appeal, it was absolutely essential for the appellant to have his medical evidence before the court. Counsel also argued that in circumstances where the court did not reduce the general damages that had been awarded by the Tribunal, the respondent had substantially failed on this issue. In such circumstances, it would be wholly unjust to do anything other than apply the normal rule which is that costs should follow the event. He also submitted that the court's judgment was one which signposted for other litigants how damages would be approached in this type of case. In these circumstances, he submitted that, regardless of the outcome, J.M. should be awarded his full costs.

Conclusion

6. It is clear from the decision of Clarke J. in *Veolia Water UK Plc v. Fingal County Council* [2007] 2 I.R. 81 that the court, particularly in complex cases, should pay particular attention to the precise circumstances in which costs have been incurred by the parties when considering the appropriate order for costs at the end of the proceedings. I agree with Clarke J. that in those cases it is often possible to identify individual issues which were pursued by the winning party but which were not resolved in their favour. Often the pursuit of such an issue has put the opposing party to substantial costs and has resulted in the trial being substantially elongated. In such circumstances, I accept that it should be possible to estimate how much of the court's time was taken up by that issue and that if the justice of the case requires it, the court might set off the costs of that issue against the cost's order made in favour of the successful party. Clearly the court has a number of tools at its disposal to deal with such events including its right to measure costs in an appropriate case, to disallow the costs of particular witnesses and the costs of the preparation by them of their expert reports and if necessary to direct that the costs of the winning party be reduced by some percentage to reflect the time spent on issues pursued by the winning party and in respect of which they were not successful.

7. However, the principles outlined in *Veolia* are at their most significant in lengthy proceedings wherein several distinct legal issues are raised for the court's consideration or in cases which involve interlocutory applications heard separately from the substantive proceedings. Just because a party is successful in their action that does not necessarily mean that they should recover, for example, the costs of an earlier interlocutory application in which the costs were reserved to the trial judge. Similarly, if the winning party has unsuccessfully pursued an unmeritorious, time consuming and costly legal issue, justice should ensure that the losing party should not be affixed with the costs of that issue.

8. It seems to me that the overriding starting position for a court asked to deal with the costs of proceedings at the conclusion of a case must be that which was stated by Clarke J. in *Veolia* namely that costs should, in most circumstances, follow the event. However, applying the reasoning of Clarke J. to the facts of the present case, the first matter of particular significance is that all of the issues on the present appeal were dealt with in the course of one day. This is not a case where the respondent can argue that an additional day's costs was spent dealing with a particular issue on which J.M. was unsuccessful. Further, I accept Mr. Hayden's argument that to run the special damages aspect of this claim and to meet the challenge of the respondent to the level of the award of general damages made by the Tribunal, it was absolutely necessary for J.M. to call medical evidence in relation to his HIV status. Without that evidence, his case would have been substantially weaker. Further, the medical evidence in relation to J.M.'s life expectancy was important in the context of the special damages claim, particularly in the light of his upcoming HCV treatment and liver transplant. Both such interventions are potentially life threatening in terms of their capacity to destabilise J.M.'s otherwise stable HIV status. Also, any foreshortening of a claimant's life expectancy due to infection, as was alluded to in *J.R* is an extremely relevant factor for the court to take into account in considering the appropriate level of general damages to be awarded to someone such as J.M.

9. In the aforementioned circumstances, on the facts of the present case, I intend to allow J.M. his full costs on the appeal. Had it been the case, however, that I had awarded a lesser sum in respect of general damages than had been awarded by the Tribunal, I would have considered directing that the appellant's costs be reduced by some percentage to reflect this fact regardless of whether or not that medical evidence may have been relevant to an appeal in respect of special damages which was successful. Certainly, I can think of a wide range of circumstances in which it might be appropriate to try to fashion an order for costs in such a manner as to ensure that unmeritorious appeals are not pursued. However, on its facts, this is not such a case.

APPROVED: Irvine, J