**19/95**

**SUPREME COURT OF VICTORIA**

# *HALL v CRIMES COMPENSATION TRIBUNAL and ANOR*

**O'Bryan J**

**13, 15 November 1995 — 9 VAR 279**

**CRIMES COMPENSATION – APPLICATION FOR AWARD – APPLICANT UNWILLING TO COMMENCE CIVIL PROCEEDINGS AGAINST OTHER PERSON – WHETHER TRIBUNAL HAS POWER TO COERCE APPLICANT TO TAKE PROCEEDINGS – WHETHER TRIBUNAL'S POWER TO ADJOURN IS FETTERED: *CRIMINAL INJURIES COMPENSATION ACT* 1983, S10(b).**

**1. The Crimes Compensation Tribunal does not have a wide discretion to adjourn a claim until the applicant has commenced civil proceedings against the person involved. The tribunal's power to adjourn is fettered by s10 of the *Criminal Injuries Compensation Act* 1983.**

**2. Accordingly, the Tribunal was in error in adjourning an application for an award indefinitely so as to compel an applicant who was unwilling and/or unable to commence a civil proceeding.**

**O'BRYAN J: [1]** This is a proceeding for judicial review of a decision of the Crimes Compensation Tribunal constituted by a Magistrate on 19 May 1995 whereby the learned Magistrate ordered an adjournment of an application for an award of compensation under the *Criminal Injuries Compensation Act* 1983 (the Act) pursuant to s10(b) (ii) of the Act. The orders sought by the plaintiff are in the nature of certiorari quashing and setting aside the decision to adjourn the application and in the nature of mandamus to compel the Tribunal to hear the application.

The facts may be stated briefly. In an application for compensation pursuant to the Act the plaintiff alleged that she was raped by a male person and suffered injury within the meaning of the Act on 15 September 1993.

Arising out of the plaintiff's allegation the police charged the male with rape and at a subsequent committal hearing he was committed for trial. The Director of Public Prosecutions decided to enter a *nolle prosequi* and the criminal proceeding terminated.

The application came on for hearing before the Tribunal on 3 May 1995 and discussion ensued between the learned Magistrate and counsel for the plaintiff. The learned Magistrate said "that he did not have any evidence on which he could base his decision as it was a word against word case." I have difficulty in understanding this observation for the male did not appear and was not represented. The learned Magistrate also observed " that this was a case where he had to have regard to s10(b) of the Act and he could not think of any other case which would fit into s10. He went on to say **[2]** that he thought this was a case perfect for s10(b), because it was a word against word case."

Although the principal affidavit of the plaintiff in support of the motion for judicial review does not reveal that her counsel opposed an adjournment of the hearing proposed by the learned Magistrate, I shall assume that she did so.

After further discussion the hearing was adjourned to 5 May to enable counsel for the applicant to make written submissions to the Magistrate. In due course a memorandum of submissions opposing an adjournment was placed before the learned Magistrate. The written submission argued, *inter alia*, that where there is a real chance that civil proceedings would issue against someone public interest considerations may justify the Tribunal exercising a discretion to adjourn proceedings pursuant to s10(b)(ii). Nevertheless, the applicant has a right to have her application heard summarily pursuant to the Act.

Although the written submissions did not explicitly say that the applicant was unwilling to

commence a civil proceeding for damages against the male a fair reading of the document could lead to no other conclusion.

On 19 May the learned Magistrate published reasons for making an order adjourning the application for compensation, in effect, *sine die*, pursuant to s10(b)(ii).

It is necessary to consider s10(b)(ii) before returning to the reasons of the learned Magistrate.

Section 10 is concerned with adjournments:

"The Tribunal may adjourn consideration of an application for compensation—
(a) on the application of the Director of Public Prosecutions, made on the ground that—
**[3]** (i) a prosecution for an offence arising out of the criminal act has commenced; or

(ii) such a prosecution is about to commence:
(b) pending the determination of proceedings—
(i) which have commenced; or
(ii) which the applicant could commence—
against any person in relation to the victims injury or death; or

(c) not relevant."

In relation to sub-clause (b) I shall assume for the purposes of this proceeding that the word "proceedings" means both criminal and civil proceedings. A question of construction arises as to the meaning of the words "could commence" in sub-clause (ii). The ordinary meaning of "could" is "it is possible" (*The Oxford English Dictionary, 2nd Edition*) or "would like to" (*New Shorter Oxford English Dictionary* 1993).

Ms O'Brien of counsel for the plaintiff submitted that in the context of the scheme of the Act the intended meaning of "could commence" is, not "it is possible to commence", but is "would like to commence". The construction urged by Mrs Davis, who appeared for the Attorney-General for the State of Victoria, is "it is possible to commence". Were this construction to be accepted the consequence is that s10(b)(ii) confers on the Tribunal power to adjourn consideration of an application pending the determination of a civil proceeding which it may be possible for the applicant to commence against someone in relation to her injury but which she is unwilling or unable to commence.

**[4]** A coercive power of this kind existed in the *Criminal Injuries Compensation Act* 1972 in s18. By sub-section (1) the Tribunal was empowered to:

> "require the applicant to take proceedings for the enforcement of any legal right or remedy the applicant has or may exercise against any other person with respect to the injury or death and may adjourn the hearing of the application pending the determination of those proceedings."

Section 10(a) in the Act reproduces s14(5) of the 1972 Act with the substitution of the Director of Public Prosecutions for the Attorney-General as the person who may apply for an adjournment of the application on the ground that a criminal prosecution has commenced or is about to commence. Section 10(b) replaces part of s18(1). (See Notes on Clauses to the *Criminal Injuries Compensation Bill* 1983 provided to Parliament by the Attorney-General at the Second Reading speech). In my opinion, when s18(1) was replaced with s10(b), the power to adjourn a proceeding until the determination of a civil proceeding an applicant could commence against a person but may be unwilling to commence was removed from the Tribunal. The change effected by s10(b) removed the coercive power previously in s18 of the 1972 Act.

The question is whether the learned Magistrate intended to compel the plaintiff to commence civil proceedings against the alleged male rapist whether or not she was willing and or able to do so.

It is now necessary to consider the decision of the learned Magistrate who constituted the Tribunal in the present case. The learned Magistrate rejected an argument that s10(b)(ii) should be read as meaning that the Tribunal may only adjourn an application when there is a "real chance"

that **[5]** civil proceedings would issue. In the final paragraph of reasons the learned Magistrate said:

> "In my view s10(b)(ii) of the Act gives the Tribunal a wide discretion to adjourn claims. I am of the opinion an application like the present should be adjourned to enable the applicant to commence her own proceedings in the civil courts. They are much better able than this Tribunal to test the strength of the allegation."

I consider that the learned Magistrate meant that he had a wide discretion to adjourn the claim until the applicant commenced a civil proceeding and her allegation of rape was determined in a civil court.

This view of the power to adjourn is wrong and fails to recognise that the Tribunal's power to adjourn an application is fettered by s10 of the Act. The discretion to adjourn must be exercised within the term of s10. It follows that the learned Magistrate acted upon an erroneous construction of s10(b) and this Court may correct the learned Magistrate's exercise of discretion.

I am satisfied by the material that Ms. O'Brien made it sufficiently clear to the learned Magistrate firstly, that her client was unwilling and/or unable to commence a civil proceeding, and, secondly, that the Tribunal had no power under s10(b) to adjourn the application indefinitely so as to compel the applicant to commence a civil proceeding. The initiative for adjourning came from the Tribunal and was vigorously opposed by Ms O'Brien.

In these circumstance the relief sought by the plaintiff in this proceeding should be granted to enable the plaintiff to have her application heard and determined by the **[6]** Tribunal. Orders will be made setting aside the decision of the Tribunal on 19 May to adjourn the application and requiring the Tribunal to hear and determine the application according to law. The question of the plaintiff's costs and who should pay them will be determined following submissions by counsel for the parties.

**APPEARANCES:** For the Plaintiff: Ms F O'Brien, counsel. Solicitors for the Plaintiff: Ann Velos for the Legal Aid Commission. For the Intervenor: Mrs S Davis, counsel. Solicitor for the Intervenor: Victorian Government Solicitor.

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