

31/96

## SUPREME COURT OF VICTORIA

***P v CRIMES COMPENSATION TRIBUNAL***

Hampel J

27 June, 2 August 1996 — [1997] 2 VR 63; (1996) 88 A Crim R 292

**NATURAL JUSTICE – PROCEDURE – CRIMES COMPENSATION APPLICATION – PROPOSAL TO NOTIFY “ALLEGED OFFENDER” – APPLICATION MADE TO MAKE SUBMISSIONS WHY NOTIFICATION SHOULD NOT BE MADE – APPLICATION REFUSED – NATURAL JUSTICE – “APPROPRIATE” – MEANING OF – WHETHER FAILURE TO ACCORD PROCEDURAL FAIRNESS – WHETHER DENIAL OF NATURAL JUSTICE: CRIMINAL INJURIES COMPENSATION ACT 1983 s7(7).**

Section 7(7) of the *Criminal Injuries Compensation Act* 1983 (‘Act’) provides:

“Where the Tribunal considers it appropriate, notification of the making of the application shall be given by the Tribunal to any person who, in the opinion of the Tribunal, has or may have an interest in the determination of the application.”

P. applied to the Crimes Compensation Tribunal (‘CCT’) for compensation claiming she suffered injury as a result of the criminal acts (‘assaults, rape, threats to kill’) of her former husband. Prior to the determination of the application, P. was informed that the CCT proposed to notify P.’s former husband of the application. P. then sought an opportunity to make submissions to the CCT to the effect that such notification would place P.’s safety in jeopardy. The CCT refused to receive P.’s submission. Upon originating motion for an order in the nature of prohibition—

**HELD: Order for prohibition made. CCT prohibited from notifying P.’s former husband of P.’s application without giving P. an opportunity of being heard.**

**1. The meaning of “appropriate” in s7(7) of the Act is not determined by reference only to the CCT’s conclusion that there is a person who “has or may have an interest in the determination of the application”. The discretion conferred by the section is a wider general discretion. It may be that in some cases any interest which the “alleged offender” may have in the determination of the application will be outweighed by a serious risk to the applicant.**

**2. Having regard to the scheme of the Act, the nature of the discretion given to the CCT and the position of the applicant, the refusal by the CCT to hear the applicant on the question of notification amounted to a denial of natural justice by a failure to accord procedural fairness.**

**HAMPEL J: [2]** The *Criminal Injuries Compensation Act* 1983 provides a scheme for compensation of “victims” of “criminal acts”. The Act establishes a Tribunal which receives applications and conducts hearings. Part III of the Act governs the conduct of applications and hearings. Section 7(7) provides:

"Where the Tribunal considers it appropriate, notification of the making of the application shall be given by the Tribunal to any person who, in the opinion of the Tribunal, has or may have an interest in the determination of the application."

Section 8 empowers the Tribunal to grant an application and determine the amount of compensation or to refuse to make an award without conducting a hearing. If the Tribunal decides to conduct a hearing it may, pursuant to s9(A), give procedural directions and, pursuant to s13(1) (b), determine its own procedures. Section 9(2) provides for hearings to be conducted in private unless the Tribunal determines otherwise. A conviction or prosecution of a person for the criminal act on which the application is based is not a pre-requisite but to make an award, the Tribunal must be satisfied “that the person whom the applicant claims was injured or killed was a victim within the meaning of this Act”.

The plaintiff applied for compensation under the Act in April 1994 claiming that she suffered injury as a result of the criminal acts of her former husband. [3] The acts specified in the application are “assaults, rape, threats to kill” committed between 1974 or 1975 and 1994. In her affidavit the plaintiff refers to frequent assaults during that period resulting in fractures of

the cheek and nasal bones, multiple bruising and lacerations. She states that she was regularly raped orally, anally and vaginally. In 1990 she reported a rape and her husband was charged. However she withdrew the complaint because of his threats and her fear of violence. The last assault in 1994 at her workplace resulted in a charge and, she believes, a conviction. The plaintiff describes her former husband as a violent man towards her and their children who has threatened her with death. In February this year, when the plaintiff was informed by her solicitor that the Tribunal proposed to notify her former husband of her application, she sought an opportunity to make submissions that the Tribunal should not notify him because that would place her safety in jeopardy. The Tribunal refused to receive her submissions and this led to the present proceeding. In an affidavit filed on behalf of the Tribunal, its manager describes the circumstances in which the notification to the alleged offender may occur. The Tribunal Member determines the question of notification.

By an Originating Motion the plaintiff seeks an order in the nature of prohibition to prevent the Tribunal from notifying the alleged offender of her claim [4] on the ground that the refusal to receive her submissions amounts to a denial of natural justice. Alternatively the plaintiff asks for an order in the nature of *certiorari* quashing the Tribunal's decision to refuse to hear her submission before notifying the offender or for declarations which would have the same effect. It was contended on behalf of the plaintiff that the decision to notify the alleged offender affected her interests in two ways. One was that it exposed her to a real risk of violence by way of retribution. The other was that it would significantly alter the nature of the proceedings by introducing another party with a right to appear and participate. These interests, it was argued, are analogous to those of any litigant in the appropriate management of litigation and, as such, attract the rules of natural justice and procedural fairness.

For the defendant it was submitted that the decision to notify is merely an administrative part of the process which occurs prior to the hearing and does not affect the plaintiff's rights to compensation. The exposure to retribution is an inevitable risk resulting from the proceedings and, while it may have a personal effect on the plaintiff, it has no legal effect. It was further submitted that the structure of the legislation does not provide for a hearing at the notification stage. The plaintiff's interest in the appropriate management of litigation arises, it was argued, only at and after the [5] directions stage under s9(A) when procedural fairness must be accorded.

Since *Kioa and Ors v West and Anor* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28 the concept of procedural fairness has broadened.

"The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention." (Per Mason J at p.584)

In *Annetts v McCann and Ors* [1990] HCA 57; (1990) 170 CLR 596; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651 it was taken as settled that:

"When a statute confers power upon a public official to destroy defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words or necessary intendment."

In that case the interests extended to the protection of the reputation of the appellants' deceased son. It was said in *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 578; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255 (1992) 175 CLR 564 that:

"Where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if 'the decision-making process, viewed in its entirety, entails procedural fairness'."

(See also *South Australia v O'Shea* [1987] HCA 39; (1987) 163 CLR 378 at 389; (1987) 73 ALR 1; 26 A Crim R 447; 61 ALJR 477 per Mason CJ.) [6] In *Johns v Australian Securities Commission and Ors* [1993] HCA 56; (1993) 178 CLR 408; 11 ACLC 1; 67 ALJR 850; 31 ALD 417; 11 ACSR 467; 116 ALR 567 a delegate who examined a company director in private and

authorised the release of the transcripts to a Royal Commission was found to have breached the rules of natural justice in failing to give the director the opportunity to be heard in opposition. The Tribunal's discretion both at the hearing and pre-hearing stages is wide and undefined. The Act does not provide any criteria upon which such decisions as who may assist the Tribunal (s7(5)), whether there should be a hearing (s8) and, if so, whether it should be held in public (s9) should be made. Similarly there are no criteria provided for the making of the decision to notify although the Tribunal must consider notification "appropriate" to a person who "has or may have an interest in the determination of the application".

The affidavit of Mr McGirr, Deputy Registrar of the Tribunal, exhibits a document which sets out the Tribunal's "*Practices, Procedures and Guidelines*" including those for notification of "alleged offenders". This document probably has no legal effect but it shows the Tribunal's reasoning and approach. In respect of s7(7) the principal consideration for notification is the provision in s27(1) which provides for recovery of awards from offenders. The reasoning in the guidelines is that "If an application for refund of an award may be made then surely the person from whom the refund may be [7] sought has an interest in the proceedings". The practice adopted, once the determination to notify is made, is to advise the applicant of that decision. The guidelines state that "The purpose of this letter is to allow the applicant to withdraw his/her application if he/she wishes to do so". Finally, the guidelines issue a warning that "The CCT should not become an alternate to the criminal justice system. If Tribunal Members are able to make a determination before them they should not involve the CCT in an elaborate hearing but make a determination on the balance of probabilities whether a crime punishable by a term of imprisonment has been committed against the applicant".

In my opinion the scheme of the Act, the nature of the discretion given to the Tribunal and the position of the plaintiff are such as to make the refusal to hear her on the question of notification amount to a denial of natural justice by a failure to accord procedural fairness. Although the notification decision and process take place before a hearing and are therefore strictly not the process which determines the plaintiff's right to compensation, nevertheless they are, in my opinion, part of the "decision making process viewed in its entirety" in that they may affect the nature and the conduct of the proceedings. The time, place and the private nature of the hearing may be affected (s9) and the plaintiff may become subject to cross-examination by or on behalf of the alleged offender (s11) who is not a party to her [8] application. The plaintiff therefore has a sufficient interest in the management of these proceedings to which she is a party to entitle her to the right to be heard.

As to the interest of the offender from whom a refund of compensation may be sought two matters must be noted. First is that recovery from the offender is conditional upon conviction (s27(1)). Despite the plaintiff's stated belief that her husband was convicted of assault as a result of the 1994 incident at her workplace, her affidavit indicates that the claim for compensation is based on criminal acts committed between 1975 and 1994 for which there are no convictions. Secondly, s27 gives the Tribunal a discretion to order recovery from the offender only upon application by the Director of Public Prosecutions and, according to the guidelines, no such application has ever been made. Even if the first requirement of s27 were satisfied, that is, if there were the relevant convictions and if an award of compensation was made without notification to the offender then, if an application was made by the Director for recovery, the Tribunal would be obliged, by virtue of sub-s(3), to notify the offender because the sub-section gives the offender the right to be heard. The offender's interests are therefore not likely to be prejudiced in this respect.

If there are other reasons for notifying the alleged offender of the application at the outset they must in my opinion be considered together with any reasons which an applicant may have to the contrary [9] before the Tribunal can conclude that notification is "appropriate". In my opinion the meaning of "appropriate" in s7(7), in the context of this legislation, is not determined by reference only to the Tribunal's conclusion that there is a person who "has or may have an interest in the determination of the application". The discretion conferred by the section is a wider general discretion. It may well be that in some cases any interest which the alleged offender may have in the determination of the application will be outweighed by a serious risk to an applicant. The notion that an applicant is informed of the decision to notify the alleged offender merely to enable her to withdraw her application is offensive. It contemplates that a person may be put in a position of having to abandon a genuine claim because of fear without the opportunity of

being heard on the issue whether, in her circumstances, the notification of the alleged offender is “appropriate”. This result could not have been intended by the legislature nor should it form any part of the Tribunal’s policy. This legislation contemplates that criminal acts must be shown to have been committed before compensation can be awarded. The character and propensity of the person who, if the applicant's allegations are true, is to be notified creates a potentially dangerous situation for the applicant. She must, in my opinion, have a legitimate expectation that [10] facts which are relevant to the exercise of the Tribunal's discretion are placed before it.

For these reasons I make the order sought in the Originating Motion, namely, that the Tribunal be prohibited from notifying the alleged offender of the plaintiff’s application without giving her an opportunity of being heard.

**APPEARANCES:** For the plaintiff: PJ Hanks, counsel. Solicitors: Howie & Maher. For the defendant: SC Crennan QC with J Paterson, counsel. Solicitors: Victorian Government Solicitor.

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