



FIRST-TIER TRIBUNAL

SOCIAL ENTITLEMENT CHAMBER

Held at: Sutton	Appellant: Mr M Stammers
On: 14 October 2022	Nino: YR 31 24 04
Before: Judge V King	Tribunal Ref: SC124/22/01297
Respondent: Davies Group (The Diffuse Mesothelioma Payment Scheme Administrator)	

Decision Notice

1. The appeal is allowed.
2. The decision of 1 June 2022 is set aside.
3. Mr Stammers is eligible for a payment under the Diffuse Mesothelioma Payment Scheme.

Summary of Reasons:

4. In reaching its decision I considered all of the scheduled evidence and heard oral evidence and submissions from Mr Stammers, his Counsel, Mr Kerr, and Counsel for the Respondent, Mr Silva.

Background:

5. Mr Stammers was born on 17th May 1951. From 1971-2 he worked for Neves Garage Ltd for around 6 to 8 months. During that period he was exposed to asbestos (p31). As a consequence he was diagnosed with mesothelioma nearly 30 years later in August 2020 (p35).
6. On 22 April 2022 Mr Stammers obtained judgment in the High Court against Neves Garage Ltd with damages to be assessed (p85). However, that judgment is said by his representatives to be “worthless” because Neves Garage Ltd has no assets or liquidity. It has not been possible to trace any employer’s liability insurance for the relevant period. That is demonstrated by the evidence at pp86-119.
7. It follows that Mr Stammers has not received damages in respect of the disease.

8. On 9 May 2022 Mr Stammers applied to the Diffuse Mesothelioma Payment Scheme (pp14-66). His application was refused on the basis that he,

“does not meet the eligibility criteria set out in section 2(1)(c) of the Mesothelioma Act 2014 which states that to be eligible to under the scheme it must be shown that “...*the person has not brought an action for damages in respect of the disease against the relevant employer or other insurer with whom the employer maintained employers’ liability insurance at the time of the person’s exposure to asbestos*” (p67)

9. Through his representatives, Mr Stammers appealed against the decision. He said that subsection 2(1)(c) considered in isolation does not give effect to the overarching principle of the Diffuse Mesothelioma Payment Scheme. In order to bring about the outcome intended by the legislation it is necessary to consider Mr Stammers’ position in the context of all of the subsections to section 2(1) of the Act, most pertinently section 2(1)(d), and interpret the provisions purposively.

Discussion:

10. In *DP v Topmark Claims Management Ltd (CM)* [2020] UKUT 0106 (AAC), UTJ Markus found that the Explanatory Notes and Memorandum to the Mesothelioma Bill,

“...make it crystal clear that the purpose of the legislation was to address the particular problems arising where tortfeasors and insurers are unable to compensate a person... [42]

11. In terms of eligibility for a payment under the scheme, the Explanatory Notes to the bill say,

“The scheme will only be open to people who have not brought an action against a relevant employer or employers’ EL insurer because they are unable to do so” [13].

12. The Mesothelioma Act 2014 follows the terms of the Bill and sets out the conditions of eligibility for a payment under the Diffuse Mesothelioma Payment Scheme (“the scheme”). Section 2 makes provisions for the eligibility of persons diagnosed with the disease:

2. Eligible people with diffuse mesothelioma

(1) A person diagnosed with diffuse mesothelioma is eligible for a payment under the scheme if—

(a) a relevant employer has negligently or in breach of statutory duty caused or permitted the person to be exposed to asbestos,

(b) the person was first diagnosed with the disease on or after 25 July 2012,

(c) the person has not brought an action for damages in respect of the disease against the relevant employer or any insurer with whom the employer maintained employers' liability insurance at the time of the person's exposure to asbestos,

(d) the person is unable to bring an action for damages in respect of the disease against any employer of the person or any insurer with whom such an employer maintained employers' liability insurance (because they cannot be found or no longer exist or for any other reason), and

(e) the person has not received damages or a specified payment in respect of the disease and is not eligible to receive a specified payment.

13. The outcome of this case turns on the meaning of "brought an action for damages".

14. Mr Silva's submission on behalf of the Respondent was that the question of whether a person has brought an action for damages is straightforward. He said that either they have or they have not. It is a yes or no answer. If yes, the person is excluded from a payment under the scheme.

15. He said that if a person "elects" to pursue a claim for damages through the courts then they must follow all of the remedies that the civil justice system has to offer right through to the end, including taking any steps necessary to enforce judgment. If that leaves the person without compensation, so be it.

16. Thus, in Mr Silva's submission, the fruitless action brought by Mr Stammers against Neves Garage Ltd excludes him from a payment under the scheme. Mr Stammers is left with no compensation and no other effective remedy.

17. Mr Kerr, for the Appellant, disagreed. His starting point was subsection 2(1)(d) and he pointed out that,

"As Neves Garage Ltd is an ongoing concern, Mr Stammers is *able* to bring an action against it. So he is caught between two stools – on the face of it, he is *obliged*, pursuant to subsection 2(1)(d), to bring an action for damages; but then he is denied any form of payment as a result of doing so, pursuant to subsection 2(1)(c)" (page 82, para 5).

18. Thus, Mr Kerr refers to the relationship between subsections (c) and (d) as a "logical fallacy" that serves to undermine the scheme unless the Act is interpreted purposively.

19. In weighing up the respective submissions I considered the case of *May v Gallagher Bassett International Ltd*, decided by DTJ Hindley on 8 April 2014 in this Tribunal (unreported).

20. Mr May's position was analogous to Mr Stammers' in all material respects save that he did not make a claim against "the relevant employer" because, although the company was still trading, it had only limited assets and would not be able to pay damages. Were it ordered to do so, it would have to go into liquidation. DTJ Hindley found that, "the fact that bringing the claim would in the end prove to be a fruitless exercise counts as a reason for being "unable" to bring an action...." That construction was supported by *UTJ Markus in DP v Topmark Claims Management Ltd* (ibid. para 10).

21. Against this background, it seems to me that, if subsection 2(1)(c) is not interpreted purposively, a claimant whose relevant employer is still in existence must weigh up the probability of them being able to pay substantial damages before issuing proceedings. Where there is doubt, the likelihood is that they will go directly to the scheme arguing that they are "unable" to bring an action for damages. If taking proceedings against the relevant employer is a choice rather than an obligation the scheme will operate as a safety net but not as the "last resort".

22. The purpose of the scheme is to compensate those who suffer from mesothelioma when the tortfeasor or insurers are unable to do so. That is clearly the position that Mr Stammers finds himself in. It is not consistent with the purpose of the scheme that he should be penalised by following the procedure set out in legislation.

23. Therefore, in finding in Mr Stammers' favour, I interpret subsection 2(1)(c) as follows:

"The person has not brought an *EFFECTIVE* action for damages in respect of the disease against the relevant employer or any insurer with whom the employer maintained employers' liability insurance at the time of the person's exposure to asbestos"

24. I find that Mr Stammers has not brought an effective action for damages and is eligible for a payment under the scheme.

Signed: V A King Tribunal Judge V King	Date: 16 October 2022
Decision Notice issued to:	Appellant on: 17/10/2022 Respondent on: 17/10/2022