

AUSTRALIA / JUDGMENT

Besson v Repatriation Commission [2014] FCA 881

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FEDERAL COURT OF AUSTRALIA

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Besson v Repatriation Commission [2014] FCA 881

Citation: Besson v Repatriation Commission [2014] FCA 881

Appeal from: Application for extension of time: Besson v Repatriation Commission [2014] FCCA 123

Parties: PETER PHILIP BESSON v REPATRIATION COMMISSION

File number: QUD 258 of 2014

Judge: RANGIAH J

Date of judgment: 22 August 2014

Catchwords: DEFENCE AND WAR – application under ss 120 and 120A of the Veterans' Entitlements Act 1986 (Cth) – veteran made a claim for a pension for incapacity on the basis that his post-traumatic stress disorder was war-caused – whether the Administrative Appeals Tribunal correctly applied the third step outlined in Repatriation Commission v Deledio (1998) 83 FCR 82 – application for extension of time to appeal decision of Administrative Appeals Tribunal – whether an extension of time within which to file a notice of appeal should be granted – application dismissed

Legislation: Veterans Entitlements Act 1986 (Cth) ss 13(1), 120 and 120A

Federal Court Rules 2011 (Cth) rr 1.39, 36.03 and 36.05

Cases cited: Border v Repatriation Commission (No 2) (2010) 191 FCR 163 applied

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194 cited

Collins v Administrative Appeals Tribunal (2007) 163 FCR 35 applied

Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344 cited

Jess v Scott (1986) 70 ALR 185 cited

MZYTT v Minister for Immigration & Citizenship [2013] FCA 76 cited

Repatriation Commission v Deledio (1998) 83 FCR 82 applied

Date of hearing: 17 July 2014

Date of last submissions: 25 July 2014

Place: Brisbane

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 36

Counsel for the Applicant: Mr MJ Taylor
Solicitor for the Applicant: Woods Prince Lawyers
Counsel for the Respondent: Ms L Allen
Solicitor for the Respondent: Australian Government Solicitor
IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION QUD 258 of 2014
BETWEEN: PETER PHILIP BESSON
Applicant
AND: REPATRIATION COMMISSION
Respondent
JUDGE: RANGIAH J
DATE OF ORDER: 22 august 2014
WHERE MADE: BRISBANE

THE COURT ORDERS
THAT:

1. The application be dismissed.
2. The applicant pay the respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.
IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION QUD 258 of 2014
BETWEEN: PETER PHILIP BESSON
Applicant
AND: REPATRIATION COMMISSION
Respondent
JUDGE: RANGIAH J
DATE: 22 august 2014
PLACE: BRISBANE

REASONS FOR JUDGMENT

1 The applicant has applied for an extension of time to file a notice of appeal pursuant to r 36.05 of the Federal Court Rules 2011 (Cth).

2 The applicant wishes to appeal from a judgment of the Federal Circuit Court of Australia dismissing the applicant's appeal from a decision of the Administrative Appeals Tribunal ("the Tribunal"). The Tribunal affirmed a decision of the Veterans' Review Board which confirmed that the Commonwealth was not liable to pay a pension to the applicant.

3 The applicant has Post-Traumatic Stress Disorder ("PTSD"). He claims that his condition is related to his war service. He was a member of the crew of HMAS Sydney, which was steaming through Indonesian waters on 15 June 1964. An announcement over the ship's public address system summoned all hands to action stations and directed that all hatches be closed. The applicant was just about to climb up an access ladder when a hatch was slammed down above him. He remained cowering at the bottom of the ladder until the all clear was given. He says he assumed the crew were all about to die because the ship must have been under attack. He alleges

that his PTSD arose as a result of this event.

4 The Tribunal decided that while the applicant genuinely believed his life was in danger, the facts did not answer the description of a "life-threatening event" in the relevant Statement of Principles. His application was unsuccessful for that reason.

5 Section 13(1) of the Veterans' Entitlements Act 1986 (Cth) ("the VEA") provides that the Commonwealth is liable to pay a pension to a veteran where that veteran has become incapacitated from a war-caused disease. The disease is taken to be "war-caused" under s 9(1) of the VEA if the disease arose out of or is attributable to any eligible war service rendered by the veteran.

6 A claim for eligibility for a pension is determined by reference to s 120 and s 120A of the VEA. Those provisions state, relevantly:

120 Standard of proof

- (1) Where a claim under Part II for a pension in respect of the incapacity from injury or disease of a veteran, or of the death of a veteran, relates to the operational service rendered by the veteran, the Commission shall determine that the injury was a war-caused injury, that the disease was a war-caused disease or that the death of the veteran was war-caused, as the case may be, unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination.

...

- (3) In applying subsection (1) or (2) in respect of the incapacity of a person from injury or disease, or in respect of the death of a person, related to service rendered by the person, the Commission shall be satisfied, beyond reasonable doubt, that there is no sufficient ground for determining:

...

- (b) that the disease was a war-caused disease or a defence-caused disease;

...

as the case may be, if the Commission, after consideration of the whole of the material before it, is of the opinion that the material before it does not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person.

120A Reasonableness of hypothesis to be assessed by reference to Statement of Principles

...

- (3) For the purposes of subsection 120(3), a hypothesis connecting an injury suffered by a person, a disease contracted by a person or the death of a person with the circumstances of any particular service rendered by the person is reasonable only if there is in force:

- (a) a Statement of Principles determined under subsection 196B(2) or (11);

...

that upholds the hypothesis.

7 The Tribunal applied Statement of Principles No 5 of 2008, which provides:

Factors that must be related to service

5. Subject to clause 7, at least one of the factors set out in clause 6 must be related to the relevant service rendered by the person.

Factors

6. The factor that must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting posttraumatic stress disorder or death from posttraumatic stress disorder with the circumstances of a person's relevant service is:

- (a) experiencing a category 1A stressor before the clinical onset of posttraumatic stress disorder;

...

Other definitions

9. For the purposes of this Statement of Principles:

"a category 1A stressor" means one or more of the following severe traumatic events:

- (a) experiencing a life-threatening event;

8 In *Repatriation Commission v Deledio* (1998) 83 FCR 82 at 97-98 ("Deledio"), the Full Court of the Federal Court outlined a four step process which the Tribunal should undertake when applying s 120 and s 120A. The steps are:

1. The Tribunal must consider all the material which is before it and determine whether that material points to a hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person. No question of fact finding arises at this stage. If no such hypothesis arises, the application must fail.
2. If the material does raise such a hypothesis, the Tribunal must then ascertain whether there is in force an SoP determined by the Authority under s 196B(2) or (11). If no such SoP is in force, the hypothesis will be taken not to be reasonable and, in consequence, the application must fail.
3. If an SoP is in force, the Tribunal must then form the opinion whether the hypothesis raised is a reasonable one. It will do so if the hypothesis fits, that is to say, is consistent with the "template" to be found in the SoP. The hypothesis raised before it must thus contain one or more of the factors which the Authority has determined to be the minimum which must

exist, and be related to the person's service (as required by ss 196B(2)(d) and (e)). If the hypothesis does contain these factors, it could neither be said to be contrary to proved or known scientific facts, nor otherwise fanciful. If the hypothesis fails to fit within the template, it will be deemed not to be "reasonable" and the claim will fail.

4. The Tribunal must then proceed to consider under s 120(1) whether it is satisfied beyond reasonable doubt that the death was not war-caused, or in the case of a claim for incapacity, that the incapacity did not arise from a war-caused injury. If not so satisfied, the claim must succeed. If the Tribunal is so satisfied, the claim must fail. It is only at this stage of the process that the Tribunal will be required to find facts from the material before it. In so doing, no question of onus of proof or the application of any presumption will be involved.

9 The Tribunal's reasons in the present case are, unfortunately, bereft of any reference to the legislation or to any of the authorities interpreting the legislation. However, it is common ground that the Tribunal purported to follow the four step process set out in *Deledio*. The Tribunal assumed that the first step should be decided in the applicant's favour and then decided the second step in the applicant's favour. It then considered the third step and said:

17. ...In this claim, he must rely on the events he described meeting the definition of a category 1A event. In particular, he must satisfy the first limb of the definition which refers to "experiencing a life threatening event".
18. I have to be satisfied the applicant's story as it was told to me "fits" the definition. In making that assessment, I am required to apply what is inelegantly referred to as a "subjective/objective" test – that is, a test which refers to a person (the objective component) in the applicant's circumstances, which include his age, experience and some other matters.
19. The applicant was a young recruit with limited experience – although this was not his first voyage. He had already been exposed to the dangers of naval service (through his own experience, and through the experiences of people he knew, like those who had perished on the *Voyager*). I accept a person in the applicant's position would probably experience a degree of apprehension about the dangers that might lurk when a ship goes to action stations. I can even accept a sailor might feel more apprehensive when aboard an ageing vessel like the *Sydney*. They were cruising through potentially hostile waters, and potentially hostile vessels had been sighted in relatively close proximity earlier the same day. Even so, I am not persuaded a person in the applicant's position could be expected to react to an alarm as the applicant did. He seems to have leaped to the conclusion that the alarm meant the ship was likely to be sunk. There was no reason for him to form that view, and other sailors of his age or experience would merely have been anxious at what might eventuate rather than terrorised by their imaginings of a particular and dire outcome.

...

21. I am satisfied that the applicant has PTSD but that it cannot be linked to his operational service because it does not meet the definition of a category 1A event in Statement of Principles No 5 of 2008.

10 Before the Federal Circuit Court, the applicant alleged that the Tribunal's decision contained three errors of law. The errors were said to be that the Tribunal failed to apply the required test of assessing the reasonableness of the hypothesis, that it took an incorrect approach in determining that there was no "life threatening event" for the purposes of the Statement of Principles and that it failed to properly apply the "subjective/objective test" required by the authorities. The Federal Circuit Court judge rejected each of these grounds.

11 The Federal Circuit Court dismissed the applicant's appeal on 6 February 2014. Rule 36.03 of the Federal Court Rules gave the applicant 21 days to file a notice of appeal against the judgment of the Federal Circuit Court. He failed to file a notice of appeal within the required time, but filed an application for an extension of time to appeal on 4 June 2014, pursuant to r 36.05 of the Federal Court Rules. The application was filed some 97 days outside the time limit.

12 The matters relevant to the exercise of the Court's discretion to grant an extension of time include:

- (a) whether the applicant has shown that there is an acceptable explanation for the delay;
- (b) whether the applicant took any other steps to assert his or her rights;
- (c) the length of the delay;
- (d) any prejudice to the respondent as a result of the delay; and
- (e) the merits of the proposed appeal.

[Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344 at 348-349; Jess v Scott (1986) 70 ALR 185 at 193-194]

Explanation for the delay

13 The applicant deposes that his former solicitor told him of the outcome of the Federal Circuit Court proceeding, but did not discuss any appeal with him or advise him of his right to appeal. He states that he was somewhat itinerant for a period of time and unable to collect his mail. He received a copy of the Federal Circuit Court's reasons well after the date of the judgment, but did not then read them. He eventually discussed his case with a volunteer with the Returned & Services League of Australia ("the RSL") on about 13 May 2014. The volunteer contacted Legal Aid Queensland which then recommended his current solicitors. The applicant seems to suggest, but does not directly state, that his PTSD had something to do with his delay in filing a notice of appeal.

14 The applicant had previously sought review of the decision of the Veterans' Review Board to the Tribunal and appealed the decision of the Tribunal to the Federal Circuit Court, so he must have been alive to at least the possibility of some form of challenge to the decision of the Federal Circuit Court. He does not suggest that he made any enquiry of his former solicitor as to whether he had any right of appeal. He does not suggest that his failure to make that enquiry was attributable to his psychiatric condition. His explanation for the delay is not particularly compelling.

15 Further, there is no adequate explanation for the extent of the applicant's delay. He seems to have maintained a sense of grievance about the judgment because he eventually approached the RSL volunteer. However, he did not do so for some three months after the judgment was given.

16 While some allowance must be made for the applicant's psychiatric condition and his itinerancy, I consider that the applicant has not provided an acceptable explanation for his delay.

Whether the applicant took other steps to assert his rights

17 The applicant took no other steps to pursue any rights with respect to a pension until he saw the RSL volunteer in May 2014, some three months after the judgment.

Prejudice to the respondent

18 The respondent does not suggest that it will be caused prejudice in defending the appeal in the event that an extension of time is granted. However, absence of prejudice is not enough, of itself, to justify an extension of time.

Length of the delay

19 The application for an extension of time was filed some 97 days after the date for the filing of the notice of appeal expired. The delay is substantial.

20 The respondent has an interest in knowing in a timely manner whether or not a judgment in its favour is to be appealed. That knowledge is relevant to the administration of its responsibilities under the VEA. Some weight should be given to the public interest in maintaining efficient public administration.

Merits of the proposed appeal

21 An appeal to the Federal Court from a judgment of the Federal Circuit Court is by way of rehearing: *MZYTT v Minister for Immigration & Citizenship* [2013] FCA 76 at [20] (and the cases referred to therein). Ordinarily, a Court entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [14]. Accordingly, in his proposed appeal it would be necessary for the applicant to demonstrate legal or factual error on the part of the primary judge.

22 The applicant's principal argument is that when the Tribunal found at the third step of the Deledio process that the facts did not answer the description of a life-threatening event it made an impermissible finding of fact. He argues that the Tribunal's task at that stage was to determine whether there was material that "fits" the Statement of Principles rather than evaluating the evidence and accepting or rejecting that evidence. He argues that the Federal Circuit Court erred in failing to find that the Tribunal had so erred.

23 The Tribunal's approach was to assume or decide the first two steps of Deledio in favour of the applicant before turning to the third step. The Tribunal decided at the third step that the hypothesis failed to fit the Statement of Principles because the event did not meet the description of a "life-threatening event". The Tribunal did not then proceed to the fourth stage.

24 The formation of the Tribunal's opinion at the third stage of the Deledio process involves the reaching of a factual conclusion and involves the assessment of all the material before the Tribunal, but not the finding of facts or the rejection of material: *Collins v Administrative Appeals Tribunal* (2007) 163 FCR 35 at 47- 48 ("Collins").

25 In *Border v Repatriation Commission* (No 2) (2010) 191 FCR 163 ("Border"), Reeves J considered what is required at the third stage in assessing a claim that PTSD has arisen out of a "life-threatening event". His Honour said at [67]:

...It is the effect of the event and not the threat itself that has to be assessed. Moreover, it is the veteran's perception of the event that is critical, relevantly his or her perception that it posed a threat of death. If that perception was a reasonable one, it constitutes a life-threatening event within the terms of subpara (a). That perception will be a reasonable one if, judged objectively, from the point of view of a reasonable person in the position of, and with the knowledge of, the veteran, it was capable of, and did convey the threat of death. Unlike with subparas (b) and (c), this is a mixed objective and subjective test. Since there will be a very wide range of reactions to any event involving a threat of death, this test is not to be applied in an unduly restrictive manner. Thus, while at one extreme a totally irrational or baseless reaction will be excluded, it is necessary to be more open to acceptance as one moves across the spectrum of possible reactions. Furthermore, the question is whether the event might or was capable of giving rise to the perception of the threat of death, not whether it did. For this reason, the veteran's conduct after the event is irrelevant to the assessment. So, too, is any information not known to the veteran which showed, objectively, that the event did not pose a threat of death, eg being threatened with a gun that was in fact unloaded.

(Underlining added.)

26 The applicant did not seek to argue that *Border* was decided incorrectly. His argument is that the Tribunal misapplied *Border* by going further than deciding whether the event alleged by the applicant was capable of giving rise to the perception of death; and that it had impermissibly decided that the event was not in fact life-threatening.

27 During oral argument, I initially thought that the applicant's argument might have some merit. On closer reflection, I cannot see that the applicant's submission can be sustained on any fair reading of the Tribunal's reasons.

28 The Tribunal accepted that the applicant genuinely believed that his life was in danger. It considered whether, from the point of view of a reasonable person in the position of and with the knowledge of the applicant, the event was capable of giving rise to the perception of death. It decided that a reasonable person in the applicant's position would not conclude that the ship was likely to be sunk.

29 In reaching that conclusion, the Tribunal assumed that the event occurred in the manner and under the circumstances that the applicant alleged. The Tribunal reached a factual conclusion that the event was not a life-threatening event but did not find facts or reject any material. It did no more than decide whether, from the point of view of the hypothetical reasonable person, the event was capable of giving rise to the perception of the threat of death. When the Tribunal's reasons are read as a whole, it is apparent that it did not decide that the event was not in fact life-threatening.

30 It is clear from *Border* that at the third stage in the Deledio process the decision-maker must consider whether the applicant's perception of the event as posing a threat of death is a reasonable one. If that perception is not reasonable, then the event will not meet the description "life-threatening". This involves what was described in *Collins* as "the reaching of a factual conclusion". That is not only permissible, but is required.

31 In these circumstances, I cannot see that the applicant has a reasonably arguable case that the Tribunal erred in its approach to the third step of the Deledio process.

32 The applicant also argues that the Federal Circuit Court erred by stating that the Tribunal concluded that there was no medical evidence to demonstrate any causal link between the applicant's PTSD and his operational service. He argues that the Tribunal had not made any such a finding. His Honour concluded, on the basis of the lack of medical evidence, that the Tribunal had determined the first step of the Deledio process against the applicant. On my reading of the Tribunal's reasons, it assumed the first step in the applicant's favour. It may be that his Honour intended to refer to the third step, and made a typographical error, but any error on that issue is immaterial, as the applicant would need to also demonstrate error on the part of the Court and the Tribunal in relation to the third step for his appeal to succeed. The applicant expressly disclaimed reliance on this asserted error by the primary judge as a separate ground of appeal.

33 In his proposed notice of appeal the applicant also raises another ground to the effect that the Tribunal failed to apply the correct test, "whether it was reasonable for a person with the Applicant's knowledge and background to have perceived [the event]...as life threatening". The question is whether the veteran's perception of the event as life-threatening is reasonable. If, from the point of view of a reasonable person in the position of and with the knowledge of the veteran, the event was capable of, and did convey, the threat of death, then the perception will be reasonable. That was the test applied by the Tribunal. The Tribunal was correct to do so.

Conclusion

34 Weight must be given to the limitation upon the period for the filing of a notice of appeal and the applicant's failure to comply with it. I do not accept that the applicant has provided a satisfactory explanation for his delay in filing the notice of appeal. The delay is a substantial one. Some weight must also be given to the public interest in maintaining efficient public administration through the respondent knowing in a timely way whether a decision is to be appealed. Each of those factors weighs against the grant of an extension of time.

35 Despite these matters, I might have granted an extension of time if I were satisfied that the applicant's prospects of success were adequate. However, I consider that the applicant's prospects of success are poor. Taking into account all the relevant factors, I consider that my discretion should be exercised against extending the time for the filing of a notice of appeal.

36 The application will be dismissed with costs.

I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah.

Associate:

Dated: 21 August 2014

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