

AUSTRALIA / JUDGMENT

Carter v Repatriation Commission [2001] FCA 992

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FEDERAL COURT OF AUSTRALIA

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Carter v Repatriation Commission [2001] FCA 992

Catchwords – Veterans' affairs – application for special rate of pension – meaning of "last paid work" in Veterans' Entitlements Act 1986 (Cth) par 24(2A)(d) – veteran did not qualify for special rate as at time when he stopped undertaking his last paid work he had not been working on his own account in his profession for a continuous period of at least ten years, as required by par 24(2A)(g)

Veterans' Entitlements Act 1986 (Cth) ss 5Q, 24

Banovich v Repatriation Commission (1986) 69 ALR 395 considered

EDWARD GORDON CARTER v REPATRIATION COMMISSION

N 213 of 2001

BRANSON J

SYDNEY

30 JULY 2001

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N 213 of 2001

BETWEEN: EDWARD GORDON CARTER

APPLICANT

AND: REPATRIATION COMMISSION

RESPONDENT

JUDGE: BRANSON J

DATE OF ORDER: 30 JULY 2001

WHERE MADE: SYDNEY

THE COURT ORDERS
THAT:

1. The decision of the Tribunal be affirmed.
Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY N 213 of 2001
BETWEEN: EDWARD GORDON CARTER
APPLICANT
AND: REPATRIATION COMMISSION
RESPONDENT
JUDGE: BRANSON J
DATE: 30 JULY 2001
PLACE: SYDNEY

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an "appeal" from a decision of the Veterans' Appeals Division of the Administrative Appeals Tribunal ("the Tribunal") dated 8 February 2001 whereby the Tribunal affirmed a decision of the respondent refusing an application for an increase in pension payable to the applicant pursuant to the Veterans' Entitlements Act 1986 (Cth) ("the Act").

2 The only issue in dispute before the Tribunal was whether Mr Carter was eligible for pension at the intermediate (s 23) or special (s 24) rate. To be eligible for pension at the intermediate or special rate Mr Carter had to satisfy the requirement, amongst others, that:

"when [he] stopped undertaking his ... last paid work, [he]:

(i) ...

(ii) if he ... was then working on his ... own account in any profession ... - had been so working in that profession ...;

for a continuous period of at least 10 years that began before the veteran turned 65 ...".

(see s 23(3A)(g) and s 24(2A)(g)).

3 The only ground of appeal pressed by the applicant ("Mr Carter") is that:

"The Tribunal erred in law in its interpretation of section 24 of the Act by:

(a) Finding that the 'last paid work' of the applicant within the terms of subsections 24(2A)(d) and 24(2A)(g) could be constituted by work of a de minimus nature, that is, work of less than 8 hours per week"

4 As the above ground of appeal contains no reference to s 23 of the Act, these reasons for decision similarly make no further reference to that section.

5 For the reasons given below, I have concluded that Mr Carter's appeal must fail and the decision of the Tribunal affirmed.

BACKGROUND FACTS

6 The Tribunal in its written reasons for decision briefly outlined Mr Carter's war service and noted that "post traumatic stress disorder had been accepted as a war-caused injury on 15 April 1991".

7 Mr Carter gave evidence before the Tribunal, which the Tribunal accepted, as to his working life after his war service. That evidence is set out in the reasons for decision of the Tribunal and may be summarised as follows.

8 Mr Carter returned from war service to work as a junior clerk in an accountant's office. He studied at night and after four to five years became a chartered accountant and later a chartered secretary. He worked in these capacities first in Sydney and then in Tamworth. In Tamworth Mr Carter, after an initial period of employment, commenced to practice on his own account building up a run-down accountancy practice which he had bought. In about 1970 Mr Carter went into a commercial business venture with two other men but the business did not prove to be successful. He continued his accountancy practice, admitting two other men as partners, until 1989 when the partnership was dissolved. At the time of the dissolution of the partnership Mr Carter was approximately seventy years of age.

9 Mr Carter did not work for approximately twelve months following the dissolution of the partnership. After that period he was approached by NZI Workers Compensation (NSW) Limited ("NZI") and he agreed to undertake contract audit work for NZI. Mr Carter undertook contract work for NZI from June 1990 to June 1995. It is apparently not in dispute that this contract work occupied Mr Carter on average for less than eight hours per week. Mr Carter's record of work undertaken for NZI, however, reveals that there were weeks in which he was occupied undertaking contract work for NZI for periods which aggregated in excess of eight hours per week.

10 Mr Carter also worked for a period as an Official Prison Visitor. It appears from his income tax return for the period 1 July 1994 to 30 June 1995 that he received income from the Department of Corrective Services during that financial year. His evidence was that he resigned as an Official Prison Visitor in September 1999.

STATUTORY PROVISIONS

11 Subsection 24(4) of the Act has the effect that, except in circumstances where a veteran's rate of pension is affected by participation in a vocational rehabilitation program, pension at a rate specified in the subsection is payable to a veteran to whom the section applies. It is not in dispute that Mr Carter will be entitled to pension at the rate specified by subs 24(4) if, and only if, he meets the requirements of subs 24(2A). It is convenient to set out subs 24(2A) in full:

"This section applies to a veteran if:

- (a) the veteran has made a claim under section 14 for a pension, or an application under section 15 for an increase in the rate of the pension that he or she is receiving; and
 - (b) the veteran had turned 65 before the claim or application was made; and
 - (c) paragraphs (1)(a) and (1)(b) apply to the veteran; and
 - (d) the veteran is, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from continuing to undertake the remunerative work (last paid work) that the veteran was last undertaking before he or she made the claim or application; and
 - (e) because the veteran is so prevented from undertaking his or her last paid work, the veteran is suffering a loss of salary or wages, or of earnings on his or her own account, that he or she would not be suffering if he or she were free from that incapacity; and
 - (f) the veteran was undertaking his or her last paid work after the veteran had turned 65; and
 - (g) when the veteran stopped undertaking his or her last paid work, the veteran:
 - (i) if he or she was then working as an employee of another person—had been working for that person, or for that person and any predecessor or predecessors of that person; or
 - (ii) if he or she was then working on his or her own account in any profession, trade, employment, vocation or calling—had been so working in that profession, trade, employment, vocation or calling;
- for a continuous period of at least 10 years that began before the veteran turned 65; and
- (h) section 25 does not apply to the veteran."

Section 25 of the Act does not apply to Mr Carter.

12 Paragraphs 24(1)(a) and 24(1)(b), which are referred to in par 24(2A)(c), relevantly provide as follows:

"(a) either:

- (i) the degree of incapacity of the veteran from war-caused injury or war-caused disease, or both, is determined under section 21A to be at least 70% or has been so determined by a determination that is in force; or
 - (ii) [not here relevant]; and
- (b) the veteran is totally and permanently incapacitated, that is to say, the veteran's incapacity from war-caused injury or war-caused disease, or both, is of such a nature as, of itself alone, to render the veteran incapable of undertaking remunerative work for periods aggregating more than 8 hours per week; ..."

13 Section 5Q of the Act includes the following definition:

"Remunerative work includes any remunerative activity."

REASONS OF THE TRIBUNAL

14 The Tribunal identified the issue for its consideration as "whether when [Mr Carter] stopped undertaking his last paid work, he had been working on his own account, in his case in the accounting profession, for a continuous period of at least 10 years that began before he turned 65".

15 The Tribunal found that the audit work undertaken by Mr Carter for NZI could not be disregarded as paid work on the basis that it was de minimus in nature. It therefore concluded that at the time of Mr Carter's application for an increase in pension (ie 5 February 1998) the "last paid work" undertaken by him was his contract work with NZI between July 1990 and June 1995. It consequently concluded that at the time of his application he had not been working in his last paid employment for a period of at least ten years that began prior to his 65th birthday. The Tribunal accepted that the work that Mr Carter did as a professional accountant was of the same nature as his work as a contract auditor but it felt unable to ignore the break in Mr Carter's work as an accountant during the period between July 1989 and June 1990.

16 The conclusion of the Tribunal was that Mr Carter was not eligible for pension at the special rate as he did not satisfy the requirement of par 24(2A)(g) of the Act. This was because he had only been engaged in his "last paid work", being his work with NZI, for a period of five years and that period began after he turned 65 years of age.

SUBMISSIONS OF THE PARTIES

17 It was submitted by counsel for Mr Carter that it was not open to the Tribunal to find that Mr Carter's "last paid work" within the meaning of par 24(2A)(d) was his casual contract audit work as that work was performed for less than eight hours per week. The argument was advanced that, as par 24(1)(b) of the Act equates total and permanent incapacity with an incapacity to undertake remunerative work for periods aggregating more than eight hours per week, par 24(2A)(d) must be addressing work which employs a capacity exceeding an aggregate of 8 hours per week. It was said to follow that the date "when the veteran stopped undertaking" this work within the meaning of par 24(2A)(g) must be the date when work above the eight hour threshold ceased. To construe the section otherwise, it was argued, would be to nullify the section's premise that a residual capacity for work may be retained by a special rate pensioner and would require the veteran to have entirely exhausted all capacity for work of the type last undertaken.

18 Counsel for the respondent submitted that it is not open to the Court to read part or all of par 24(1)(b) into par 24(2A)(d) and thus to define "last paid work" by reference to par 24(1)(b). She pointed out that par 24(1)(b) is concerned with the level of incapacity which a veteran suffers by reason of war-caused injury or disease alone, and that that subject matter is not referred to in par 24(2A)(d) which first introduces the concept of "last paid work" into subs 24(2A). She further pointed out that in the second reading speech for the Veterans' Affairs (1994-95 Budget Measures)

Legislation Amendment Bill 1994, which when enacted brought ss 23 and 24 of the Act into their current form, it was said:

"The second initiative relates to changes to the eligibility criteria for special and intermediate rate pensions. The former being known in the past as the TPI, or totally and permanently incapacitated, pension. The criteria for these higher rates of disability pension were changed in 1985 when it became clear that the outmoded terminology of the old Repatriation Act was enabling these pensions to be paid to veterans who had completed a full working life, after retiring on superannuation and other retirement benefits. This was never intended. The original intention of these higher levels of pension was to compensate those severely disabled veterans who could not work to support their families on their return from service. It was to be in only very rare cases that any veteran beyond the normal retirement age would be eligible for such rates of pension.

Subject to certain exceptions and to protection of existing special and intermediate pensions, the changes being made by this bill reinforce that intention. They will mean that these pensions will not normally be granted to veterans who are over 65. An exception to this rule will apply if the veteran was engaged in remunerative work after the age of 65 and that work was in the same business or employment in which the veteran had been working for 10 continuous years. This would include, for example, many in the farming community."

19 The written submissions of the respondent asserted that "[I]t would arguably have been open to the Tribunal to regard the applicant's work as a prison visitor as the last paid work which he performed." Had the Tribunal treated Mr Carter's work as an Official Prison Visitor as his last paid work, it would have been obliged to conclude that he did not meet the requirements of pars 23(3A)(g) and 24(2A)(g) as he did not undertake work of this kind for a continuous period of ten years. However, as the respondent did not file a notice of cross-appeal or a notice of contention (see O 53 r 13 of the Federal Court Rules) it is not necessary for this issue to be considered further.

CONSIDERATION

20 In *Banovich v Repatriation Commission* ("Banovich") (1986) 69 ALR 395, the Full Court of this Court gave consideration to the meaning of the phrase "remunerative work that the member was undertaking" in a predecessor provision of s 24 of the Act (ie par [1](b)(iii) of Sch 2 of the Repatriation Act 1920 (Cth)). At 402 the Court said:

"... it is, in our opinion, erroneous to read the phrase 'remunerative work that the member was undertaking' as referring to a particular job with a particular employer. The term 'remunerative work' is used in the Schedule in a context which indicates an intention to refer to work generally Consistently with that use, the phrase 'remunerative work which the respondent was undertaking' should be read as a reference to the type of work which the member previously undertook and not to any particular job."

21 Although it did not prove to be vital to the Tribunal's decision in this case, the Tribunal accepted the Applicant's submission that the "... work the Applicant did as a professional accountant is clearly the same nature as the audit work."

22 It is not, in my view, self evidently clear that the approach of the Full Court in Banovich would allow full-time work as a partner in an accounting practice to be characterised as work of the same type as limited and irregular audit work undertaken on a contract basis. Paragraph 24(2A)(d) of the Act might prove to have a harsh impact on veterans seeking to receive the special rate of pension if the work which Mr Carter undertook as a partner in his accounting practice and the limited audit work that he subsequently undertook for NZI were both properly to be understood as examples of "the remunerative work ... that [he] was last undertaking before he ... made the ... application" within the meaning of par 24(2A)(d). A consequence of this construction of the phrase "the remunerative work ... that the veteran was last undertaking ..." would seem to be that a veteran who was, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from undertaking work as a full-time partner in an accounting practice, but not prevented from undertaking on a contract basis limited and irregular audit work (even though such work was not in fact undertaken), might not be able to establish that he or she was because of that incapacity alone prevented from undertaking his or her last paid work. I am inclined to doubt that such a construction of par 24(2A)(d) would reflect the intention of Parliament. Moreover, it is to be observed that par 24(2A)(g) is not concerned with whether a veteran had at the crucial time been undertaking the same remunerative work for a continuous period of at least ten years, but merely with whether the veteran, if employed, had been working with the same employer or, if self employed, in the same profession, trade etc, for a continuous period of at least ten years. However, as I did not hear full argument on the issue of the proper construction of the phrase "the remunerative work ... that the veteran was last undertaking" it is not appropriate for me to consider it further.

23 The real issue to be determined on the application is whether, on the proper construction of subs 24(2A) of the Act, the time when Mr Carter stopped undertaking his "last paid work" was when he stopped working as a partner in his accounting practice or when he ceased to undertake contract work with NZI. If he stopped undertaking his "last paid work" when he stopped working as a partner in his accountancy practice, he had at that time been working on his own account in the accounting profession for a continuous period of at least ten years that began before he turned sixty-five years of age (see par 24(2A)(g)). However, if he stopped undertaking his "last paid work" when he ceased to undertake contract work with NZI, he had not at that time been working on his own account in the accounting profession for a period of at least ten years because he had not worked at all for approximately twelve months following the dissolution of his partnership.

24 A veteran's "last paid work" within the meaning of subs 24(2A) of the Act is "the remunerative work ... that the veteran was last undertaking before he or she made the claim or application" (par 24(2A)(d)). As is noted above, s 5Q of the Act defines "remunerative work" very broadly to include "any remunerative activity." It is therefore necessary to determine whether, within the meaning of s 24 of the Act, Mr Carter's activities in undertaking contract work with NZI were "remunerative" activities.

25 I have not been able to ascertain from the materials before me the total remuneration received by Mr Carter for his contract work with NZI. However, Mr Carter's income tax return for the period 1 July 1990 to 30 June 1991 reveals that in that financial year he received income from casual audits of \$4,500.00. It seems reasonable to assume that this income was derived by Mr Carter from NZI. It appears that if the total contract work undertaken by Mr Carter for NZI is averaged over the total period of time that he undertook such work, Mr Carter undertook contract work for NZI over that period for, on average, significantly less than eight hours per week. However, it further appears that during that period there were weeks when Mr Carter in fact undertook contract work for NZI for in excess of eight hours per week. In February 1992 his fee for this work was \$40.00 per hour with travelling time, mileage and secretarial fees separately charged.

26 I am unable to accept the contention of the applicant that the definition of "totally and permanently incapacitated" contained in par 24(1)(b) indicates that pars 24(2A)(d) and 24(2A)(g) must be concerned with work which employs the veteran's capacity for periods aggregating more than eight hours per week on average. The paragraphs are, in my view, intended to deal with distinct issues. Paragraph 24(1)(b) is concerned with degree of incapacity, par 24(2A)(d) with the reason which prevented the veteran from continuing to undertake his or her last paid work and par 24(2A)(g) with the demonstration of a long-term intention to undertake a particular type of work beyond the age of sixty-five years.

27 The construction of pars 24(2A)(d) and 24(2A)(g) for which the applicant contends would involve a significant rewriting of the paragraphs. I am not persuaded that the context in which the paragraphs are found provides justification for such an exercise.

28 There may be some work, or other activities, for which payment is received which on analysis could not be found to be "remunerative work" as that term is defined in s 5Q of the Act (perhaps, for example, because the payment received was low and in the nature of an honorarium or because of the level of related costs incurred). However, I do not consider that Mr Carter's activities as a contract auditor for NZI were of that character. His hourly rate of remuneration and the total remuneration received by him from his contract auditing activities in the 1991 financial year seem to me bring his activities clearly within the ordinary meaning of "remunerative activities". I conclude that Mr Carter stopped undertaking his "last paid work" within the meaning of subs 24(2A) of the Act when he ceased undertaking contract work with NZI.

CONCLUSION

29 When Mr Carter, in June 1995, stopped undertaking his "last paid work", namely his contract work with NZI, he had not then been working on his own account in the accounting profession for a continuous period of at least ten years. Mr Carter had, as the Tribunal found, not worked at all in the period of approximately twelve months which followed the dissolution of his partnership in 1989. This break in Mr Carter's working life broke the continuity of his work in the accounting profession with the result that when he ceased to undertake contract work with NZI he had only been working in the accounting profession for a continuous period of five years. This period did not begin before he turned sixty-five years of age.

30 The Tribunal was thus right to conclude that Mr Carter is not eligible for pension at the special rate for which s 24 of the Act provides as he does not satisfy the criterion of eligibility contained in par 24(2A)(g) of the Act.

31 The decision of the Tribunal will be affirmed.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 30 July 2001

Counsel for the Applicant: Mr M Vincent

Solicitor for the Applicant: Dibbs Barker Gosling

Counsel for the Respondent: Ms R Henderson

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 29 June 2001

Date of Judgment: 30 July 2001

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