

AUSTRALIA / JUDGMENT

Fry, John v Repatriation Commission [1997] FCA 771

COURT

FEDERAL COURT OF AUSTRALIA

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FEDERAL COURT OF AUSTRALIA

VETERANS' AFFAIRS - appeal from decision of Administrative Appeals Tribunal ('the AAT') - whether veteran entitled to Special or TPI rate of pension under s 24 Veterans' Entitlement Act 1986 (Cth) - whether veteran ceased work for reasons other than war-caused disabilities - finding by Tribunal that inability to continue to undertake full-time employment essentially because of criminal conviction - applicant not entitled to Special Rate

ADMINISTRATIVE LAW - whether sufficient compliance with s 43(2B) of the Administrative Appeals Tribunal Act 1975 - whether reasoning process of the AAT exposed sufficiently to enable an understanding of the basis for the decision - requirements of s 43 satisfied

Veterans' Entitlement Act 1986 (Cth) s 24

Administrative Appeals Tribunal Act 1975(Cth) s 43

Starcevich v Repatriation Commission (1987-88) 76 ALR 449

JOHN FRY v REPATRIATION COMMISSION

VG 160 of 1996

SPENDER J

BRISBANE

12 August 1997

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA)

)

QUEENSLAND DISTRICT REGISTRY) VG 160 of 1996

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GENERAL DIVISION)

On appeal from a decision of a member of the General Administrative Division of the Administrative Appeals Tribunal

BETWEEN: JOHN FRY

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE(s): Spender J

PLACE: Brisbane

DATE: 12 August 1997

MINUTES OF ORDER

THE COURT ORDERS
THAT:

The application be dismissed with costs, to be taxed if not agreed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

This application is an appeal from a decision of the Administrative Appeals Tribunal (constituted by Commodore B G Gibbs, AM RAN (Retd), Senior Member), given on 4 March 1996, the effect of which was to refuse an application for an increase in the applicant's war pension to what is known as the "Special" or "TPI" rate of pension as provided for in s 24 of the Veterans' Entitlements Act 1986 (Cth) ('the Act').

In *Starceвич v Repatriation Commission* (1987-88) 76 ALR 449, Fox J set out at 453, observations by the acting Minister concerning the legislative history of the TPI rate of pension made during the second reading speech of the Repatriation Legislation Amendment Bill 1985:

"Since 1920, there has been a special rate of disability pension payable in circumstances where, because of total and permanent incapacity resulting from war service, a veteran has been unable to resume or to continue in civil employment. The special or TPI rate pension was designed for severely disabled veterans of a relatively young age who could never go back to work and could never hope to support themselves or their families or put away money for their old age. It was never intended that the TPI rate would become payable to a veteran who, having enjoyed a full working life after war service, then retires from work possibly with whatever superannuation or other retirement benefits are available to the Australian work force.'

Later in the speech, the acting Minister said: '...the TPI rate pension can become payable only when a veteran is totally and permanently disabled by accepted disabilities and is thereby precluded from continuing to engage in remunerative work. If a person has had the usual span of a working life or has retired voluntarily or has left employment for reasons other than accepted disabilities, a TPI pension is not payable. It would be in only very rare cases that any veteran beyond the normal retirement age could be eligible for this pension.'

The applicant was born on 18 November 1933 and served in the Australian Army from 11 June 1952 until 10 June 1958, including service from 5 March 1953 to 17 April 1954 in Korea and from 8 October 1955 to 19 October 1957 in Malaya, which service is "operational service" during these two periods as defined in the Act.

After his discharge from the army, Mr Fry worked as a carpenter and joiner doing sub-contracting work. However, because of the volatile nature of the building industry, he ceased working as a sub-contractor in 1981 and commenced employment with the Footscray Wholesale Market as a Market Officer, responsible for the application of rules relating to the operations at the market. He continued in that employment until October 1993, at which time he was suspended on suspicion of receiving secret commissions. He was later charged and convicted of receiving secret commissions and served a gaol sentence from 23 October 1994 to 22 February 1995. After his release from prison, Mr Fry worked for six days with Woodstock Drilling as a driller's assistant. The nature of the work aggravated his neck pain and he ceased work.

Prior to 8 June 1993, Mr Fry had disabilities of leucoderma and eczematous dermatitis accepted as war-caused and was in receipt of a pension at twenty percent of the General Rate. On 8 June 1993, the applicant lodged a "Claim by a Veteran for Disability Pension and Medical Treatment" in respect of "arthritis in neck", "nervous problem" and "hearing problems" which were later diagnosed as cervical spondylosis, generalised anxiety disorder and sensori-neural hearing loss. On 8 October 1993, a delegate of the Repatriation Commission ('the Commission') accepted sensori-neural hearing loss as war-caused, and the pension remained at twenty percent of the General Rate.

Mr Fry sought review of that decision insofar as it rejected generalised anxiety disorder and cervical spondylosis as being war-caused. The Veterans' Review Board on 21 September 1994 accepted that the veteran's cervical spondylosis was war-caused and assessed the disability pension for the veteran's incapacity from all war-caused disabilities at forty percent of the General Rate from and including 8 March 1993.

On 18 January 1995, Mr Fry applied for review by the Administrative Appeals Tribunal ('the AAT') of the decision of the Veterans' Review Board, challenging the rejection of generalised anxiety disorder as being war-caused and the assessment of pension at forty percent of the General Rate. At the hearing of that review, the Commission conceded that the applicant's generalised anxiety disorder was war-caused and that the level of pension should be seventy percent of the General Rate. The AAT rejected the applicant's claim that he was entitled to payment of the Special Rate of pension. The AAT concluded:

"I am not reasonably satisfied that Mr Fry's incapacity from his war-caused disabilities is of such a nature as, of itself alone, to render him incapable of undertaking remunerative work for periods aggregating more than eight hours per week (section 24(1)(b)). In other words, he is not totally and permanently incapacitated. Nor is he, by reason of incapacity from his war-caused disabilities, alone, prevented from continuing to undertake remunerative work that he was undertaking. This being so, it cannot be said that he is suffering a loss of salary or wages, or of earnings on his own account pursuant to section 24(1)(c)."

The applicant's claim for payment of the pension at the Special Rate is to be determined having regard to the provisions of the Act prior to the amendments which were introduced in June 1994. To be entitled to the Special Rate of pension, the applicant must satisfy the provisions of s 24 of the Act, which relevantly provided:

"(1) This section applies to a veteran, other than a veteran to whom section 25 applies, if:

(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) ...

(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; and

(c) the veteran is, by reason of incapacity from that war-caused injury or war-caused disease, or both, alone, prevented from continuing to undertake remunerative work that the veteran was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his or her own account, that the veteran would not be suffering if the veteran were free of that incapacity.

(2) For the purpose of paragraph (1)(c):

(a) a veteran who is incapacitated from war-caused injury or war-caused disease, or both, shall not be taken to be suffering a loss of salary or wages, or of earnings on his or her own account, by reason of that incapacity if:

(i) the veteran has ceased to engage in remunerative work for reasons other than his or her incapacity from that war-caused injury or war-caused disease, or both; or

(ii) the veteran is incapacitated, or prevented, from engaging in remunerative work for some other reason; and

- (b) where a veteran, not being a veteran who has attained the age of 65 years, who has not been engaged in remunerative work satisfies the Commission that he or she has been genuinely seeking to engage in remunerative work, that he or she would, but for that incapacity, be continuing so to seek to engage in remunerative work and that that incapacity is the substantial cause of his or her inability to obtain remunerative work in which to engage, the veteran shall be treated as having been prevented by reason of that incapacity from continuing to undertake remunerative work that the veteran was undertaking.
- (3) ...
- (4) ..."

By virtue of s 19(5) of the Act, the AAT, when conducting a review of an assessment, has an obligation to assess the rate or rates at which a pension would have been payable from time to time during the assessment period, and the rate at which pension is payable from the date of the AAT's determination. Section 19(9) of the Act provides that the "assessment period" in relation to a claim or application relating to a pension means the period starting on the application day (in this case, 8 June 1993) and ending when the claim or application is determined.

The AAT's reasons for decision are succinct and may be set out:

"48. Mr Fry was employed as a Market Officer until October 1993. While it was Dr Parkin's opinion that because of his psychiatric condition it would be better were Mr Fry not to return to employment as, or similar to, a Market Officer, the evidence of Dr Byrne and Dr Stone was that Mr Fry can still work as a Market Officer, or do similar work. Dr Parkin likewise agreed that Mr Fry was able to undertake other work similar to that of a Market Officer.

49. On the evidence before me I find that Mr Fry ceased working as a carpenter because of the state of the building industry at that time. I further find that he ceased employment as a Market Officer essentially because of his criminal conviction. There is, however, no doubt that he ceased working as a driller's assistant because of his war-caused disabilities, alone.
50. I acknowledge and am mindful that Mr Fry suffers from an anxiety disorder. While that disorder and his cervical spondylosis clearly cause him problems, it cannot in my view be said that his war-caused disabilities, alone, prevent him from continuing to undertake work as a Market Officer, or work of a similar nature.
51. Turning to section 24(2)(b), it appears that Mr Fry has made some attempt to obtain remunerative work. However, as I have indicated, I am reasonably satisfied that he ceased to engage in remunerative work that he had been undertaking, for reasons other than his incapacity from his war-caused disabilities."

Four grounds of appeal were advanced on behalf of the applicant:

"1 There was no evidence upon which the [AAT] could reasonably find 'that during the assessment period under consideration the applicant has been able to work full-time in normal occupation';

2 The AAT was in breach of its obligations to give reasons under s 43(2B) of the AAT Act as it is not possible to discern how it concluded that:

- (a) it was not reasonably satisfied that the applicant's incapacity from his war-caused disabilities is of such a nature as, of itself alone, to render him incapable of undertaking remunerative work for periods aggregating more than eight hours per week;
- (b) the applicant is not, by reason of incapacity from his war-caused disabilities alone, prevented from continuing to undertake remunerative work that he was undertaking;

3 The Tribunal found that there was 'no doubt that [the applicant] ceased work as a driller's assistant because of his war-caused disabilities, alone' but later concluded that 'he ceased to engage in remunerative work that he had been undertaking, for reasons other than his incapacity from his war-caused disabilities'; and

4 The Tribunal erred in its application of s 24(2)(b) of the [Act]."

As to the first ground of appeal, the finding under challenge is one made in the context of the applicant's life-style assessment. Mr. Fry worked as a Market Officer until his suspension in October 1993. During this part of the assessment period he was engaged in full-time employment. The finding, insofar as it relates to the whole of the assessment period, is directed at the applicant's capacity to work full-time in normal occupation. On a fair reading of the AAT's reasons, it is my opinion that the AAT concluded that throughout the whole of the assessment period, the applicant had the capacity to undertake work as a Market Officer (or work of a similar nature), but that the factors which prevented him from continuing to undertake that work were not exclusively war-caused disabilities; his inability to continue to undertake work in that capacity was "essentially because of his criminal conviction".

Turning to the ground alleging a failure by the AAT to give reasons required by s 43(2B) of the Administrative Appeals Tribunal Act 1975 ('the AAT Act'), I agree that it is not sufficient compliance with the requirements of that section simply to outline the evidence before the AAT, without clarifying the findings as to which evidence it accepted and which evidence it rejected. The reasoning process must be exposed sufficiently to enable an understanding of the basis for the decision.

Burchett J in *Australian Postal Corporation v Lucas* (1991) 33 FCR 101 said at 109:

"I am conscious that an administrative tribunal, which has performed the substance of its task, should not be picked up pedantically for mere failures in accurate and comprehensive expression. But s 43(2B) expresses a fundamental condition of responsible administrative review, and a fundamental condition for acceptability of the decisions made upon review. Such a decision must be able to be understood."

In *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507, Woodward J described the obligation under s 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) in these terms:

"The passages from judgments which are conveniently brought together in *Re Palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 206-207, serve to confirm my view that s 13(1) of the ADJR Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation."

Section 43(2B) of the Act does not impose upon the AAT any standard of perfection; substantial compliance is what is required: *Bisley Investment Corp v Australian Broadcasting Tribunal* (1982) 59 FLR 132. As Pincus J (with whom French J and I agreed) noted in *Commissioner of Taxation v Osborne* (1990) 26 FCR 63 at 65:

"A breach of that provision is not necessarily shown by pointing to matters which might, with advantage, have been the subject of fuller or more detailed discussion..."

The AAT's reasons are meant to inform: they are not meant to be reviewed by an eye seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed: *McAuliffe v Secretary, Department of Social Services* (1992) 28 ALD 609. The requirements of s 43(2B) will accordingly be met where a tribunal indicates in its reasons which evidence is accepted or relied upon as the basis for the conclusions that it reaches. It is desirable that these matters be expressly stated, but if as a matter of fair inference or clear implication, the reasoning process can be understood, there will be no failure to comply with the requirements of s 43 of the AAT Act.

While the AAT did not expressly state that it accepted the evidence of Dr Byrne and Dr Stone (that Mr Fry was capable of undertaking work as a Market Officer), it seems to me as a matter of implication that, having regard to paragraphs 48, 49 and 50 of the reasons for decision, that that was the basis of the AAT's conclusions. An express acceptance of the evidence of Dr Byrne and Dr Stone would have been preferable. However, the clear implication from the reasons of the AAT is that the AAT accepted evidence that Mr Fry continued to have the capacity to work as a Market Officer or do similar work; that he was precluded from that employment essentially because of his criminal conviction, and as a consequence, that his war-caused disabilities alone did not and do not prevent him from continuing to undertake work as a Market Officer or work of a similar nature.

In my opinion, the AAT satisfied the requirements of s 43 of the AAT Act in this case.

As to the third ground of appeal, in my opinion there is no inconsistency in these two findings. It is clear that his war-caused cervical spondylosis prevented him from working as a driller's assistant. The reference in the reasons for decision to "ceasing to engage in remunerative work that he had been undertaking" is a reference to his ceasing work as a Market Officer. It was for reasons other than his incapacity from his war-caused disabilities namely, his criminal conviction for taking secret commissions in that position, which prevented him from continuing to engage in that work.

"Remunerative work" is defined in the Act as "any remunerative activity". The phrase "remunerative work that the veteran was undertaking" does not refer to any particular job that the veteran had but to the type of work that the veteran previously undertook: *Banovich v Repatriation Commission* (1986-87) 69 ALR 395.

The relevant remunerative work need not be the last remunerative work that the veteran was undertaking, but it is necessary that it be remunerative work that the veteran would have been undertaking at the relevant time in the assessment period had the veteran not been incapacitated by his war-caused disabilities. In *Starcevich v Repatriation Commission* (supra), Fox J said at 454:

"It seems to me that the intention of s 24(1)(c) is that the applicant must have suffered substantial loss of remuneration consequent alone upon the incapacity referred to in s 24(1)(a) and (b). The loss must be real, in the sense that the applicant cannot rely upon any remunerative work that he has undertaken in the past, but it would be unnecessarily restrictive to assess the loss by reference only to the last remunerative work undertaken before the applicant's inability to work became complete. In my opinion, a veteran's entitlement to a pension under s 24 may be based on his being prevented from continuing to undertake substantial remunerative work that he has undertaken in the past, even if that work was followed by work of a different type before the veteran ceased work altogether."

As to the final ground of appeal, the AAT in my view did not err in its application of s 24(2B) of the Act. In paragraph 51 of the reasons for decision set out above, the AAT indicated that even if the ameliorating provision of s 24(2)(b) is applied to s 24(1)(c), the applicant was not entitled to the Special Rate of pension because of the effect of s 24(2)(a)(i), which provides that a veteran shall not be taken to be suffering the loss of salary or wages if the veteran ceased to engage in remunerative work for reasons other than his incapacity from war-caused injury or disease, or both. That the AAT so found appears from paragraph 50 of its reasons.

For the above reasons, the application should be dismissed with costs, to be taxed if not agreed.

I certify that this and the preceding nine.(9) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Spender.

Date: 12 August 1997 Associate:

Counsel for the Applicant: Mr D O'Gorman

Solicitors for the Applicant: Gilshenan & Luton Lawyers

Counsel for the Respondent: Miss E Ford

Solicitor for the Respondent: Australian Government Solicitor

Date of hearing: 8 April 1997

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