

AUSTRALIA / JUDGMENT

Grant v Repatriation Commission [1999] FCA 1047

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FEDERAL COURT OF AUSTRALIA

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FEDERAL COURT OF AUSTRALIA

Grant v Repatriation Commission [1999] FCA 1047

VETERANS' AFFAIRS – Special rate of pension – Whether veteran prevented from continuing remunerative work because of war-caused disability "alone".

Veterans' Entitlements Act 1986 ss 24(2A)(d), 120(4), (6)

Repatriation Commission v Smith (1987) 15 FCR 327 applied

Cavell v Repatriation Commission (1998) AAR 534 distinguished

Sun Alliance Insurance Ltd v Massoud [1989] VR 8 applied

BRIAN GRANT v REPATRIATION COMMISSION

VG 311 OF 1998

SUNDBERG J

4 AUGUST 1999

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY VG 311 of 1998

BETWEEN: BRIAN GRANT

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: SUNDBERG J

DATE OF ORDER: 4 AUGUST 1999

WHERE MADE: MELBOURNE

**THE COURT ORDERS
THAT:**

1. The application be dismissed.
 2. The applicant pay the respondent's costs of the application.
- Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY VG 311 OF 1998
BETWEEN: BRIAN GRANT
Applicant
AND: REPATRIATION COMMISSION
Respondent
JUDGE: SUNDBERG J
DATE: 4 AUGUST 1999
PLACE: MELBOURNE

REASONS FOR JUDGMENT**BACKGROUND**

1 The respondent made a determination that the applicant was entitled to a disability pension under the Veterans' Entitlements Act 1986 ("the Act") at 80% of the General Rate. On review, the Veterans' Review Board increased the pension to 100% of the General Rate. The applicant sought review of this decision by the Administrative Appeals Tribunal, claiming that he was entitled to a Special Rate of pension, or, in the alternative, to an Extreme Disablement Adjustment. The Administrative Appeals Tribunal affirmed the decision under review. The applicant now appeals to this Court from the Tribunal's decision.

THE LEGISLATION

2 It was accepted that the applicant was eligible to be paid a pension. The question was whether he was entitled to receive a pension at the Special Rate under s 24 of the Act. The claim to an Extreme Disablement Adjustment under s 22(4) was not the subject of appeal. As the applicant had turned 65 before he lodged his claim, in order to be eligible for a pension at the Special Rate he must satisfy the requirements of ss 24(2A). Section 24(2A) sets out various criteria, all of which must be satisfied for the veteran to qualify for a pension at the Special Rate. The criterion relevant to this appeal is in par (d), which requires that:

"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."

3 The standard of proof to be applied in determining whether this criterion is met is that set out in s 120(4). The Tribunal must decide the matter "to its reasonable satisfaction" – that is, on the balance of probabilities: *Repatriation Commission v Smith* (1987) 15 FCR 327 at 335. Section 120(6) provides that there is to be no onus of proof:

"Nothing in the provisions of this section, or in any other provision of this Act, shall be taken to impose on ... [any party] any onus of proving any matter that is, or might be, relevant to the determination of the claim or application."

EVIDENCE BEFORE THE TRIBUNAL

4 The applicant had served in the Australian Army during World War II from 2 March 1942 until 14 August 1946. His service was in the south-west Pacific and the whole of his service constituted operational service for the purposes of the Act. It is accepted that he suffers from the following service-related disabilities:

- lumbar disc lesion
- soft tissue injury of the groin
- rupture of left tibialis anterior tendon
- co-ordination deficit of the left eye
- osteo-arthritis of the left hip.

The applicant stated that he had suffered from lower back pain since his accepted injuries in World War II. These limited his activity and his ability to sit or remain in the one position for any length of time. As a result of the pain, he could not walk further than 50 metres. The applicant gave evidence that, following his discharge from the Army, he worked in a number of occupations, but mostly in the farming industry. He found that his back pain interfered with his ability to work effectively. In 1976 he purchased a sheep farming property. Over time he found it increasingly difficult to carry out the physical labour required in running the sheep farm, and in 1986 his son returned to the farm to assist him. In his work history, the applicant stated that in 1993 he was so debilitated he had to give up farming altogether. Between 1986 and 1993 he had been able to supervise the operation of the farm, but his inability to perform physical work meant he was obliged to employ labour, which meant that the farm was no longer viable.

5 The evidence before the Tribunal as to the reason the applicant ceased farming was confusing and, at times, contradictory. The Tribunal accepted that this may have been due to the fact that the applicant suffered a stroke in 1997 which affected his memory. In Exhibit A4, a letter written by the applicant to his accountant on 26 June 1997, the applicant stated that he was forced to cease remunerative work after the shearing in November 1986 as a result of the effects of his war injuries. In his oral evidence he said that, but for his war-related disabilities, he would have been able to continue on the farm and the farm would have been viable. However, during cross-examination the applicant agreed that part of the reason he ceased remunerative work in 1986 was the economic slump in the wool industry, which resulted in low prices for wool. The applicant agreed that he "gave the game away" in 1986 "because of the wool price ... and the injuries and so forth". He stated that in 1986 the wool market was so depressed that not even a fit farmer could have made a profit. In re-examination the applicant said that, even if he had been able to carry out physical work on the farm, it would not have been viable because of the low

wool prices. In Exhibit R4, a letter written to the Department of Veterans' Affairs in 1992, the applicant indicated that he had been forced to put the farm on the market "due to the collapse of the wool market".

6 Dr William Stone, a rehabilitation physician, had seen the applicant in November 1997 and had provided a written report. At the hearing Dr Stone stated that he had the impression that the applicant had ceased work in 1993, and that between 1986 and 1993 he had performed a limited supporting role for his son in the running of the farm. The applicant's major problem had been physical restriction due to low back pain. Dr Stone gave evidence that the applicant had been diagnosed with carcinoma of the prostate in 1994, but that this would not have affected his ability to work.

TRIBUNAL'S DECISION

7 After setting out the evidence before it, the Tribunal concluded that the applicant was not entitled to a Special Rate of pension as he did not meet the requirements of s 24(2A)(d). The Tribunal stated that it had:

"determined that, on the evidence of the veteran, both the oral evidence taken on the day by telephone and documentary evidence, in particular that contained in Exhibit A4, the applicant did not satisfy the "alone test" and had ceased remunerative work due to the combination of the effects of his accepted war-caused disabilities and the economic slump in the wool industry in the 1980's which continued well into the 1990's."

GROUND'S OF REVIEW

(a) Incorrect interpretation and application of section 24

8 The applicant submitted that the Tribunal had erred in its interpretation and application of s 24. He advanced several arguments in support of this submission. The first was that the Tribunal erred in simply concluding that the "alone test" had not been satisfied, that is, that the applicant's war-caused disabilities alone prevented him from undertaking remunerative work. The applicant argued that the Tribunal should have undertaken its own separate examination as to whether on the evidence s 24 had been satisfied. It was accepted that if the applicant failed to satisfy the "alone test" in s 24(2A)(d) his claim for a pension at the Special Rate must fail. On the applicant's own evidence, he had ceased remunerative work due a combination of the effects of his war-caused disabilities and the economic slump in the wool industry. In these circumstances, the Tribunal was entitled to find that the applicant did not satisfy par (d) and was not entitled to a pension at the Special Rate. The Tribunal did not fail to "make its own separate examination" as to the satisfaction of s 24.

9 The second argument advanced on behalf of the applicant was that the Tribunal erred in basing its decision, in part, on Exhibit A4, in which he stated that he finished remunerative work after the shearing in November 1986. It was claimed that this merely dealt with the applicant's inability to do shearing work and "had no part to play in the examination of s 24(2A)(d)". Instead, it was

submitted, the Tribunal was required to undertake a close examination of whether s 24(2A)(d) was satisfied. In Exhibit A4 the applicant said - "I finished remunerative work ... [after] the shearing of 1986, in November when we did the shearing". He thus explains why and when he ceased to do remunerative work. The applicant inaccurately characterises the letter as merely dealing with his ability to continue to do shearing. The reference to shearing is solely to fix the date on which remunerative work ceased. In any event, the Tribunal's decision does not turn solely on Exhibit A4, but as well on the oral evidence given by the applicant to the effect that he ceased work in November 1986 due to a combination of his war-caused disabilities and the drop in wool prices.

10 The third argument advanced by the applicant was that the Tribunal was required to ask itself what was the remunerative work to be considered for the purposes of s 24(2A)(d). The applicant said he ceased remunerative work as a result of the combination of war-caused disabilities and the drop in wool prices. Section 24(2A)(d) was thus not satisfied. There was no necessity for the Tribunal to identify the nature of the remunerative work that had ceased. In any event, it did identify the remunerative work as sheep farming work. The Tribunal listed the various jobs the applicant had worked in since the war. The last was as a sheep farmer, which began when he purchased the property north of Coleraine in 1976. The Tribunal then referred to the evidence bearing on why the applicant had ceased "farming". It noted that the applicant's son had returned "to the farm to assist in the farming" in 1983 or 1991. The Tribunal found the slump in the wool industry to be a factor contributing to the applicant ceasing remunerative work. It is also evident from the Tribunal's reliance on Exhibit A4, in which the applicant stated that he ceased remunerative work when he ceased shearing, that the work in question was sheep farming work. It is as plain as could be that the Tribunal did not fail to identify the remunerative work that the applicant had ceased to perform.

11 Fourthly, the applicant argued that the Tribunal erred in failing to give consideration to the fact that the applicant had continued to exercise a supervisory role in the running of the farm after he ceased performing physical work. According to the applicant, the Tribunal "mistook remunerative work with profitability from the farm". By this, the applicant seems to mean that the farm was not profitable after 1986 because he had to employ outside labour. This was the result of his war-caused disabilities. But for this, his supervisory role would have generated income and would constitute remunerative work. However, the applicant's own evidence was that he ceased remunerative work after the November 1986 shearing, when he ceased to perform physical work on the farm. It is irrelevant that he stayed on in a supervisory capacity past this date if he did not receive any remuneration for it.

12 Finally, it was submitted that the Tribunal regarded the "alone test" as meaning that the war-caused disability must be the "unique and absolute cause" of the applicant's decision to cease remunerative work. Characterising the "alone test" as "the sole, unique and absolute cause" of the cessation of remunerative work was held to be incorrect in *Cavell v Repatriation Commission* (1998) AAR 534. In that case, at 539, Burchett J stated that to paraphrase the "alone test" in that way has the tendency:

"To distract the tribunal from its true task – to make a practical decision whether the veteran's loss of remunerative work is attributable to his service-related incapacities, and not to something else as well. It is a decision that should not be made upon nice philosophical distinctions, but with an eye to reality, and as a matter in respect of which common sense is the proper guide."

In that case it was found that in spite of stating the test incorrectly, the Tribunal had not erred in reaching its decision, as there were other factors which led to the veteran's loss of remunerative work. In the present case, on the applicant's own evidence, the slump in the wool industry was a major factor contributing to his ceasing remunerative employment. In light of this, it cannot be said that the Tribunal reached its decision based upon "nice philosophical distinctions", or that it required the applicant's war-related disabilities to be the "sole, unique and absolute cause" of his ceasing remunerative employment. What the Tribunal said in the present case bears no resemblance to what was said in Cavell. No attempt was made to explain why the Tribunal's description of the requirement in par (d) as the "alone test" was deficient.

(d) Imposition of an onus of proof

13 The applicant argued that the Tribunal erred by placing the onus on the applicant to demonstrate that he met the requirements of s 24(2A)(d), contrary to s 120(6) of the Act. In support of this argument, the applicant points to par 18 of the Tribunal's reasons for decision, in which the Tribunal concludes that "on the evidence ... the applicant did not satisfy the 'alone test'". It was submitted that this indicates that the Tribunal required the applicant to satisfy it that he met the 'alone test'. However, on a fair reading of the passage, the Tribunal is not requiring the applicant to satisfy it, but rather that he had to satisfy the 'alone test'. This is merely a statement of what is required by the legislation – to be eligible for a pension at the Special Rate, the applicant must satisfy the "alone test". It does not impose an onus on the applicant to satisfy the Tribunal that the requirements of the "alone test" are met.

(d) Failure to give adequate reasons

14 The applicant complained that the Tribunal failed to give adequate reasons for its decision. In *Comcare v Susan Jane Parker* (unreported, 2 July 1996) Finn J quoted with approval the following passage from the judgment of Gray J, giving the decision of the Victorian Full Court in *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, at 18:

"The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will, in my opinion, be inadequate if:

- (a) the appeal court is unable to ascertain the reasoning upon which the decision is based; or
- (b) justice is not seen to have been done."

It is clear from the next sentence from Gray J's judgment and from Finn J's comments, that (a) refers to the situation where the appeal court cannot discern the tribunal's reasoning and (b) to the situation where the parties are unable to determine why the tribunal decided the way it did. Finn J went on to conclude, at par 27:

"It is not in my view either appropriate or profitable to speculate about the possible course of reasoning which produced the Tribunal's conclusion. Both the parties and, for that matter, this Court should be able to discern that course from the reasons given. In saying this I am not for a moment suggesting that the mere presence of some doubt, some ambiguity or some parsimony in the reasons given will for that reason render reasons for decision inadequate."

15 In the present case, the Tribunal's findings are stated with sufficient clarity to enable the parties and the Court to ascertain the reasoning upon which the decision was based. In par 18 the Tribunal makes the critical finding that the applicant had ceased remunerative work due to a combination of causes – the effects of his war-caused disabilities and the economic slump in the wool industry. The Tribunal clearly states the evidence on which it has reached this finding - the applicant's oral and documentary evidence, which the Tribunal had set out earlier in the reasons. This critical finding meant that the applicant did not satisfy the "alone test" and was therefore not entitled to a pension at the Special Rate. The reasoning is perfectly clear, despite the fact that the Tribunal's conclusions are stated in summary form.

CONCLUSION

16 None of the grounds of review has been made out, and the appeal must be dismissed.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sundberg.

Associate:

Dated: 4 August 1999

Counsel for the Applicant: D De Marchi

Solicitor for the Applicant: De Marchi & Associates

Counsel for the Respondent: P J Hanks

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 29 July 1999

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