

AUSTRALIA / JUDGMENT

Lamers v Repatriation Commission [2001] FCA 24

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FEDERAL COURT OF AUSTRALIA

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FEDERAL COURT OF AUSTRALIA

Lamers v Repatriation Commission [2001] FCA 24

VETERANS' AFFAIRS – appeal from decision of Administrative Appeals Tribunal – whether veteran entitled to pension at special rate – whether failure to act according to substantial justice and substantial merits of case – whether error of law – nature of remunerative work undertaken by veteran.

Veterans' Entitlements Act 1986 (Cth): s 24, s 119

Flentjar v Repatriation Commission (1997) 26 AAR 93 referred to

Banovich v Repatriation Commission (1986) 69 ALR 395 referred to

Repatriation Commission v Sheehy (1995) 133 ALR 654 referred to

Collins v Minister for Immigration (1981) 36 ALR 598 referred to

PETER JOHN LAMERS as the legal personal representative of the late JOHN FLENTJAR v
REPATRIATION COMMISSION

V 660 of 1999

GOLDBERG J

24 JANUARY 2001

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY V 660 of 1999

BETWEEN: PETER JOHN LAMERS as the legal personal representative of the late JOHN FLENTJAR
Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: GOLDBERG J

DATE OF ORDER: 24 JANUARY 2001

WHERE MADE: MELBOURNE

**THE COURT ORDERS
THAT:**

1. The appeal be dismissed.
 2. The applicant pay the respondent's costs of the appeal.
- 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 V 660 of 1999
BETWEEN: PETER JOHN LAMERS as the legal personal representative of the late
JOHN FLENTJAR
Applicant
AND: REPATRIATION COMMISSION
Respondent
JUDGE: GOLDBERG J
DATE: 24 JANUARY 2001
PLACE: MELBOURNE

REASONS FOR JUDGMENT**Introduction**

1 On 29 October 1999 the Administrative Appeals Tribunal ("the Tribunal") determined that the late John Flentjar deceased ("the veteran") was not entitled to be paid a pension at the special rate pursuant to s 24 of the Veterans' Entitlements Act 1986 (Cth) ("the Act"). The veteran died on 2 December 1998 and his application for a pension at the special rate has been continued by the applicant, the executor of his will, in accordance with s 126(1) of the Act. The applicant has appealed against the Tribunal's decision pursuant to s 44 of the Administrative Appeals Tribunal Act 1975 (Cth).

2 This is the second time the veteran's application for payment of a pension at the special rate has been before the Court. An earlier decision of the Tribunal had allowed the veteran's application but that decision was set aside by Spender J and remitted to the Tribunal for further hearing: *Repatriation Commission v Flentjar* (1997) 47 ALD 67. An appeal by the veteran against that decision was dismissed by a Full Court: *Flentjar v Repatriation Commission* (1997) 26 AAR 93. An application to the High Court for special leave to appeal was refused on 19 May 1998.

Background

3 The veteran was born on 4 September 1916 and undertook operational service during the Second World War. He served in the Royal Australian Navy from 1934 until his discharge on 7 October 1946. After his discharge he initially worked as a sign writer and, at some time prior to 1960, he purchased a licence to operate a taxi and earned his living as a taxi owner/driver. In approximately 1970, on medical advice, he ceased driving his taxi as a result of his war-caused disability of irritable bowel syndrome, which condition was exacerbated by his sitting for long hours in the taxi. Shortly thereafter he sold his taxi licence and for the balance of his working life he worked for Courage Breweries and the Victorian Tramways. He retired at the age of 62 years. On 7 August 1991, the day on which the veteran lodged a claim for a pension at the special rate,

he was aged 74 years and 11 months and on the day he died, 2 December 1998, he was aged 82 years and 3 months.

4 The day on which the veteran lodged his claim for a pension at the special rate, 7 August 1991, is the application day for the purpose of assessing his entitlement to the pension at the special rate: s 19(9) of the Act. In order to be entitled to be paid the pension at the special rate the veteran had to bring himself within the provisions of s 24 of the Act on 7 August 1991 or at any time during the assessment period, that is the period between the date of his claim and the date his claim was determined. Effectively that period terminated earlier on the date of his death.

5 As at 7 August 1991, s 24 (which has since been amended) provided:

"(1) This section applies to a veteran 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) the veteran is, because he or she has suffered or is suffering from pulmonary tuberculosis, receiving or entitled to receive a pension at the general rate; 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; 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; and

(d) ...

(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 ..."

6 It was not contested that the veteran had a number of war-caused diseases, chronic bronchitis, anxiety state with irritable bowel, ischaemic heart disease and adenocarcinoma of the colon. His degree of incapacity from his war-caused disabilities entitled him to the payment of a pension of 100% of the general rate pursuant to s 21A of the Act. It was also uncontested that the veteran satisfied the provisions of s 24(1)(a) and (b) of the Act. The issue for the Tribunal was whether s 24(1)(c) applied so as to qualify the veteran to receive the special rate pension. (There was also before the Tribunal the issue whether the veteran was entitled to be paid the extreme disablement adjustment pursuant to s 22 of the Act. The Tribunal remitted that issue to the respondent for further consideration and it is not part of this appeal.) The Tribunal was required to determine in accordance with s 24(1)(c) a hypothetical question, namely what the veteran would have done during the assessment period if he had not suffered from his war-caused diseases and disabilities.

Reasoning of the Tribunal

7 The Tribunal identified the relevant issue as being:

"... whether, given that it is accepted that he gave up his taxi licence in 1970 as the result of his war-caused disabilities, he would have continued to operate his taxi business and if he would have been likely to still be doing so as at 7 August 1991 (or at any subsequent period up to his date of death)."

The Tribunal noted the uncontradicted evidence that until February 1994 the Victorian Taxation Directorate had a firm policy of not permitting taxi drivers to drive beyond the age of 70 years. The evidence also disclosed that since February 1994 the basis of the Directorate's determination of fitness to drive a taxi has been by reference to a person's medical fitness to drive and has not been restricted by a person's age. However, at no time did age or lack of medical fitness prevent a person from leasing a taxi to another driver or from employing another person to drive his or her taxi.

8 The Tribunal was satisfied that:

"... the veteran enjoyed his work as a taxi driver and would have been likely to continue as an owner/operator for the balance of his working life had his war-caused disability not prevented him from doing so."

9 The Tribunal noted that as the veteran turned 70 years on 4 September 1986 he would have been prevented from continuing to drive his taxi by the age requirement of the Victorian Taxation Directorate, but he could have reapplied for a licence to drive a taxi after the policy change in February 1994 when he would have been 77 years of age. Even if he had continued driving until the age of 70 years, by February 1994 he would not have driven a taxi for at least six years as a result of the age restriction policy.

10 The Tribunal considered the evidence relevant to the issue whether the veteran might have recommenced driving a taxi after February 1994. The Tribunal concluded that it was improbable, leaving his war-caused disabilities aside, that he would have been likely to have re-established himself as a taxi driver at any time between February 1994 and the date of his death in December 1998. The Tribunal was satisfied:

"... that driving his taxi was not remunerative work the veteran would hypothetically have been undertaking at any time during the application period."

11 The Tribunal referred to the medical advice that the veteran had been given in or about 1970 that he should stop driving his taxi and was satisfied that it was open to him at that time to lease or assign his taxi licence.

12 The Tribunal then considered what relevant remunerative work the veteran was undertaking at the time he ceased driving his taxi as a result of his war-caused disease, referring to the decision of the Full Court in *Flentjar v Repatriation Commission* (supra) and *Banovich v Repatriation Commission* (1986) 69 ALR 395. The Tribunal then reasoned:

"From the above authorities, the Tribunal concludes that the type of work undertaken by the veteran was that of a taxi owner-driver. While he had the option to lease and/or employ a driver for his taxi, the evidence does not show that this was a course upon which at any time he embarked as a form of remunerative work. The issue, raised by the Tribunal, of whether leasing his taxi licence or employing a driver may or may not constitute 'remunerative work' as that term is defined in s.5Q(1) of the Act as 'includes any remunerative activity', accordingly does not arise for consideration. Leasing or employing a driver were options open to the applicant, but since he did not, at any time, take up either of those options then it cannot be said that they constituted a form of remunerative work in which he could be found to have engaged. Section 24(1)(c) clearly refers to remunerative work that the veteran was undertaking. It follows that the Tribunal does not need to consider the submissions it requested of Mr De Marchi and Mr Hanks as to whether or not leasing a taxi could be considered to be 'remunerative work'."

The Tribunal, therefore, concluded that the veteran did not meet the requirements of s 24(1)(c) of the Act and did not qualify to receive the special rate pension.

The appeal

13 The applicant relied upon the following grounds of appeal:

- the Tribunal did not have regard to, or apply, the provisions of s 119 of the Act, that is take a beneficial approach to the claim;
- the Tribunal was wrong in law in finding that it was unlikely that the veteran would have been likely to re-engage in driving a taxi in February 1994;
- the Tribunal was wrong in law in finding against the evidence that it was open to the veteran to assign or lease his taxi licence;

- the Tribunal was wrong in law in limiting the examination of the loss of remuneration to the driving of a taxi rather than the broader remunerative work of operating a taxi licence;
- the Tribunal was wrong in law in determining that because the veteran had never leased his taxi licence he could not rely on remuneration from the operation of leasing a taxi licence for the purposes of s 24(1)(c) of the Act.

14 The applicant submitted that the ability to lease the taxi or employ a driver was part of the remunerative work in which the veteran engaged before he was required by his war-caused disease to give up his licence. As the Tribunal had found that an owner/driver had no restriction placed on him to lease or employ another driver under appropriate circumstances, the applicant contended that he was entitled to a pension at the special rate. It was submitted that the Tribunal, in contravention of s 119(1)(g) and (h) of the Act, failed to act according to substantial justice and the substantial merits of the case, without regard to legal form and technicalities and did not take into account difficulties in ascertaining the facts, when it drew a distinction between driving a taxi and leasing a taxi licence, or employing a driver for the taxi, and concluded that the veteran had not leased the taxi or employed a driver for the taxi. In short, the applicant submitted that the Tribunal disregarded s 119(1)(g) in not considering the effect of his war-caused disease on his ability to lease his taxi licence. The applicant submitted, in the alternative, that the Tribunal erred in law in finding against the weight of the evidence that the veteran could have leased his licence as the evidence on that point was anecdotal, and that the veteran had given evidence of the pressure put upon him to sell the licence.

15 As the Full Court stressed in *Flentjar v Repatriation Commission* (supra), at 95, it is important for the purposes of s 24(1)(c) of the Act to identify the relevant "remunerative work" which the veteran was undertaking. The Full Court noted that there was a distinction between "the leasing of a taxi licence" and the work of "taxi driving or working as a taxi owner-driver". The relevant "remunerative work" for the purposes of s 24(1)(c) is the type of work that the veteran had previously undertaken and not any particular job: *Banovich v Repatriation Commission* (supra) at 402.

16 The critical issue before the Tribunal was the nature of the remunerative work which the veteran had undertaken. He had only ever undertaken the work of an owner/driver of a taxi and had never undertaken any work in the nature of leasing his taxi licence or employing another person to drive the taxi. Section 119(1)(g) and (h) of the Act were not relevant to the determination of the nature of the remunerative work the veteran had undertaken. The determination of that issue depended upon a consideration of the evidence. Section 24(1)(c) required the Tribunal to make a finding as to the nature of the remunerative work which the veteran was undertaking at the relevant time. Section 119(1)(g) of the Act did not allow the Tribunal to disregard this statutory prescription. Further, s 119(1)(g) did not allow the Tribunal to blur or eliminate the distinction between the work of owning and driving a taxi on the one hand, and leasing the taxi licence or employing a driver to drive the taxi on the other hand. It would have been a misapplication of s 119(1)(g) for the Tribunal to conclude that that statutory provision required it to treat driving a taxi and leasing the taxi licence, or employing a driver to

drive the taxi, as the same type of remunerative work or remunerative activity. Further the facts and circumstances before the Tribunal did not give it any basis to have regard to the provisions of s 119(1)(h) for the purpose of determining whether the veteran had engaged in the remunerative work of leasing his taxi licence or employing a driver for his taxi at the relevant time.

17 The Tribunal did not make any error in law in reaching its conclusions that driving his taxi was not remunerative work the veteran would hypothetically have been undertaking at any time during the application or assessment period, that the type of work undertaken by the veteran was that of a taxi owner-driver, and that he had never undertaken remunerative work in the nature of leasing his taxi licence or employing a driver to drive his taxi. The Tribunal correctly analysed and applied the relevant principles, particularly those to be extracted from *Flentjar v Repatriation Commission* (supra) and *Banovich v Repatriation Commission* (supra). The Tribunal, in particular, was correct in law in drawing a distinction between the remunerative work of a taxi owner-driver and the remunerative work of leasing a taxi licence or employing a driver to drive a taxi. The Tribunal was also correct in law in concluding that, although leasing the taxi licence or employing a driver were options open to the veteran, they did not constitute a form of remunerative work he had undertaken or in which he had been engaged as he did not take up either of those options at any time.

18 That the Tribunal's approach to the nature of the "remunerative work" undertaken by the veteran was correct is demonstrated by *Repatriation Commission v Sheehy* (1995) 133 ALR 654. Sackville J said at 660:

"Section 24(1)(c) has been said to impose a requirement that the veteran demonstrate 'economic loss': *Banovich v Repatriation Commission* (1986) 69 ALR 395 (Fed C, Full Court) at 400. While this is accurate enough as a general description, the criteria in s 24(1)(c) are not necessarily the same, for example, as the principles applied by a court in assessing damages for economic loss in a personal injury case. The fact that a veteran has suffered economic loss by reason of a war-caused incapacity does not necessarily mean that he or she satisfies s 24(1)(c). For example, it is not enough for a veteran over the age of 65, who has never been engaged in a particular kind of remunerative work, to show that, but for the incapacity, he or she would have obtained that kind of remunerative work. An illustration is a veteran over the age of 65, who has never worked as a farmer because of war-related injury. That veteran could not successfully claim to come within s 24(1)(c) merely by showing that, but for the injury, he or she would have taken up employment as a farmer for the first time at age 66."

19 It was open to the Tribunal to find, on the evidence before it, that driving his taxi was not remunerative work the veteran would hypothetically have been undertaking at any time during the assessment period which commenced on 7 August 1991. The Tribunal had evidence before it to the effect that the veteran would not have been able to drive his taxi from the time he turned 70 years until the Victorian Taxi Directorate changed its policy in February 1994 permitting taxi drivers to drive beyond the age of 70 years. By that stage the veteran would not have driven a taxi for seven years and the Tribunal thought it inherently unlikely that, in such circumstances, he would have re-applied for permission to drive a taxi in February 1994. Further, the veteran had

given evidence before the first tribunal (which the parties agreed was before the second Tribunal) that, after the Victorian Taxi Directorate changed its policy, if he had not had his war-caused disease, he would have considered allowing his wife or someone else in his family, such as his son, to operate the taxi. Once this finding was made it followed, as a matter of principle, that the application by the veteran must fail. At no time had he been undertaking remunerative work in the nature of leasing his taxi licence or employing a driver to drive his taxi.

20 There is no merit in the ground of appeal that the Tribunal was wrong in law in finding against the evidence that it was open to the veteran to assign or lease his taxi licence. The applicant submitted that this finding was a perverse finding on the evidence but the applicant accepted that it was open to the Tribunal on the evidence to make this finding. Insofar as this ground relies on the submission that the finding was against the evidence or the weight of the evidence, it does not raise any error of law: *Collins v Minister for Immigration and Ethnic Affairs* (1981) 36 ALR 598 at 601. Insofar as the ground relies on the submission that there was no evidence upon which such a finding could be made, the submission must be rejected. There was evidence before the Tribunal upon which it could find that it was open to the veteran to lease or assign his taxi licence.

21 The application will be dismissed with costs.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Goldberg.

Associate:

Dated: 24 January 2001

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: 30 October 2000

Date of Judgment: 24 January 2001

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