

AUSTRALIA / JUDGMENT

Repatriation Commission v Smith, M.J. [1987] FCA 432

COURT

(standard of proof) - appropriateness of Tribunal taking

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CATCHWORDS

Veterans' affairs - Disability pension - application for special rate - veteran had disabilities accepted as war-caused including periarthritis and spondylolisthesis - veteran in effect forced to retire from employment with Hobart Marine Board at age 63 because of war-caused disabilities - s.20 Veterans' Entitlements Act 1986 ("the Act") - s.24(1)(c) of the Act in contention - whether criteria set out in s.24 of the Act to be considered as at date of application rather than as at date of retirement - whether eligibility for special rate depends upon existence of continuing economic loss - interpretation of s.120(4) of the Act (standard of proof) - appropriateness of Tribunal taking 'official notice' of relevant facts - ss.33(1} (c), 44(1)

Administrative Appeals Tribunal Act 1975.

REPATRIATION COMMISSION v. MAXWELL J. SMITH

No. T5 of 1987

Northrop, Beaumont and Spender JJ.

Sydney

10 August 1987

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IN THE FEDERAL COURT OF AUSTRALIA

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TASMANIA DISTRICT REGISTRY) No. T5 of 1987

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GENERAL DIVISION

ON APPEAL FROM THE VETERANS' APPEALS DIVISION OF THE
ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY
DEPUTY PRESIDENT R.C. JENNINGS QO.C.

BETWEEN: REPATRIATION COMMISSION

Applicant

AND: MAXWELL J. SMITH

Respondent

MINUTES OF ORDER

Court: Northrop, Beaumont and Spender JJ.

Date orders made: 10 = August 1987

Where made: Sydney

THE COURT ORDERS:

1. The appeal be allowed with costs.
2. The Tribunal's decision be set aside and the matter remitted to the Tribunal to be heard and decided again with the hearing of further evidence.

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

IN THE FEDERAL COURT OF AUSTRALIA

TASMANIA DISTRICT REGISTRY T. No. G5 of 1987

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GENERAL DIVISION

ON APPEAL FROM THE GENERAL ADMINISTRATIVE DIVISION
OF THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY
MR. R.C. JENNINGS, O.C., DEPUTY PRESIDENT
REPATRIATION COMMISSION Applicant

and

MAXWELL J. SMITH Respondent

COURT: NORTHROP, BEAUMONT AND SPENDER JJ.

DATE : 10 AUGUST 1987

REASONS FOR JUDGMENT

NORTHROP J.

I would make the orders proposed by Beaumont J. and

I concur with his reasons for judgment.

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"vasons for Judgment heroin of the '

-lorourable Mr. Justice R-M Northrop Hy Sharaw P Judean Associate

Dated; 10 August 1987

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IN THE FEDERAL COURT OF AUSTRALIA

TASMANIA DISTRICT REGISTRY No. T5 of 1987

GENERAL DIVISION

ON APPEAL FROM THE VETERANS' APPEALS DIVISION OF THE ADMINISTRATIVE APPEALS
TRIBUNAL CONSTITUTED BY DEPUTY PRESIDENT R.C. JENNINGS O.C.

BETWEEN: REPATRIATION COMMISSION Applicant AND: MAXWELL J. SMITH Respondent

CORAM: Northrop, Beaumont and Spender JJ.

DATED: 16 August 1987

REASONS FOR JUDGMENT

BEAUMONT J. The Veterans' Entitlements Act 1986 ("the Act")

makes provision for a number of pensions for veterans and their dependents. We are concerned here with Part II of the Act which deals with pensions other than "service" pensions. So far as presently material, the general provisions of Part ITI may be summarised thus: (1) Where a veteran has been incapacitated from a war-caused injury oor a war-caused disease, the Commonwealth is liable to pay a pension to the veteran in accordance with the Act (s.13(1)(b), (d)). (2) A claim for a pension shall be in writing and accompanied by relevant evidence but this requirement is not to be taken to impose any onus of

proof on a claimant (s.14(1),(3),(4))- (3) A veteran in receipt

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of a pension may apply for an increase in the rate of the pension on the ground that his incapacity has increased (s.15). (4) Where a claim in accordance with s.14 for a pension is granted (see ss.17, 18 and 19), the Commission may approve payment of the pension from a date not earlier than three months before the date

on which the claim was received (s.20(1)).

The rate of pension now claimed is dealt with by Division 4 of Part II of the Act which is entitled "Rates of pensions payable to veterans". This Division provides for three types of pension - at the general rate, the intermediate rate, and the special rate. The general rate is applicable when the veteran is not eligible for pension at the intermediate or special rates (s.22(1)). The general rate payable to a veteran is the rate assessed by the Commission as a rate per fortnight that constitutes the same percentage of the maximum rate per fortnight specified in s.22(7) (\$137.60, as it was in 1986) as the percentage determined by the Commission to be his degree of incapacity from the war-caused injury or disease (s.22(2)(3)(4)). The intermediate rate is applicable if (a) there is in force in respect of the veteran a determination under the Act determining that the degree of incapacity of the veteran from war-caused injury or war-caused disease, or both, is 100 per centum; (b) the veteran's incapacity from war-caused injury or war-caused disease, or both, is, of itself alone, of such a nature as to render the veteran incapable of undertaking remunerative work otherwise than on a part-time basis or intermittently; and (c) the veteran is, by reason of incapacity from war-caused injury or

war-caused disease, or both, alone, prevented from continuing to

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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 from that incapacity

(s.23(1)).

The special rate, with which we are concerned, is

provided by s.24:

"Special rate of pension

24.(1) This section applies to a veteran, other than a veteran to whom section 25 applies, if -

- (a) there is in force in respect of the veteran a determination under this Act determining that the degree of incapacity of the veteran from war-caused injury or war-caused disease, or both, is 100 per centum;

- (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
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- 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) This section also applies to a veteran who has been blinded in both eyes as a result of war-caused injury or war-caused disease, or both.
- (4) The rate at which pension is payable to a veteran to whom this section applies is \$364.90 per fortnight."

A veteran's capacity to undertake remunerative work is
dealt with by s.28 -

"28. In determining, for the purposes of paragraph...24(1)(b), whether a veteran who is incapacitated from war-caused injury or war-caused disease, or both, is incapable of undertaking

remunerative work, the Commission shall have regard to the following matters only:

- (a) the vocational, trade and professional skills, qualifications and experience of the veteran;
- (b) the kinds of remunerative work which a person with the skills, qualifications and experience referred to in paragraph (a) might reasonably undertake; and
- (c) the degree to which the physical or mental impairment of the veteran as a result of the injury or disease, or both, has reduced his or her capacity to undertake the kinds of remunerative work referred to in paragraph (b)."

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The standard of proof is dealt with for present purposes by s.120(4) -

"(4)...the Commission shall, in making [its]...determination or decision..., including the assessment or re-assessment of the rate of a pension granted under Part II...decide the matter to its reasonable satisfaction."

A similar but earlier legislative scheme was considered

in three recent Full Court decisions - *Banovich v. Repatriation*

Commission (1986) 69 A.L.R. 395; *Delkou v. Repatriation Commission* (1986) 69 A.L.R. 406; *Lucas v. Repatriation*

Commission (1986) 69 A.L.R. 415. It is common ground that although the events now in question took place some years ago, the Act is applicable in the present case. As has been said, the issue in the present case was the eligibility of the respondent, Mr. Smith, for a special rate of pension pursuant to s.24 of the Act. (As was pointed out in *Banovich* at p.398, there is a clear distinction drawn in the Act between a determination that the Commonwealth is liable to pay a pension on the ground of incapacity on the one hand and the rate of any such pension on the other.) To adopt the language used in *Banovich*, (at p.400), s.24 specifies three qualifying criteria. They may be shortly described as first, receipt of 100 per cent general rate pension, secondly, total and permanent incapacity and thirdly, economic loss. The Commission has always accepted that the first two of these criteria are satisfied here. Only the third criterion (see

s.24(1)(c)) is in contention.

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As has been said, the construction of the earlier but similar legislation was considered in the trilogy of cases referred to. As an aid to construction, the Court there relied upon the following observations made by the Acting Minister for

Veterans' Affairs in the second reading speech:

"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. Determining authorities have found the application of the present

legislative provisions difficult because the provisions, unchanged since 1920, contain outmoded and imprecise terms. The amendments clarify the

eligibility criteria and make it clear that to qualify for a TPI pension a veteran must be eligible for the 100 per cent general rate pension. In addition, 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. Special provision is made by the Bill to cover veterans who are under 65 years of age, are unemployed and are genuinely seeking to

engage in remunerative work." (see Parliamentary Debates, House of Representatives, 17 May 1985 at pp. 2645-6).

At all material times, the respondent has been in receipt of a pension at the general rate. On 17 April 1985, he sought an increase to the special rate. On 24 May 1985, the

Commission refused his application. On 5 May 1986, the Veterans'

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Review Board affirmed this decision. (The Board, in fact, dealt with the matter under earlier legislation but nothing turns on this for our purposes.) However, on review of this decision by the Administrative Appeals Tribunal on 7 April 1987, it was directed that the respondent be paid a pension at the special rate "from the relevant date". The Commission now "appeals" to the Court in the exercise of its original jurisdiction under

s.44(1) of the Administrative Appeals Tribunal Act 1975. The

appeal is, of course, limited to a question of law.

Before the Tribunal, there was no real dispute about the facts. The respondent is now aged 71 years, having been born on 29 October 1915. He served in the A.I.F. from 1940 to 1946 and during service was a prisoner of war for more than three years. Prior to his retirement in November 1978, aged 63 years, the respondent worked as a plumber. From 1962, he was employed as a foreman-plumber by the Hobart Marine Board. Previously, he had

been self-employed, or otherwise employed, as a plumber.

In his reasons for decision, the Tribunal made the following findings:

"During the last few years of his working life at the Marine Board his work was mainly supervisory and he was able to forego much physical work such as climbing under wharves.

In November 1978, shortly after his 63rd birthday, he decided to accept a redundancy package then offered rather than work for the Board as a plumber for another year, because he did not think he was physically capable of fulltime work due to _ the periarthritis from which he was suffering, especially in the hands.

After his retirement the applicant did some relieving sheet metal work for about a month. One effect on his

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service pension of earning \$479.50 during this period was that he was required to provide a statement to the Department of Repatriation on 28 February 1979 which included the following:-

'I wish to inform the Department of Veterans' Affairs that I have earned \$479.50 gross from employment with the Marine Board of Hobart.

I do not intend to work again.

I understand that my permissible income of \$198.08 has been exceeded and there will be a slight overpayment in my service pension and my wife's service pension..."

It is possible to interpret the Tribunal's findings in a way which would suggest that the respondent's retirement was in no way related to his war-created disabilities. Such an interpretation would be misleading for it was common ground before the Tribunal and in this Court that his retirement was for that reason. He gave this evidence, which was not challenged, to

the Tribunal:

"Well, now, how did you come to finish up at the Marine Board? Would you just face Mr. Jennings and explain how that came about?---Well, there was a redundancy packet went around but - which meant that as I had four plumbers at the time all of a sudden with the laying off of men they discovered they only wanted one plumber, which required doing the harder work, the climbing, the general plumbing so that I found that this was much harder than supervising. I mean I was capable of supervising or doing a little workshop work but to do the general plumbing I would not have been capable of doing - - -

Yes. And how did it come about - were you offered the redundancy package or were you thinking of retiring because of your war-caused disabilities? Just explain how it all came about, will you? This is in 1978, is not it?---That is right.

November of 1978?---Well, it was suggested that they were making people redundant, only they would require the one plumber. I could have had that job - - -

Yes?--- - - - but as - due to the war-service disabilities and the ability to work and climb around under the wharf and that sort of thing, it was beyond

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So, again, if you had not had your war-caused disabilities, then you would have been able to continue?---Yes. I enjoyed my work. I felt I would have liked to have stayed there."

The Commission has accepted that the disabilities suffered by the respondent which included periarthritis and spondylolisthesis, were service related; and that, because of these disabilities, the respondent's knees, shoulders, wrists and neck caused discomfort and that he was unable to bend or lift. As has been said, the Commission has at all times accepted that paras.(a) and (b) of s.24(1) were satisfied here. The issue for determination before the Tribunal and on the appeal is whether, in terms of para.(c) of s.24(1), the respondent "is by reason of incapacity from that war-caused injury or disease, or both, alone, prevented from undertaking remunerative work that [he]...was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his...own account,

that [he]...would not be suffering if [he]...were free of that incapacity."

The Tribunal, after referring to the decisions in

Banovich, Delkou and Lucas, said (at pp.7-9 of its reasons):

"I accept the submission that it is notorious that, like carpenters, some plumbers do continue their trade

to a limited extent after retirement. Like carpentry the type of work available for an older man is restricted. Climbing around roofs is required for

active builders and plumbers, but nevertheless there is ample work in both trades that the average fit 70 year old can handle without difficulty.

This Tribunal is required to consider not only the nature of the occupation of a veteran and whether or not self-employment is an option readily available, but also the particular character and skills of the

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particular veteran in order to assess his prospects of engaging in remunerative work after retirement, if he

were not prevented by war-caused injury or disease.

In this case the lapse of time between retirement and the relevant date was five and half years. The fact that he did comparatively little work in that time was due to his disabilities. I am satisfied that he is indeed a man who has always enjoyed his work and who would have sought the kind of casual plumbing work that is commonly performed by more elderly plumbers if he did not have those disabilities. It is not necessary that the Tribunal should be satisfied that he could earn a living wage or secure full time employment....

..-The problem now posed is the extent to which notorious facts may be regarded as sufficient to engender the reasonable satisfaction required by s.120(4)...

It seems to be less important to adduce actual evidence that X would have employed Y in his trade or profession after his retirement, but for his disabilities, than it is to examine the real likelihood that the particular veteran would have been sufficiently motivated to pursue his calling and secure earnings on his own account for more than eight hours a week. Accordingly the absence of

corroborative evidence does not in this case preclude a finding that the applicant was such a person.

I find that he had sufficient skills and interest in his trade to have preferred the option of offering himself for casual work after he ceased to be employed as a plumber. He had sufficient experience of being self-employed to have found no difficulty in finding work as a plumber (whether supervisory, advisory or in sheet metal) notwithstanding his age and long period as an employee to the Marine Board."

The Commission submits that the Tribunal made a number of errors of law in concluding that the respondent was eligible for pension at the special rate. It argues that the Tribunal looked at the matter as at the date of the respondent's retirement (i.e. November 1978) whereas, the argument runs, the question is to be considered as at the date of the application for increase in the rate of pension (i.e. April 1985). Then it

is said that the standard of proof contemplated by s.120(4)

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required that the respondent make out a case "on the balance of probabilities". Applying that standard as at April 1985 when the respondent was 69, the argument runs, he failed to demonstrate that, because of his service-related disabilities alone, he was prevented from continuing to undertake remunerative work that he was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his own account, that he would not be suffering if he were free of that incapacity. It is contended that his age (i.e. 69 years) of itself would probably have prevented him from undertaking such work. At any rate, the respondent, it is said, failed to produce any "hard" or concrete evidence that he was prevented from undertaking remunerative work by reason of his war disabilities alone; in particular, it was not open to the Tribunal to take "judicial notice" or its

equivalent, of so-called "notorious" facts.

In aid of its submission that the Tribunal applied the wrong standard of proof, the Commission relies upon the following comment made (at p.6) by the Tribunal by way of prefatory

observations to the findings already cited:

"20. This Tribunal is required to decide this application to its reasonable satisfaction (s.120(4)).

Any veteran seeking a Special Rate pension must face the difficulty of producing some material to satisfy the decision maker that but for his incapacity he would on some prior date have continued to undertake remunerative work.

21. The cases in which this can be shown to be beyond reasonable doubt will be rare indeed. A state of reasonable satisfaction is possible however, when it appears from the nature of the veteran's prior employment that there is a real possibility, as distinct from a fanciful one, that remunerative work for more than eight hours a week would have been likely."

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It is convenient, in the first instance, to recall what,

relevantly, was decided in *Banovich, Delkou and Lucas*: (1) The

term "remunerative work" refers to the type of work which the member previously undertook; hence the loss of a particular job, because, for example, of retrenchment for economic reasons, is immaterial for our purposes (*Banovich* at p.402). (2) Eligibility for pension at the special rate is to be determined as at the earliest available date, viz. three months before the date of application (s.20(1); *Banovich* at pp.403-4). In so holding, the Full Court (*Fisher, Beaumont and Wilcox JJ.*) rejected the member's submission that he was entitled to the special rate if he was at any time able to satisfy the statutory criteria, that is to say, the Court rejected the submission that once the entitlement arose, it was said, it was not lost because, before the final determination of the claim for that pension, there arose some additional impediment to remunerative work (at p.403). (3) Although a person is not automatically disentitled to a special rate pension on attaining 65 years, eligibility will

only be established if, on the facts, the member was prevented

from working by the service-related disabilities alone (*Banovich*

at p.404; *Delkou* at pp.413-4; *Lucas* at pp.421-2).

Because the rejection of the members' claims was upheld in *Banovich, Delkou and Lucas*, it was not necessary there to consider the separate question of the duration of a pension at the special rate. It is submitted by the respondent, and the Tribunal seems to have so assumed, that this pension, once granted, is payable during the life of the member. In other

words, the submission runs, eligibility for the special rate does

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not depend upon the existence of any continuing economic loss. I

will return to this later.

I will deal first with the Commission's contention that the Tribunal applied the wrong standard of proof. It will be remembered that s.120(4) provides that the Commission shall decide the matter "to its reasonable satisfaction". As has been noted, the Tribunal thought that this degree of satisfaction

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"possible...when it appears from the nature of the veteran's prior employment that there is a real possibility, as distinct from a fanciful one, that remunerative work for more than eight hours a week would have been likely."

It would seem that the Tribunal had in mind the test

explained by Toohey J. in *Repatriation Commission v. Bishop*

(1983) 48 A.L.R. 461 at p.468 -

"...while there is no onus upon a claimant, there must be something in the material before the Tribunal pointing to a possibility, real as opposed to fanciful, of a connection between death and war service."

But Toohey J. was there concerned with a very different onus of

proof provision as his next remarks indicate (at p.468) -

"The question then is - when in the present case the Tribunal felt itself obliged to conclude that where the aetiology of a disease is unknown it could not be satisfied beyond reasonable doubt that there was no relationship between war service and the disease, was that approach consistent with the provisions of the Repatriation Act as construed by the courts?"

By contrast, s.120(4) speaks in terms of a reasonable satisfaction. This expression has a settled meaning, at least in

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a curial context. In *Briginshaw v. Briginshaw* (1938) 60 C.L.R.

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Dixon J., dealing with the civil standard of persuasion,

said (at p.362):

"...it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable

satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences." (Emphasis added)

Similarly, in *Rejcek v. McElroy* (1965) 112 C.L.R.

p.521):

"No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied..." (Emphasis added)

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the Full High Court spoke of the civil standard of proof (at

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Difficulties have arisen because of the use of different expressions in describing the civil standard but, as the learned authors of *Cross on Evidence* (Third Australian Edition - D.M. Byrne Q.C. and J.D. Heydon) say of this standard (at p.246):

"In ordinary civil cases it is usually expressed as involving the 'preponderance of probability', the

'balance of probabilities', or the 'preponderance of evidence'. It might be argued that the last of these seems to involve no more than the preponderance of the evidence produced by the proponent of an issue over that produced by its opponent. It is more common, however, to regard all of these terms as synonymous, and as connoting not really relative preponderance over the evidence of the opponent but satisfaction of a prescribed level of probability. The possibility of a contrary finding does not prevent a finding reached on that standard from being appropriate. It is not

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enough for a plaintiff to fail that his account 'may not be correct!'"

The foregoing is, of course, dealing with the standard required in court proceedings where the rules of evidence are applicable. The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks

fit (Administrative Appeals Tribunal Act 1975 s.33(1)(c);

McDonald v. Director-General of Social Security (1984) 1 F.C.R.

354). Yet, whilst the Tribunal was not bound by the technical evidentiary rules, especially the exclusionary rules, natural justice may require that it act on material that is relevant and

logically probative (see Mahon v. Air New Zealand Ltd. [1984] A.C.

808; Minister for Immigration and Ethnic Affairs v. Pochi (1980)

31 A.L.J. 666; Enid Campbell Wall and Truly Tried (Ed. by

Campbell and Waller) at pp.70-1, 86; Cross, op. cit. at

pp.11-13; Aronson and Franklin, Review of Administrative Action

at p.95; p.174).

Even if the Tribunal is not bound by the traditional evidentiary principles, s.120(4) constitutes a clear direction to the Tribunal that it must be reasonably satisfied before it makes any decision.

In my opinion, this could only have been intended

to introduce the standard of proof required in civil litigation.

McDonald's case, supra, dealing with social security legislation

is not authority to the contrary. Rather, it is a case of

s.120(4) introducing the civil standard for our purposes (see

Minister for Health v. Thomson (1985) 60 A.L.J. 701 at p.712;

Campbell, op. cit. at p.53; see Evelyn Nellie Bast v.

Repatriation Commission, unreported, 22 July 1987, per Jenkinson,

per Heydon J. at [7]

[22]

per Heydon J.

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Neaves and Wilcox JJ. at p. 32; cf. under the English legislation, *Miller v. Minister of Pensions* (1947) 2 All E.R. 372

per Denning J. at p.374).

It follows, in my view, that the Tribunal erred in adopting the Bishop test. Instead, it should have asked itself whether on the facts of the case, it was persuaded on the civil standard. There is, in this connection, a distinction of substance to be drawn between the probabilities on the one hand and mere possibilities, even if they are real as distinct from

fanciful, on the other (see *Re Repatriation Commission and Delkou* [9]

A.L.J. 358; *Easton and Repatriation Commission*, Administrative

Appeals Tribunal, unreported, 29 June 1987; *Repatriation Commission and Faulkner*, Administrative Appeals Tribunal,

unreported, 22 May 1987).

The fact that the Tribunal fell into error in a step in its process of reasoning does not, of course, mean that its decision was necessarily wrong and should be set aside. It is necessary to examine the other grounds of the Commission's

challenge.

It is convenient first to deal with the submission that the matter should have been considered as at the date of application (April 1985) rather than as at the date of retirement

(November 1978).

It may be accepted that the period in which retirement

occurs will be of more than historical significance for present

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purposes, It is at that time that the question posed by s.24(1)(c) will arise, initially at least, for determination. In the present case, if the question raised by s.24(1)(c) had been decided in November 1978, it would, no doubt, have been resolved in favour of the respondent. At that time, he was aged 63 years and it could reasonably have been anticipated that, his war disabilities apart, he would have remained in employment with the Board until the usual retirement age of 65 years. If at any time after his early retirement by reason of his service disabilities and prior to

October 1980, the respondent had claimed a pension at the special rate, he would have been eligible for it. But, even if that pension had then been granted, it would not, in my view, have been payable for an indefinite period. It was payable on a periodic basis and, in my view, it was intended by the legislature to provide some measure of compensation for continuing economic loss. In other words, a pension at the special rate was not, in my opinion, intended to be payable for the whole of the veteran's life or indefinitely. A veteran is eligible for it only for so long as he is prevented from undertaking remunerative work by the service disability. The present tense "is", twice used in s.24(1)(c), reinforces the evident policy of s.24 to afford some compensation for actual economic loss. Once a veteran has passed the age where, even if he had not suffered a war injury or disease, he could reasonably be expected to withdraw from remunerative work, the rationale for this particular pension is also withdrawn (cf. McDonald, *supra*, at pp.360, 365).

The respondent did not, however, claim this pension 1 I he : }-

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until April 1985. He is therefore confronted with the provisions of s.20(1) limiting payment of this class of pension to a period not earlier than three months before that date. So much was decided in Banovich. It follows, in my view, that even if the respondent may have been eligible for the special pension if he had applied before November 1980 (or, strictly, by as late as January 1981 to allow for the extra three months provided by s.20(1)), by April 1985 he was no longer able to rely on his assumed employment with the Board until he turned 65: by April

1985, he was already 69.

Yet the inquiry does not end there. In theory at least, even if the respondent had had to retire at 65 from his particular employment, it would still be open to him in accordance with the reasoning in Banovich, to demonstrate that he would have thereafter undertaken remunerative activities elsewhere. This is a question of fact which, as has been said,

must be resolved to the Tribunal's reasonable satisfaction.

In this connection, the Commission complains that the Tribunal wrongly took "judicial notice" of what it described as the "notorious" fact that some plumbers on retirement from their employment at 65, engage in casual plumbing work.

The general position is well explained by Professor

Campbell (op.cit. at pp.49-50):

"The curial rules of evidence differentiate between those matters of fact which can only be proved by evidence and those facts which may be judicially noticed, i.e. which are not required to be proved by evidence. Tribunals which are not bound by the rules

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of evidence are certainly not constrained by the doctrine of judicial notice and may take 'official' notice of a much wider range of facts than the facts which may be judicially noticed. This facility is especially important to those tribunals whose members include experts in a particular field whose expertise has a direct bearing on the work of the tribunal, e.g. medical practitioners in relation to the assessment of claims for compensation or pensions for physical disability or incapacitation. Facts which may be officially noticed by a tribunal, may nonetheless be facts which, if noticed, must be disclosed to interested parties, for the sake of natural justice, in order to give those parties an opportunity to controvert the facts noticed."

As has been said, the question posed by s.24(1)(c) is one of hypothetical fact. The Tribunal must attempt an assessment of what the respondent probably would have done if he had none of his service disabilities. The starting point is an examination of the prospects of employment, including self-employment, in southern Tasmania in early 1985 for a healthy 69 year old plumber. It was in the course of such an examination that the Tribunal referred to the "notorious" facts already mentioned.

It may be accepted that it was open to the Tribunal to find that on retirement from employment at 65 years, some plumbers seek casual work elsewhere. But it does not, of course, necessarily follow that the respondent would have done so. Given his established pattern of employment with a government or semi-government body, one would expect that it would be unlikely that the respondent would, at 65 years of age, wish to assume the risks and expense of setting up a plumbing business of his own. But it is unnecessary to express a concluded view on this question. It is apparent that the Tribunal approached the

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determination of this issue of fact upon the footing that the standard of persuasion was that of "real possibilities" rather than the probabilities. It is equally apparent that its conclusions were materially influenced by its view of the standard of proof required by the Act. In those circumstances, the appeal must be allowed with costs, the Tribunal's decision set aside, and the matter remitted to the Tribunal to be heard and decided again with the hearing of further evidence. The respondent should have a certificate under the Federal

Proceedings (Costs) Act 1981.

I certify that this and the preceding nineteen (19) pages are a true copy of the Reasons for Judgment herein of his Honour Mr. Justice Beaumont.

J OPE

Associate

Dated: 10 August 1987

Counsel and Solicitors Mr. Proctor for applicant instructed for Applicant: by Australian Government Solicitor Counsel and Solicitors Mr. M. Hodgman Q.C. with for Respondent: Mr. Piggott instructed by

Howard Piggott Date of Hearing: 21 July 1987

Date Judgment delivered: 10 August 1987

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TASMANIA DISTRICT REGISTRY

IN THE FEDERAL COURT OF AUSTRALIA

GENERAL DIVISION

))) T. No. G5 of 1987))

ON APPEAL FROM THE GENERAL ADMINISTRATIVE DIVISION OF THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY

MR. R.C. JENNINGS, O.C., DEPUTY PRESIDENT

BETWEEN : REPATRIATION COMMISSION Applicant AND: MAXWELL J. SMITH Respondent

COURT: NORTHROP, BEAUMONT AND SPENDER JJ. DATE : 10 AUGUST 1987

PLACE: SYDNEY

REASONS FOR JUDGMENT

SPENDER J.

IT agree with the reasons of Beaumont J. and with the

orders that he proposes.

{ certify that tusontto proceeding

1S : pages-are a true copy of the reasons for

judgment herein of His Honour

Mr Justice Spender

Dated 10 August 1987

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Prepared on 29 October 2026 · Esheria