

AUSTRALIA / JUDGMENT

Repatriation Commission v Robertson [2007] FCA 1674

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FEDERAL COURT OF AUSTRALIA

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Repatriation Commission v Robertson [2007] FCA 1674

VETERAN'S ENTITLEMENT – Whether injuries or disabilities related to eligible service – wrong test identified and decided by Administrative Appeals Tribunal – findings made in the absence of evidence – whether futile to remit to Administrative Appeals Tribunal upon the possibility of a different outcome being reached.

Held: Appeal allowed, proceedings remitted to Administrative Appeals Tribunal

Administrative Appeals Tribunal Act 1975 (Cth), s 44(5)

Veteran's Entitlement Act 1986 (Cth), ss 9, 68, 70, 120, 196B

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 followed

Arnott v Repatriation Commission (2001) 106 FCR 83 referred to

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 referred to

Comcare v Sahu-Khan (2007) 156 FCR 536 referred to

Craig v South Australia (1995) 184 CLR 163 followed

Deledio v Repatriation Commission (1997) 25 AAR 396 referred to

Lees v Repatriation Commission (2002) 125 FCR 331 referred to

Mines v Repatriation Commission (2004) 40 AAR 238 followed

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 32 followed

Nguyen v Minister for Immigration and Multicultural Affairs (1998) 88 FCR 206 referred to

Re Robertson v Repatriation Commission (1998) 50 ALD 668 referred to

Repatriation Commission v Bendy (1989) 18 ALD 144 referred to

Repatriation Commission v Brady [2007] FCA 1087 referred to

Repatriation Commission v Cornelius [2002] FCA 750 referred to

Repatriation Commission v Deledio (1998) 83 FCR 82 referred to

Repatriation Commission v Milenz (2006) 43 AAR 565 referred to

Santa Sabina College v Minister for Education (1985) 58 ALR 527 referred to

Treloar v Australian Telecommunications Commission (1990) 26 FCR 316 referred to

REPATRIATION COMMISSION v PETER ROBERTSON

NSD 552 OF 2007

COWDROY J

4 DECEMBER 2007

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY NSD 552 OF 2007

ON APPEAL FROM THE VETERANS' APPEALS DIVISION OF THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: REPATRIATION COMMISSION

Appellant

AND: PETER ROBERTSON

Respondent

JUDGE: COWDROY J

DATE OF ORDER: 4 DECEMBER 2007

WHERE MADE: SYDNEY

THE COURT ORDERS
THAT:

1. The decision of the Administrative Appeals Tribunal of 7 March 2007 be set aside.
2. The matter be remitted to the Administrative Appeals Tribunal, differently constituted, for determination according to law.
3. The Respondent pay the Appellant'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

NEW SOUTH WALES DISTRICT REGISTRY NSD 552 OF 2007

ON APPEAL FROM THE VETERANS' APPEALS DIVISION OF THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: REPATRIATION COMMISSION

Appellant

AND: PETER ROBERTSON

Respondent

JUDGE: COWDROY J

DATE: 4 DECEMBER 2007

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 The Repatriation Commission ('the Commission') appeals from a decision of the Veterans' Appeals Division of the Administrative Appeals Tribunal ('the Tribunal') dated 7 March 2007. The Tribunal set aside the decision of the Commission which found that medical conditions from which the respondent ('Mr Robertson') suffers are not defence caused.

BACKGROUND FACTS

2 Mr Robertson served with the Royal Australian Navy ('the RAN') from 5 January 1965 to 22 March 1988 and had been trained as a diver. By the end of his naval career he had attained the rank of Chief Petty Officer. On 3 June 1969 Mr Robertson was serving on HMAS Melbourne when it collided with USS Frank E Evans. As a diver his duties immediately following the collision included recovery of survivors, bodies and body parts. Subsequently he experienced

psychological stressors caused by his involvement in a diving incident in Hong Kong; being in proximity to HMAS Melbourne and experiencing a fire on HMAS Supply.

3 Following his discharge from the RAN in 1988 Mr Robertson claimed to suffer from post traumatic stress disorder ('PTSD'), alcohol dependence and major depression. On 12 September 2003 Mr Robertson lodged a claim with the Commission for a Disability Pension in respect of such conditions on the basis that they were related to his service in the RAN.

4 In its decision of 28 April 2004 the Commission determined that Mr Robertson's depressive disorder, PTSD, alcohol dependence or alcohol abuse and hypertension were not service related diseases or injuries within the meaning of s 70 of the Veterans' Entitlements Act 1986 (Cth) ('the Act'). Mr Robertson appealed such decision to the Veterans Review Board ('the VRB') on 11 May 2004.

5 On 2 December 2004 the VRB affirmed the Commission's decision. On 16 February 2005 Mr Robertson lodged an Application for Review of the VRB's decision with the Tribunal. On 7 March 2007 the Tribunal set aside the decision of the VRB and determined that Mr Robertson's PTSD, alcohol dependence and major depression were related to his 'eligible service'.

6 By Amended Notice of Appeal filed on 30 July 2007 the Commission appeals to this Court from the decision of the Tribunal.

STATUTORY PROVISIONS

7 Section 70(1) contained in Division 2 of Part IV of the Act makes provision for pensions payable by the Commonwealth of Australia to a member of the Forces, as defined, who is incapacitated, or who dies, from a defence-caused injury or disease.

8 Section 70(5) makes provision for the circumstances in which an injury or disease suffered by a member of the Forces shall be taken to be defence caused. Such circumstances include those in which a member of the Forces suffers aggravation of or contribution to a condition due to defence service rendered after the member suffered the injury or contracted the disease: see s 70(5)(d).

9 Part XIA of the Act provides for the establishment, functions and powers of the Repatriation Medical Authority ('the Authority'). Section 196B thereof sets out the functions of the Authority and relevantly provides, inter alia, for the determination by it of a Statement of Principles ('SoP') in respect of various kinds of conditions, and factors which must exist and be related to service rendered by a person before it can be said that a reasonable hypothesis has been raised connecting such conditions with the service rendered.

STATEMENTS OF PRINCIPLES

10 In respect of the conditions suffered by Mr Robertson, three SoP are relevant, namely Statement of Principles for Post Traumatic Stress Disorder (SoP No. 4 of 1999) ('the SoP for PTSD'), Statement of Principles for Depressive Disorder (SoP No. 59 of 1998) ('the SoP for Depressive Disorder') and Statement of Principles for Alcohol Dependence or Alcohol Abuse (SoP No 77 of 1998) ('the SoP for Alcohol Dependence').

11 Clause 2(b) of the SoP for PTSD provides a comprehensive definition of such condition which includes requirements that a person has been exposed to a traumatic event, as defined; the traumatic event be persistently re-experienced in a number of defined ways; the person engages in persistent avoidance of stimuli associated with the trauma and experiences a numbing of general responsiveness; the person experiences persistent symptoms of increased arousal not present before the trauma; the duration of the symptoms be more than one month; and that the symptoms cause the person clinically significant distress or impairment in social, occupational or other important areas of functioning.

12 Clause 5 of the SoP for PTSD states the factors which must exist before it can be said, on the balance of probabilities, that PTSD is connected with the circumstances of a person's relevant service. Such factors are relevantly described in clause 5 as follows:

- (a) experiencing a severe stressor prior to the clinical onset of post traumatic stress disorder; or
- (b) experiencing a severe stressor prior to the clinical worsening of post traumatic stress disorder; or
- (c) inability to obtain appropriate clinical management for post traumatic stress disorder.

13 The term 'experiencing a severe stressor' is defined in clause 8 of the SoP for PTSD as follows:

"experiencing a severe stressor" means the person experienced, witnessed, or was confronted with an event or events that involved actual or threat of death or serious injury, or a threat to the person's, or another person's, physical integrity.

TRIBUNAL'S FINDINGS

14 There was no dispute before the Tribunal that Mr Robertson suffers from PTSD, alcohol dependence and major depression. The Tribunal noted:

There is consensus between Mr Robertson's treating psychiatrist, Dr Reinhardt and Dr Delaforce, the psychiatrist who examined Mr Robertson for the purposes of this application, that a stressor experienced before his eligible service, the collision between the Frank E Evans and the HMAS Melbourne, is a severe stressor and the instigator of his post traumatic stress disorder.

15 However the Tribunal found that Mr Robertson's PTSD did not have its clinical onset until 1994. The Tribunal concluded that if such incident was the sole cause of the PTSD, it occurred outside his period of 'eligible service' because the incident occurred before 7 December 1972 (see

s 68 of the Act). Accordingly it was not related to his 'eligible service'. The Tribunal also considered that other incidents namely the diving incident in Hong Kong in 1974 while on board HMAS Stuart, the stress episodes which occurred at least three to six times per year suffered by Mr Robertson whilst continuing to serve on HMAS Melbourne, and a fire on HMAS Supply, were each severe stressors ('the subsequent stressors'). The Tribunal found:

On the basis of the expert evidence I am satisfied that the later stressors "add their measure" to the final manifestation of Mr Robertson's post traumatic stress disorder in 1994 (Treloar v Australian Telecommunications Commission). In any event, the SoP operates, by factor 5(a) to establish a connection to service (experiencing a severe stressor prior to the clinical onset of post traumatic stress disorder).

Section 120B of the Act establishes war causation where there is material that raises a connection between a disease and service and a SoP upholds that connection. Both requirements are met here and so Mr Robertson's post traumatic stress disorder is war caused.

16 As to Mr Robertson's claims of alcohol dependence, the Tribunal considered the relevant factor for alcohol dependence to be that the person was 'suffering from a psychiatric disorder at the time of the clinical onset of alcohol dependence or alcohol abuse': see clause 5(a) of the SoP for Alcohol Dependence. The Tribunal found that Mr Robertson's alcohol dependence 'had its clinical onset sometime in the 1990s but no later than 1997' when it was formally diagnosed. The Tribunal concluded that 'on the balance of probabilities, Mr Robertson had post traumatic stress disorder at the time of the clinical onset of his alcohol dependence'.

17 The relevant factor for major depression as found by the Tribunal, requires the claimant to 'have a clinically significant psychiatric condition within the one year immediately before the onset of depressive disorder': see clause 5(b) the SoP for Depressive Disorder. The Tribunal found that Mr Robertson's major depression 'had its clinical onset in the mid 1990s' and continued:

Given this time range and the clinical onset of post traumatic stress disorder in 1994, I find it more probable than not that Mr Robertson had post traumatic stress disorder within one year immediately before the clinical onset of major depression.

18 The Tribunal found that both Mr Robertson's alcohol dependence and major depression were related to his 'eligible service'.

SUBMISSIONS

(a) 'Defence service' not 'eligible service'

19 The Commission submits that the Tribunal erred by finding that Mr Robertson's service was 'eligible service' as referred to in s 9(1)(e) of the Act rather than finding that his service was 'defence service' as defined in s 68(1)(a) of the Act. The latter section relevantly defines 'defence service' as 'continuous full-time service rendered as a member of the Defence Force on or after 7th December 1972 and before the terminating date'. The terminating date is defined in s 68(1) of the Act as 7 April 1994, the date upon which the Military Compensation Act 1994 (Cth)

commenced. In consequence, it is submitted that the Tribunal should have considered whether Mr Robertson's PTSD, alcohol dependence and major depression were 'defence caused' pursuant to s 70(5) of the Act.

20 Mr Robertson agrees with the Commission's submission and agrees that the Tribunal erroneously referred to s 9(1)(e) of the Act. It is also agreed that the Tribunal erroneously referred to 'war caused' disease of Mr Robertson in its decision instead of 'defence caused'. Mr Robertson acknowledges that because his PTSD was found to have had its clinical onset in 1994 (after termination of Mr Robertson's defence service), the Tribunal's reference to 'the contribution, to a material degree' adopting the wording of s 9(1)(e) and s 70(5)(d) was irrelevant as the issue raised by these sections is whether an injury or disease was contributed to in a material degree or was aggravated by any eligible war service or defence service respectively rendered after the injury was suffered or the disease was contracted. Mr Robertson refers to *Comcare v Sahu-Kahn* (2007) 156 FCR 536 at [16] and submits that the adoption by the Tribunal of the wording in s 9(1)(e) and s 70(5)(d) required a more onerous test than that required by s 70(5)(a) of the Act which Mr Robertson submits is the section to which the Tribunal should have had regard. Such provision renders an injury 'defence-caused' if it arose out of, or was attributable to, defence service.

(b) Effect of erroneous reference

21 The Commission submits that Clauses 5(b) and 6 of the SoP for PTSD give effect to s 70(5)(d) of the Act. Accordingly s 70(5)(d) precluded the Tribunal from finding that Mr Robertson's PTSD was defence caused unless either Mr Robertson developed PTSD during, or prior to, his defence service and the PTSD was contributed to or was aggravated by his defence service. Because the Tribunal did not refer to s 70(5)(d) it failed to apply the correct test for determining whether Mr Robertson's condition was contributed to in a material degree or was aggravated by defence service rendered after he developed PTSD.

22 Mr Robertson submits such errors made no difference because the statutory provisions which establish the necessary causal relationships between the service and disease or injury contained in s 9(1) and s 70(5) respectively are virtually the same for 'eligible war service' and 'defence service'. The relevant SoP all applied to 'eligible service' which is defined in clause 8 of each SoP to include 'eligible war service' and 'defence service' with the result that the factors required by the SoP for both forms of service were identical.

(c) Effect of intervening stressors

23 The Commission submits that unless the clinical onset of PTSD occurred prior to or during Mr Robertson's defence service, the possibility of the condition becoming clinically worse as a result of the intervening stressors experienced during his defence service does not arise. The Commission submits that there was no expert evidence to suggest that the subsequent stressors would have been one of the causes of Mr Robertson's PTSD and that since there was evidence to show that PTSD arose before Mr Robertson's defence service, and that the clinical onset of PTSD did not occur until 1994, the Tribunal's enquiry into the intervening stressors was irrelevant.

24 Mr Robertson acknowledges that the clinical onset of PTSD occurred in 1994. However Mr Robertson submits that the issue before the Tribunal was not one of aggravation of an existing condition. Rather the issue before the Tribunal was whether the subsequent stressors were in themselves the causes for the onset of Mr Robertson's PTSD in 1994. Mr Robertson relies upon the Tribunal's observations that a number of stressors will exacerbate or make a condition worse than it would have been if there was only one stressor and submits that the Tribunal was entitled to find that the subsequent stressors would 'add their measure' to the final manifestation of Mr Robertson's PTSD. That is, the subsequent stressors each were part of the cause of Mr Robertson's PTSD. As such, the requirement of s 70(5)(a) was satisfied. Mr Robertson submits that the subsequent stressors satisfied the test in clause 5(a) of the SoP for PTSD which requires the claimant to have experienced a severe stressor prior to the onset of PTSD. He submits that no expert evidence was required to support the claim that the subsequent stressors were, by themselves, causes of Mr Robertson's PTSD in view of the finding that Mr Robertson had suffered severe stressors prior to the onset of his PTSD.

25 Accordingly Mr Robertson submits that despite the errors of the Tribunal in applying the criteria 'eligible service' instead of 'defence service' and also referring incorrectly to s 9(1)(e) of the Act, it makes no difference to the result since the facts as found also satisfy the criteria posed by s 70(5)(a) of the Act. Mr Robertson submits that he was entitled to succeed in his claim if s 70(5)(a) was satisfied and the existence of severe stressors during his service culminated in the diagnosis of PTSD which was made in 1994. The Tribunal was so satisfied because it found that whilst the collision between HMAS Melbourne and USS Frank E Evans was 'the instigator' of Mr Robertson's PTSD, the subsequent stressors 'added their measure' to the final manifestation of the condition in 1994.

FINDINGS

26 The test which should have been applied by the Tribunal to determine Mr Robertson's eligibility for a pension is prescribed by s 70(5) of the Act. Section 70(5)(d) of the Act is relevant if aggravation of Mr Robertson's PTSD is claimed. However s 70(5)(d) and clauses 5(b) and 6 of the SoP for PTSD which implement it, could not apply to Mr Robertson unless he had contracted PTSD during his defence service or prior to such service, and the PTSD was contributed to in a material degree by such service. This was not the case as found by the Tribunal.

27 For Mr Robertson to satisfy the test that his PTSD was defence caused, Mr Robertson had to experience a severe stressor and s 70(5)(a) of the Act applied if the Tribunal intended to find that the subsequent stressors were causes of the PTSD. The Tribunal did not refer to s 70(5)(a).

28 Nowhere in its decision did the Tribunal refer to the correct statutory provisions which applied to determine Mr Robertson's statutory entitlement. Further, the reference to s 9(1) of the Act demonstrates an obvious error by the Tribunal. Section 9(1) of the Act applies to 'war-caused' injuries related to 'eligible war service' as defined in s 7 of the Act. Section 9(1) is irrelevant to Mr Robertson whose entitlement to a pension will be based upon his 'defence service', and not 'eligible war service' as considered by the Tribunal.

29 Even though the text of s 9(1)(e) and of s 70(5)(d) are similar, this circumstance does not detract from the conclusion that the wrong test was applied by the Tribunal. The failure of the Tribunal to refer to the correct statutory provision demonstrates that the Tribunal asked itself the wrong question. Jurisdictional error therefore exists in its decision: see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171; *Craig v South Australia* (1995) 184 CLR 163 at 179. Whether such error is by itself sufficient to warrant the setting aside of the Tribunal's decision is a matter within the Court's discretion.

30 The Tribunal concluded that the subsequent stressors 'add their measure' to the initial stressor sustained by Mr Robertson (the collision between HMAS Melbourne and USS Frank E Evans). The Tribunal noted:

Dr Delaforce was of the opinion that the Melbourne – Evans collision was the cause of Mr Robertson's post traumatic stress disorder. However, he allowed that subsequent stressors can make a psychiatric disorder worse. He also agreed that a number of significant stressors will make a condition worse than it would be if there had been only one stressor.

Dr Reinhardt characterised the Melbourne – Evans collision as the initial stressor that "sparked the whole thing off" but considered that later stressors would have an exacerbating effect. She also considered that an incident that was, in effect, a re-experiencing of the initial stressor can be characterised as a stressor in itself.

31 The Tribunal considered that the Hong Kong Harbour diving incident

'brought back memories of the Melbourne – Evans collision and made him feel 'quite stressed'.

The Tribunal found:

In this way, the incident meets the definition of "severe stressor".

32 The same conclusions were drawn by the Tribunal in relation to Mr Robertson's proximity to HMAS Melbourne and the fire aboard HMAS Supply. The Tribunal said:

I have found that Mr Robertson suffered additional severe stressors during his eligible service (the Hong Kong diving incident, incidents of proximity to the Melbourne and the fire on the Supply).

33 Since the Tribunal found that Mr Robertson's PTSD had its clinical onset in 1994 namely after his defence service had concluded there could be no scope for any contribution to or aggravation of his PTSD by the subsequent stressors suffered during his defence service as considered in

Treloar v Australian Telecommunications Commission (1990) 26 FCR 316 unless they were severe stressors which caused the PTSD: see the observations of Heerey J in Deledio v Repatriation Commission (1997) 47 ALD 261 at 275 with whom the Full Court agreed (see Repatriation Commission v Deledio (1998) 83 FCR 82 at 95-96). See also Repatriation Commission v Bendy (1989) 18 ALD 144 at 146.

34 The term 'clinical onset' is not defined in the Act. The parties accept the definition provided in Re Robertson v Repatriation Commission (1998) 50 ALD 668 at 670 that:

there is a clinical onset of a disease, either when a person becomes aware of some feature or symptom which enables a doctor to say that the disease was present at that time, or when a finding is made on investigation which is indicative to a doctor of the disease being present at that time.

See also Repatriation Commission v Cornelius [2002] FCA 750; and Lees v Repatriation Commission (2002) 125 FCR 331.

35 As was recognised by Gray J in Mines v Repatriation Commission (2004) 40 AAR 238 at [39], one or more possible traumatic events might exist and the making of a determination as to which of the events was responsible for the condition may be required: see also Bendy 18 ALD 144. However it is essential to identify the stressor occurring during defence service which resulted in the PTSD to satisfy Clause 5(a) of the SoP for PTSD. Unless such stressor or stressors experienced during defence service led to such clinical onset, they are irrelevant.

36 The reasoning of the Tribunal does not establish the basis for its conclusion that the subsequent stressors 'add their measure' to the final manifestation of Mr Robertson's PTSD. At [44] of the Tribunal's decision, under the heading 'contribution to post traumatic stress disorder' it said:

A complicating factor in this application is that Mr Robertson's post traumatic stress disorder arose out of the initial severe stressor constituted by the Melbourne – Evans collision. That incident occurred outside his period of eligible service and so, if it is the sole cause of his post traumatic stress disorder, which I have found had its clinical onset in 1994, then that disorder is not related to his eligible service.

37 The Tribunal's references to the medical evidence that 'subsequent stressors can make a psychiatric condition worse' and 'later stressors would have an exacerbating effect' suggest that the Tribunal was only considering whether the additional severe stressors experienced by Mr Robertson during his defence service aggravated his PTSD. However, the Tribunal's finding that there was no need to consider whether there was worsening of PTSD because the clinical onset of PTSD did not occur until 1994, 'much later than any of the stressors claimed by Mr Robertson', suggests that the Tribunal considered that any one of those stressors could have caused the PTSD. Accordingly the Tribunal's observations appear to be inconsistent.

38 In these circumstances the Court finds that the Tribunal, by failing to refer to s 70(5)(a) of the Act, has misdirected itself in respect of the correct test to be applied in determining whether Mr Robertson's PTSD was defence-caused.

Onset of alcohol dependence

39 The Tribunal found that Mr Robertson's alcohol dependence 'had its clinical onset in the 1990s, but not later than 1997, the time it was formally diagnosed'. The Tribunal found on the balance of probabilities that Mr Robertson had PTSD at the time of the clinical onset of his alcohol dependence, concluding:

It follows that Mr Robertson's alcoholic dependence and major depression are related to his eligible service.

40 There was no material before the Tribunal capable of supporting the finding that the clinical onset of Mr Robertson's alcohol dependence occurred at a time when he had PTSD. In this respect Mr Robertson conceded that the Tribunal erred in law.

41 The parties differ on the question whether the Court should determine that Mr Robertson's alcohol dependence was not defence-caused as submitted by the Commission or whether the question should be remitted to the Tribunal as urged by Mr Robertson. For the reasons stated hereunder, the Court will refer this issue to the Tribunal.

Onset of major depressive illness

42 The Commission submits that there was no evidence to support the Tribunal's finding that Mr Robertson's major depressive illness occurred whilst Mr Robertson was suffering from PTSD.

43 The clinical onset of such a condition is a diagnostic issue requiring medical opinion: see Cornelius [2002] FCA 750 at [28]; Lees 125 FCR 331; Repatriation Commission v Milenz (2006) 43 AAR 565 at [34]; Repatriation Commission v Brady [2007] FCA 1087 at [36].

44 Unless the Tribunal was satisfied that Mr Robertson had 'a clinically significant psychiatric condition within one year immediately before the clinical onset of depressive disorder', clause 5(b) of the SoP for Depressive Disorder could not establish a connection between Mr Robertson's depressive disorder and his defence service.

45 In view of the Tribunal's application of the erroneous tests referred to above in relation to Mr Robertson's PTSD, namely the failure to find that Mr Robertson's service was 'defence service', and whether the PTSD was 'defence-caused', the Tribunal misdirected itself. Further, in consequence of the finding in relation to the cause of Mr Robertson's PTSD, the findings of the Tribunal relating to the depressive illness cannot be maintained as any finding is dependent upon the existence of Mr Robertson's PTSD as being defence caused.

CONCLUSION

46 The Commission submits that the Court should find that the collision between HMAS Melbourne and USS Frank E Evans was the stressor which caused Mr Robertson's PTSD, and that as such his PTSD, his alcohol dependence and his major depressive illness were not 'defence caused'.

47 Mr Robertson submits that the Tribunal's findings relating to his PTSD and depression should be upheld, and that only the claim relating to his alcohol dependence should be referred to the Tribunal for redetermination.

48 The Court is not satisfied that if the Tribunal had addressed the correct questions, its decision would be the same, irrespective of the error: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 384. The errors of the Tribunal include the reference to eligible service under s 9(1) when the correct test was contained in s 70(5) of the Act; the reference to 'war service' when the only service relevant was Mr Robertson's 'defence service'; the failure to refer to the correct provisions in s 70(5) of the Act; and the finding made in the absence of evidence of Mr Robertson's alcohol dependence. The Tribunal did not identify the correct issues which it was required to determine and accordingly fell into jurisdictional error: see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 347-348.

49 In view of the above findings of error in the decision of the Tribunal, the Court is not of the opinion that it would be 'futile to remit the matter': see *Arnott v Repatriation Commission* (2001) 106 FCR 83 at [36]. Rather the Court considers that there is a possibility that a different result would be reached on such remitter: see *Santa Sabina College v Minister for Education* (1985) 58 ALR 527 at 540; and *Nguyen v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 206 at 213-214.

50 Accordingly the Court orders that the Tribunal's decision be set aside and the proceedings be remitted for determination by a differently constituted Tribunal pursuant to s 44(5) of the *Administrative Appeals Tribunal Act 1975* (Cth).

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Cowdroy.

Associate:

Dated: 4 December 2007

Counsel for the Appellant: J. MacDonnell

Solicitor for the Appellant: Australian Government Solicitor

Counsel for the Respondent: C. Colborne

Solicitor for the Respondent: Wyatt Attorneys

Date of Hearing: 13 August 2007

Date of Judgment: 4 December 2007

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