

AUSTRALIA / JUDGMENT

Repatriation Commission v. Wright, B.M. [1987] FCA 430

COURT

Tribunal Act 1975.

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CATCHWORDS

Veterans' affairs - disability pension - application for special rate — veteran had disabilities (as at date of application) accepted as war-caused: injury right knee, osteoarthritis, anxiety state, dyspepsia, tinea pedis - veteran retired of own volition from employment with Electrolytic Zinc Company at age 62 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) - ss.33(1)(c), 44(1) Administrative Appeals Tribunal Act 1975.

REPATRIATION COMMISSION v. BYRON MAXWELL WRIGHT

No. T4 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. T4 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 Q.C., MR. D.A. KEARNEY (MEMBER)

AND DR. W. MCLAREN THOMSON (MEMBER)

BETWEEN: REPATRIATION COMMISSION

Applicant

AND: BYRON MAXWELL WRIGHT

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.

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IN THE FEDERAL COURT OF AUSTRALIA

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TASMANIA DISTRICT REGISTRY) T. No. G 4 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 AND
MR. D.A. KEARNEY AND DR. W. McLAREN THOMSON, MEMBERS

BETWEEN:

REPATRIATION COMMISSION Applicant

and

BYRON MAXWELL WRIGHT Respondent

COURT: NORTHROP, BEAUMONT AND SPENDER JJ.

DATE: 10 August 1987

PLACE: SYDNEY

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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isnourable Mr. Tuctice R M Northrop j

i Sharony P JUseN Associate ;

Patod: 10 August 1987

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IN_THE FEDERAL COURT OF AUSTRALIA

)) TASMANIA DISTRICT REGISTRY) No. T4 of 1987))

GENERAL DIVISION

ON APPEAL FROM THE VETERANS' APPEALS DIVISION OF THE ADMINISTRATIVE APPEALS
TRIBUNAL CONSTITUTED BY DEPUTY PRESIDENT R.C. JENNINGS Q.C., MR. D.A. KEARNEY
(MEMBER) AND DR. W. MCLAREN THOMSON (MEMBER)

BETWEEN : REPATRIATION COMMISSION Applicant AND: BYRON MAXWELL WRIGHT
Respondent

CORAM: Northrop, Beaumont and Spender JJ.

DATED: 10 August 1987

REASONS FOR JUDGMENT

BEAUMONT J. This appeal was argued at the same time as the
matter of Smith (No. T5 of 1987). The legislative background is

described in Smith and need not be repeated.

the history of this matter is as follows. On 23 August 1984, the respondent sought an increase in his rate of pension. On 7 January 1985, the Commission determined to grant an increase from 70 to 90 per cent of the general rate with effect from 23 August 1984. On 10 February 1986, the Veterans' Review Board decided, by majority, to assess the rate of pension at the special rate. On 7 April 1987, the Administrative Appeals Tribunal, by majority, affirmed that decision. The Commission

now appeals to this Court.

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As in Smith, it is common ground that paras.(a) and (b) of s.24(1) are satisfied here, that is to say, it is accepted that the respondent was eligible to receive a pension at 100 per cent of the general rate and that he was totally and permanently incapacitated as a result of war disabilities and that, at material times, such incapacity had rendered him incapable of undertaking remunerative work for periods aggregating more than

eight hours per week.

The respondent was born on 19 January 1916. He left school at 16 years and worked all his life as a carpenter. He served in the A.I.F. from 1941 to 1945. According to the reasons

of the majority of the Tribunal -

"9, --He began work at the Electrolytic Zinc Company ('the E.Z.') in 1957 (scil.c. 1951) where he remained as a tradesman until he retired of his own volition on 14 July 1978 after ceasing work some 5 weeks earlier. He had sought an increase in his disability pension in October 1977 which was granted as to 10 per cent in January 1978 and as to a further 10 per cent in August

1978. His application for a service pension on the grounds of age was sought on 20 June 1978 and granted on 13 July with effect immediately after his retirement.
10. The reason for the veteran's retirement was incapacity from war-caused disease particularly his generalised osteo-arthritis as reported by a rehabilitation specialist (Dr. C.M. Shugg) who saw him in June 1978 and advised him to modify his life style to ease the pain he was suffering.
11. Age had no bearing on his cessation of employment because at 62.5 years of age he could have remained with his employer until he was 65. He did not seek any work after retiring. He did not engage in any remunerative work after that date because he could not work as a result of his accepted disability. We make this finding on his evidence notwithstanding the opinions expressed in 1978 concerning a possible residual capacity for light work. We regard the method of assessing a percentage disability at that time as being less reliable than the applicant's own evidence.

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12. The veteran told the Tribunal that he knew of 17 carpenters who had worked on their own account in their trade for some years after retiring from the E.Z., of three who had done the same after leaving the Housing Department and another from the Marine Board. He knew of none who had worked for an employer. Of these persons 7 were now either dead or overseas, but he believed 5 or more were still working.
13. He said that he had always enjoyed working with timber and had hoped, before his disabilities caused him to retire, that he would continue working as a carpenter after forced retirement in due course at 65. His father had done so until he was 70. He named two others he knew who were over 75 when they stopped work."

The majority then repeated part of the Tribunal's

standard of proof required. The majority expressed

"22. In the present case we were impressed by the evidence as to other carpenters continuing their craft or trade in a smaller way after 'retirement' (at or before 65). It accords with our impression of the presence in the community of such tradesmen operating on their own account. Little more is required, the veteran agreed in this case, than a bag of tools and an ability and incentive to read advertisements seeking skilled tradesmen.

23. We have considered whether or not the source of the respondent's knowledge (partly anecdotal) and the absence of any other form of proof should cause us to doubt the evidence received. There is the added problem that the respondent did not inform us at what age in relation to retirement others became self-employed. On balance we are prepared to act on the uncorroborated evidence of the respondent, because, as we have said, it accords with our own experience.

24. Despite some concern also about the lapse of time between the veteran's retirement in 1978 and his claim for a Special Rate pension in 1984, we do not regard this as of significance in this case because that period of inactivity arose from the effects of his disease.

25. It has been suggested by our colleague that the failure of the applicant to take any steps to secure

reasons in Smith, including paras. 20 and 21 dealing with the
its

conclusion that s.24(1)(c) was satisfied here for these reasons:

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work between the date of his retirement in July 1978 and the relevant date demonstrates that he would never have been likely to secure work if he had been free of disabilities. In support it is said that on 21 August 1978 his assessment was only 70% of the General Rate. Furthermore the concession that he fulfilled the requirements of s.24(1)(b) only related to the relevant date, not the date of retirement.

26. The answer to this line of argument in our opinion is that an assessment after resignation from work at 70% (i.e. able to do light work only with some breaks) does not compel the conclusion that he would have engaged in remunerative work in 1978 if his condition had been unaffected by war-caused injury or disease.

27. The only inference which can be drawn from his failure to seek work when he was said to be capable of 'light work with breaks', is that during those years to have worked would have caused diminution of his service pension.

28. The question to be asked is not whether his failure to do part-time or casual work prior to the relevant date was prompted by some financial consideration, but whether looking at the whole of the evidence now he was, at his date of retirement, the kind of person who, all things being equal, would have preferred a chance to work to total retirement.

29. In our opinion his failure to seek work when he was capable of doing some, does not detract from the strong impression we have formed that he is a man who would have had the necessary motivation, skill and opportunity to continue working to the necessary degree after his retirement at 62.5 years but for his war-caused disease."

In the course of the respondent's oral evidence before the Tribunal, Mr. Hodgman Q.C. (for the respondent - Mr. Dalton

appeared for the Commission) put this to the respondent:

"You retired from the EZ Company in 1978?---That is right.

And that was on, what I might say, was unanimous medical advice; Is that so?---Yes.

And is it the fact that because of your war-caused disabilities - and there is no argument about this - I think you do not dispute as at retirement?

MR. DALTON: It was not conceded at retirement, only

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at relevant date. MR. HONGMAN: I will lead it from him.

Well, Mr. Dalton does not dispute that as of 1984 war-caused disabilities would have forced you out of the workforce. Is the fact that you were advised by your LMO, Dr. Whyte, to retire in 1978? ~---That is correct.

And that was because of your war-caused disabilities; is that correct?---Yes.

And no other reason?--No other reason."

It is common ground that, as at the date of his application (August 1984), the respondent suffered from six service-related disabilities: injury right knee (meniscus operation); osteoarthritis lumbar spine; generalised

osteoarthritis; anxiety state; dyspepsia and tinea pedis.

The respondent described the nature of his work as

follows:

"What sort of carpentry did you do at the Zinc Works?---I started off on construction, then went into maintenance, and my last four or five years I was in the workshop.

Yes. And what would you do there?--When I first went in there we made cells; that is a matter of putting one board on top of another, making a box out of boards, one on top of the other.

And what were you doing in the latter years of your life at the Zinc company?---I did most or I did pretty well all of the work required by the fire station which was putting up first-aid boxes.

Yes, I understand?---I beg your pardon?

Yes, I follow?---Fire-extinguisher boards, notices; that was quite an easy job because I started at quarter to 8. The fire station people started at 9 o'clock and they would usually send a man with a utility; take me to wherever the job was to be done; perhaps hold the thing for me and all I would have to do was attach a board or fix a box. I might repair the small first-aid boxes.

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Yes, I follow.

MR. HODGMAN: And even with all that easy work, on medical advice you had to give up your job?---Well, at that time they were starting some of the blitzes out there on work - getting rid of workers and it looked as though I would have been put back - could possibly have been put back onto maintenance work and I knew at that time that would be too much."

He explained his desire to retire as follows:

"I was ignorant of the way to go about it. I was told afterwards by an RSL representative that at times when I had a bad back I would see my LMO, have treatment and I would - this is when the zinc works was a home. You could get - I could go back to work and not do any work and find it easier there than to stay at home and be uncomfortable. When my back was bad I esuld neither lay down comfortably, sit or was just wandering around with nothing to do whereas, go back to work I could put in a week or 10 days, see more or less doing not much more than putting in an appearance and being carried by the workmates." -

The Commission now submits, as it did in Smith, that the

majority of the Tribunal fell into error in three respects: (1) The wrong standard of proof was applied. (2) The matter was considered as at the date of retirement instead of as at the date of application. (3) The finding that s.24(1)(c) was satisfied

was not open or at least should not have been made.

The Commission cannot, of course, invite the Court to reconsider merely factual questions. But, in principle, the present appeal raises the same questions of law as were raised in

Smith. It must follow, for the reasons there given, that the appeal must succeed.

I would propose that the orders in Smith be made here also.

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I certify that thrs—ardé the preceding @t7¢ (©) pages are a true copy of the Reasons for Judgment herein of

his Honour ae

Associate

Dated: 10 August 1987

Counsel and Solicitors for Applicant:

Counsel and Solicitors for Respondent:

Date of Hearing:

Date of Judgment;

Mr. Proctor for applicant instructed by Australian Government Solicitor

Mr. M. Hodgman Q.C. with Mr. Piggott instructed by Howard Piggott

21 July 1987

10 August 1987

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IN THE FEDERAL COURT OF AUSTRALIA

TASMANIA DISTRICT REGISTRY T. No. G 4 of 1987

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GENERAL DIVISION

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ON APPEAL FROM THE GENERAL ADMINISTRATIVE DIVISION OF THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY MR. R.C. JENNINGS, O.C., DEPUTY PRESIDENT AND MR. D.A. KEARNEY AND DR. W. McLAREN THOMSON, MEMBERS

BETWEEN :

REPATRIATION COMMISSION Applicant

- 7

BYRON MAXWELL WRIGHT m Respondent :

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

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PLACE: SYDNEY

REASONS FOR JUDGMENT

SPENDER J. i.

I agree with the reasons of Beaumont J. and with the
orders that he proposes.

| sartli y that this and the ____-p aceding pages are a true copy of the reasons for le
judgment herein of His Honour

Mr, Justice Spender <{ Weeds -velt !

Associate Dated 10 August 1987

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