

AUSTRALIA / JUDGMENT

Scott, E.S. v Commissioner for Superannuation [1987] FCA 738

COURT
IN THE FEDERAL COURT OF AUSTRALIA

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JUDGMENT No. 7387.82.

CATCHWORDS

Superannuation - Commonwealth - deemed invalidity - eligible employee (applicant) purported to resign from employment on medical grounds - applicant also applied for and in receipt of pension under Repatriation Act 1920 - whether applicant should be deemed to have retired on ground of invalidity - nature of discretion of Commissioner for Superannuation.

Superannuation Act 1976, ss.7, 54.

Administrative Appeals Act 1975 ss.43,44.

ERNEST SYDNEY SCOTT v. COMMISSIONER FOR SUPERANNUATION

No. G203 of 1987

NEAVES, BEAUMONT AND GUMMOW JJ.

SYDNEY

23 DECEMBER 1987

IN THE FEDERAL COURT OF AUSTRALIA

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NEW SOUTH WALES DISTRICT REGISTRY) No. G203 of 1987

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GENERAL DIVISION)

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

BETWEEN: ERNEST SYDNEY SCOTT

Applicant

AND: COMMISSIONER FOR
SUPERANNUATION

Respondent

COURT: NEAVES, BEAUMONT AND GUMMOW JJ.

DATE ORDER MADE: 23 DECEMBER 1987

WHERE MADE: SYDNEY**THE COURT ORDERS:**

1. The appeal be allowed with costs.
2. The decision of the Administrative Appeals Tribunal dated 10 April 1987 be set aside; in lieu thereof that the decision of the Commissioner for Superannuation be set aside with a direction that the Commissioner give an appropriate direction under s.7(2).

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 No. G 203 of 1987

GENERAL DIVISION

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

BETWEEN : ERNEST SYDNEY SCOTT

Applicant

AND: COMMISSIONER FOR

SUPERANNUATION

Respondent

CORAM: Neaves, Beaumont and Gummow JJ.

DATE: 23 December 1987

REASONS FOR JUDGMENT**NEAVES J.**

This is an application by Ernest Sydney Scott by way of appeal from a decision of the General Administrative Division of the Administrative Appeals Tribunal ("the Tribunal") given on 10 April 1987 affirming a decision of a delegate of the Commissioner for Superannuation ("the Commissioner") made on 4 March 1983, and subsequently confirmed by the Commissioner, refusing to exercise favourably to Mr Scott the discretion conferred by sub-s.7(2) of the

Superannuation Act 1976 (Cth) ("the Superannuation Act").

2.

Mr Scott, who was born on 18 June 1923, was employed for many years in the Postmaster-General's Department of the Commonwealth of Australia. On 19 May 1960, while so employed, he became a contributor to the Provident Account established

under Part V of the Superannuation Act 1922 (Cth) ("the superseded Act"). Upon the establishment of the Australian

Telecommunications Commission ("the Commission"), Mr Scott's employment in the Postmaster-General's Department was terminated and he became an officer of the Commission. He continued to be a contributor to the Provident Account until the Superannuation Act came into operation on 1 July 1976. He then became a contributor to the Superannuation Fund established by that Act. He resigned from his employment with the Commission with effect from 10 October 1980. His contributory service thus exceeded 20 years. He was, immediately prior to his resignation taking effect, an "eligible employee" within the meaning of that expression in the Superannuation Act.

At the date of Mr Scott's resignation, s.183 of the Superannuation Act applied to a person who was or had ceased to be an eligible employee, being a person who was, or at any time had been, a person referred to in par.(a) of the definition of "eligible employee" in sub-s.3(1). That paragraph was in the

following terms:

"(a) a person, who, immediately before the commencement of this Act, was an employee for the purposes of the superseded Act and has continued to be, and is, such an employee."

Section 183 went on to provide that the regulations might make provision for modifying the Superannuation Act, or a provision of the Act specified in the regulations, in the application of the Act or that provision to and in relation to a person to whom s.183 applied, or to or in relation to a prescribed class of persons to whom that section applied. The modifications that might be made included modifications providing for benefits in addition to, or in substitution for, benefits provided for by the Superannuation Act. By the Superannuation (Former Provident Account Contributors) Regulations ("the regulations"), being Statutory Rules 1978 No.227, the Superannuation Act and the provisions thereof specified in the Schedule to the regulations were to apply, subject to the modifications specified in the Schedule, to and in relation to those persons to whom s.183 of the Act

applied who

- (a) had ceased to be eligible employees, being eligible employees referred to in par.(a) of the definition of "eligible employee" in s.3(1) of the Act;
- (b) had not, after so ceasing, again become eligible employees; and
- (c) immediately before 1 July 1976, were contributors to, or were liable to contribute to, the Provident Account established under the superseded Act.

The matter has proceeded on the basis that Mr Scott was such a person.

Upon his resignation, Mr Scott became entitled, pursuant to s.80 of the Superannuation Act as modified by the regulations, to a lump sum benefit, payable out of the Superannuation Fund established by the Superannuation Act, of an amount equal to his accumulated contributions. His accumulated contributions amounted to \$8,638.43 and that amount was paid to him on 1 December 1980. A short time prior to his resignation from his employment, and in contemplation thereof, Mr Scott applied for a service pension under the Repatriation Act 1920 (Cth). A decision was made under s.85 of that Act to grant him a service pension with effect from 20 August 1980. It does not appear

when that decision was made,

At the relevant time, the Telecommunications Act 1975 (Cth) provided that, if an officer appeared to the Commissioner to be inefficient or incompetent, or unable to

discharge or incapable of discharging the duties of his

position, the Commission might, inter alia, retire him from the Australian Telecommunications Commission Service (sub-s.56(1)). The procedures necessary for retirement on the ground of invalidity were not taken in relation to Mr Scott and no decision was made by the Commission that he he

retired.

In order to determine what were the benefits to which Mr Scott would have been entitled under the Superannuation Act as modified by the regulations if he had,

on 10 October 1980 (which was a date before the date on

which he would have attained his maximum retiring age),

ceased to be an eligible employee by reason of retirement on

the ground of invalidity, it is necessary to have regard to

the following additional matters:

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

Sub-ss.(3), (3A) and (4) of s.66 and s.79 of the Superannuation Act had no application in Mr Scott's case;

Mr Scott's period of prospective service, as defined in sub-s.3(1) of the Superannuation Act, was not less than 20 years but was less than 31 years;

Mr Scott had not paid supplementary contributions;

Mr Scott would not have been entitled to make an election under s.69 of the Superannuation Act as his contributory service exceeded 8 years;

Three times Mr Scott's accumulated basic contributions would have been greater than one-half of the amount that was the amount per annum of his final annual rate of salary;

Mr Scott had not been a contributor to the Provident Account established by the superseded Act on more than one occasion;

Mr Scott did not fall within s.212, one of the additional sections inserted by the regulations; and

As his contributory service exceeded 20 years, no question would have arisen of reducing on medical grounds the benefits otherwise payable to him (see ss.66(2) and 184 of the Superannuation Act).

Taking those matters into account, the benefits

to

which he would have been entitled in the circumstances

postulated would have been as follows:

(i) aif he did not make an election under s.68 or s.198 (another of the additional sections inserted by the regulations) - to invalidity pension at the rate of 70 per centum of his final annual rate of salary (shown on Exhibit "A" as \$11,419), that is to say \$7,993.30 per annum (see the modified sub-ss.66(1) and 67(1));

(1i) if he made an election under s.68 - to invalidity pension at the rate of 50 per centum of his final annual rate of salary or \$5,709.50 per annum and a lump sum benefit, payable out of the Superannuation Fund, equal to his accumulated contributions or \$8,638.43

(see the modified sub-ss.66(1), 68(1), 68(2) and 68(5));

(iil) if he made an election under s.198 - to a lump sum benefit equal to three times his accumulated basic contributions or \$25,915.29 (see the modified sub-s.66(1)

and the additional ss.196, 198 and 200 inserted by the regulations).

Payment of the benefits to which Mr Scott would have been entitled, except where the benefit was expressed to be

payable out of the Superannuation Fund, would have been made

out of the Consolidated Revenue Fund (s.112).

If Mr Scott had ceased to be an eligible employee by reason of retirement on the ground of invalidity and had made an election under s.68, he would not have been entitled to make an election under s.198 (sub-s.198(2)). An election under s.68 or s.198 would have had to be made not later than three months after becoming entitled to invalidity benefit under sub-s.66(1).

Mr Scott corresponded with the Commissioner in relation to his entitlement under the Superannuation Act and

7.

in due course the Commissioner treated that correspondence as being a request for the exercise in Mr Scott's favour of the discretion conferred by sub-s.7(2) of that Act. That sub-section provides:

"Where a person has, before attaining his maximum retiring age, ceased to be an eligible employee otherwise than by reason of death or by reason of his having been retired, or his services having been otherwise terminated, on the ground of physical or mental incapacity to perform his duties, but the Commissioner is satisfied that, at the time he ceased to be an eligible employee, he was, by reason of physical or mental incapacity, unfit to perform his duties, the Commissioner may direct that the person shall, for the purposes of this Act, be deemed to have been retired on the ground of that physical or mental incapacity."

As has already been mentioned, a delegate of the Commissioner, and the Commissioner on reconsideration, declined to exercise that discretion in Mr Scott's favour. The matter then came before the Tribunal which affirmed the decision though on grounds different from those relied upon

by the delegate and the Commissioner.

It was accepted in the proceedings before the Tribunal that Mr Scott was a person who had, before attaining his maximum retiring age, ceased to be an eligible employee otherwise than by reason of death or by reason of his having been retired, or his services having been otherwise terminated, on the ground of his physical or mental incapacity to perform his duties. The Tribunal was,

however, satisfied on the material before it, contrary to

8.

the view taken both by the delegate and the Commissioner, that at the time Mr Scott ceased to be an eligible employee, he was, by reason of physical or mental incapacity, unfit to perform his duties. The Commissioner did not challenge that

finding.

The Tribunal went on to consider whether, the condition precedent to the applicability of sub-s.7(2) being satisfied, it was appropriate that the discretion which that sub-section confers should be exercised in Mr Scott's favour so as to deem him to have been retired on the ground of physical or mental incapacity. The Tribunal concluded that it was not appropriate that the discretion be so exercised. In reaching that conclusion the Tribunal adverted to the circumstance that, if the discretion were exercised, an adjustment would have to be made back to the date of the cessation of Mr Scott's employment so that, unless it were fair to treat the employee as having been retired on the ground of invalidity as from the date of the cessation of

his employment, the discretion ought not to be exercised in his favour.

The Tribunal also adverted to the circumstance that, had he been retired on grounds of invalidity on 10 October 1980, Mr Scott would have been entitled to exercise the right of election conferred by s.68 or s.198. It considered that it would have been to his advantage in 1980 to have made an election under s.198 on the basis that it

"would have enabled him to receive a lump sum and also to

apply for and obtain a service pension under the Repatriation Act 1920 (Cth)". The Tribunal noted that, if it were to exercise the discretion under sub-s.7(2) of the

Superannuation Act in Mr Scott's favour, he would have to consider whether, in the present circumstances, he should exercise the right of election under s.68 or s.198 and that it was not clear whether it would be to his benefit to

exercise either election. The Tribunal continued:

"In the circumstances, it is no longer possible to put Mr Scott into the position he would have been in had he retired on the ground of invalidity. Since 1980 to date, he has' been receiving a repatriation pension. No decision that the Commissioner could make and no order of the Tribunal can affect the sum that Mr Scott has received under the Repatriation Act 1920

(Cth) and the Veterans' Entitlement Act 1986 (Cth). He has had that benefit and it is a benefit that cannot be adjusted by a decision taken under s.7(2) of the Act.

If the s.7(2) discretion is exercised favourably to Mr Scott, he will be entitled to insist on payment of arrears of superannuation pension from October 1980 to the present date and a continuing pension hereafter. In such event, he will also be entitled to retain, as a double benefit, the pension received from 1980 to date under the Repatriation Act 1920 (Cth) and the Veterans' Entitlements Act 1986 (Cth).

In our opinion, the possibility of this double benefit makes it unjust to exercise favourably the s.7(2) discretion. It may be unfortunate that this is so, but of course one of the reasons for the early resignation was that Mr Scott wished to obtain the benefit of a pension under the Repatriation Act 1920 (Cth). He has had that benefit and, having done so, it is now impossible for the Commissioner or the Tribunal to reverse the situation."

It was submitted on behalf of Mr Scott that, as a matter of law, the Tribunal was not entitled, in exercising 10.

the discretion which sub-s.7(2) of the Superannuation Act conferred, to take the above matters into consideration.

Each of them was said to be a matter extraneous to the exercise of the discretion.

Sub-section 7(2) confers a wide discretion on the Commissioner and, on review, on the Tribunal: Commissioner

for Superannuation v. Hastings (1986) 70 A.L.R. 625. As the Full Court there said (at pp.630-1):

"Because the circumstances of individual cases must differ widely, it is impossible to cast such a provision in a rigid form; a discretion must be vested in a suitable person, to be exercised upon the merits of the individual case. The industrial and medical history of the applicant for a pension is undoubtedly material to the decision to be made. Otherwise, as the relevant matters are unspecified in the legislation, it is for the Commissioner to determine what matters are to be taken into account and the weight to be given to them 'unconfined except in so far as the subject matter and the scope and purpose' of s.7(2) enables a court to say that 'given reasons are definitely extraneous to any objects the legislature could have had in view': see the words of Dixon J. in *Water Conservation Commission v. Browning* (1947) 74 C.L.R. 492 at 505, adopted in *R. v. Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 27 A.L.R. 321 at 325; 144 C.L.R. 45 at 49. The ultimate question for the Commissioner is whether it would be reasonable, having regard to the interests not only of the applicant for a pension but of other contributors to the superannuation fund, to treat the applicant as being entitled to the same benefits as if he or she had retired on the ground of invalidity. The Commissioner's decision is, of course, itself subject to review by the Administrative Appeals Tribunal. "

11.

The function of the Court is not to substitute its own opinion or decision whether the discretion should be exercised in Mr Scott's favour. That matter has been committed by Parliament to the Commissioner and the Tribunal. The only question for the Court is whether the Tribunal, in exercising the power under sub-s.7(2), has gone

beyond the proper limits of the discretion.

In my opinion, no error of law on the part of the Tribunal has been demonstrated. The Tribunal was not, in my view, confined to considering whether it would have been appropriate in October 1980 to exercise the discretion under sub-s.7(2) in Mr Scott's favour. It was entitled, and, as I think, bound, to consider, as it did, the consequences of exercising the discretion in his favour at the date of its decision, namely 10 April 1987. It is not to the point to say that, had the occasion for the exercise of the discretion arisen in October 1980, it would almost certainly have been exercised in his favour. The question for the Tribunal was whether, in the circumstances as they existed in April 1987, it was appropriate, or just or fair, whichever word one adopts to describe the appropriate test, to treat Mr Scott as though he had been retired on

invalidity grounds at the earlier date.

In my view, the Tribunal was entitled to have regard to the circumstance that, if Mr Scott were to be deemed to have been retired on the ground of physical or

mental incapacity, it would be open to him to exercise an

12.

election under s.68 or s.198 and to the further circumstance that, unless an election were made under either section, he would be entitled, as from 10 October 1980 and continuing, to an annual pension of 70 per centum of his final annual rate of salary. It was also open to the Tribunal to conclude, in the light of the supervening events, including the circumstance that he had applied for and been granted a

service pension under the Repatriation Act 1920 (Cth) on the

footing that he was not entitled to a pension under the Superannuation Act, that the discretion under sub-s.7(2) should not be exercised in his favour. To exercise the discretion in his favour in those circumstances would have resulted in him being placed in a more advantageous position than a comparable employee who had been retired on invalidity grounds on the same date as Mr Scott's resignation took effect and this, in my view, was a factor which the Tribunal could properly regard as relevant to its decision. To take it into account was not to have regard to

a matter extraneous to the object or purpose of sub-s.7(2).

It was also submitted on behalf of Mr Scott that the Tribunal, in exercising its discretion, had failed to take into account the circumstances in which he came to resign from his employment and failed to follow the procedures which would, almost inevitably, have resulted in a decision by the Commission under sub-s.56(1) of the Telecommunications Act 1975 (Cth) that he be retired on medical grounds.

13.

The Tribunal clearly adverted to those

circumstances in that part of its reasons for decision which led it to conclude that the pre-condition to the exercise of the discretion under sub-s.7(2) had been established. The

Tribunal said:

"We believe that his failure to ascertain the proper means of obtaining retirement on the ground of invalidity resulted from his medical problems including the anxiety and depression from which he was then suffering. He felt that

he was unable to continue to work and unable to

cope with the travel and conversations necessary to fully discuss the matter with Telecom."

While it is true that this aspect of the matter was

not again expressly referred to, I am not prepared to find that the Tribunal did not have it well in mind as one of the factors to be considered when determining how the discretion

under sub-s.7(2) should be exercised.

In my opinion, the appeal should be dismissed with

costs.

I certify that this and

the preceding 12 pages are a true copy of the Reasons

for Judgment herein of the

Honourable Mr Justice Neaves.

Associat

Dated: 23 December 1987

IN THE FEDERAL COURT OF AUSTRALIA

)) NEW SOUTH WALES DISTRICT REGISTRY) No. G203 of 1987))

GENERAL DIVISION

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

BETWEEN: ERNEST SYDNEY SCOTT

Applicant

AND: COMMISSIONER FOR

SUPERANNUATION Respondent CORAM : NEAVES, BEAUMONT AND GUMMOW JJ. PLACE: SYDNEY DATE: 23 DECEMBER 1987 REASONS FOR JUDGMENT BEAUMONT AND GUMMOW JJ.

The applicant, Mr. Scott, applied

to the Administrative Appeals Tribunal for review of a decision of the respondent, the Commissioner for Superannuation, made under the Superannuation Act 1976. Before going to the specific provision under which the Commissioner made his decision, some reference should be made to the general scheme of the legislation in its application to persons who cease to be eligible employees. A person may cease to be an eligible employee prior to attaining the maximum retiring age by reason of death or resignation or by dismissal for cause or by reason of his having been retired on

the ground of invalidity, i.e., physical or mental incapacity

to perform the duties of office. Retirement on the ground of invalidity may occur with or without the approval of the employee after the employee has been medically examined when it is shown, on medical grounds, that the employee is unfit to perform the duties of office (see, e.g., Telecommunications Act 1975 (Cth) s.56(1)(c); *Trigger v. Australian*

Telecommunications Commission (1984) 4 F.C.R. 242 at p.255).

The significance of retirement on the ground of invalidity, as contrasted with retirement on other grounds, is that under the Superannuation Act 1976, different benefits are payable in the case of an employee who retires by reason of age (age retirement benefits) or on the ground of invalidity (invalidity benefits) than in the case of an employee who resigns or is retired early on some other ground (see Davis, *The Law of Superannuation in Australia* at pp.257-259; 261). As a matter of form, in circumstances to be explained later, Mr. Scott purported to resign from his employment. The present question is whether, as a matter of substance, he should be deemed to have retired on the ground of invalidity, notwithstanding his resignation. In a proper case, the Commissioner is given the power to direct that a person who has resigned from his employment is to be deemed to have been retired on grounds of invalidity. The Commissioner refused to give this direction here and it is this decision which was

sought to be reviewed in the Tribunal.

The Commissioner's power to give an appropriate

direction is conferred by s.7 of the Superannuation Act 1976:

"7. (1) A reference in this Act to the retirement of an eligible employee on the ground of invalidity shall be read as a reference to his having been retired, or his services having been otherwise terminated, on the ground of physical or mental incapacity to perform his duties.

(2) Where a person has, before attaining his maximum retiring age, ceased to be an eligible employee otherwise than by reason of death or by reason of his having been retired, or his services having been otherwise terminated, on the ground of physical or mental incapacity to perform his duties, but the Commissioner is satisfied that, at the time he ceased to be an

eligible employee, he was, by reason of physical or mental incapacity, unfit to perform his duties, the Commissioner may direct that the person shall, for the purposes of this Act, be deemed to have been retired on the ground of that physical or mental incapacity."

As has been said, the Commissioner refused to give a direction under s.7(2). The Tribunal affirmed the Commissioner's decision and Mr. Scott now appeals to the Court

pursuant to the jurisdiction conferred by s.44(1) of the
Administrative Appeals Tribunal Act 1975.

Mr. Scott was employed as an electroplater by Telecom Australia and its predecessor for more than 30 years. On 19 May 1960, he became a contributor to the Superannuation Fund established under the Superannuation Act 1922. On 1 July 1976, the Superannuation Act 1976 (hereafter "the Act") came into operation, superseding the Superannuation Act 1922. Mr. Scott became an eligible employee for the purposes of the

Act. In June 1979, Mr. Scott contemplated retirement. He wrote to the Commissioner:

"I work for No. 1 Workshop, Unwin Bridge Rd, St. Peters, Telecom. My Doctor may retire me
on

account of ill health, I would like

information regarding pension and provident due to me, my age is 56 years."

(In fact, the letter was written by Mrs. Scott as Mr. Scott is
unable to write a letter.

him which he

Signs. Subsequent references to letters written

by Mr. Scott should be taken against this background.)

The Commissioner replied by letter dated 25 September
1979

"I refer to your enquiry of 20 Jun 1979 concerning invalidity retirement benefits. I regret the delay in replying.

2.

If you retire on 30 Sep 1979 for example

with 19 years contributory service and your benefit is adjusted on medical grounds your options would be -

(a)

(b)

(c)

3.

pension of 66.5% of your final salary plus a refund of any accumulated supplementary contributions; based on your current salary of \$9987 as advised by your employer your pension would be \$6641.36 gross per annum; or

on election, pension of 47.5% of your final salary plus a lump sum _ of accumulated contributions; based on a salary of \$9987 your pension would be \$4743.83 gross per annum; or

on election, the lump sum that would have been payable under the provisions of the superseded Provident Account, that is 3 times accumulated basic contributions and a refund of any accumulated supplementary contributions; in your case, an amount of approximately \$21,680.

Should your benefit not be adjusted on

medical grounds your options would be -

(a)

pension of 70% of your final salary plus a refund of any accumulated supplementary contributions; based on a salary of

His wife writes correspondence for

\$9987 your pension would be \$6990.90 gross per annum; or

(b) on election, pension of 50% of your final salary plus a lump sum of accumulated contributions; based on a salary of \$9987 your pension would be \$4993.50 gross per annum; or

(c) on election, the lump sum as outlined in paragraph 2(c) above.

4. You commenced contributing to the Provident Account on 19 May 1960. Therefore on invalidity retirement on and from 19 May 1980, with 20 completed years contributory service, your benefit would not be subject to adjustment on medical grounds. (Please refer to paragraph 3 above).

5. Your accumulated contributions to 30 Sep 1979 will be approximately \$7220. This figure is based on a fortnightly contribution of \$18.70, and includes interest due to 13 Sep

1979. You have no supplementary contributions

to date. The latest prescribed rate of interest is 8.414%, with effect from 1 Jul 1977.

6. It should be noted that the Commissioner for Superannuation may require' invalidity pensioners to undergo medical examinations to determine their fitness for re-employment.

7. Please do not hesitate to contact this Office if you have any further enquiries regarding your superannuation benefits that may not be fully explained by the enclosed paper.

Encl. P.A. leaflet Taxation leaflet"

On 3 October 1980, in circumstances to be elaborated later, Mr. Scott tendered his resignation from Telecom, as from 10 October 1980, on "medical grounds". On the same day, he signed a printed application form distributed by the Commissioner and proposed to be completed for the purposes of

the Act by a contributor who "resigns or a contributor who

retires and who elects to exercise an option to take a Lump Sum Benefit in lieu of a pension entitlement", Mr. Scott applied for a refund of accumulated contributions and payment of a lump sum benefit. His stated reason for termination of services ("Resignation, Dismissal, Age/Early Age Retirement, Invalidity Retirement, Involuntary Retirement" were mentioned on the form) was "resignation". By notification dated 27 October 1980, a delegate of the Commission, Lesley Spinks, informed the Commissioner that Mr. Scott's resignation had

been accepted from 10 October.

On 4 May 1981, Mr. Scott wrote to the Commissioner:

"...please inform me, as to when The Provident, is to paid to me. I retired from Telecom in October, 1980, and to date have not heard from Commissioner for Superannuation, therefor would you kindly let me know, whether there is a claim form to made out.

Have letter date 25 September 1979 which stated, on election, the lump sum that would have been payable under Provident Account, that is 3 times accumulated basic contribution

and a refund of any accumulated supplementary contributions, in your case, I have received a sum of \$6875.19."

The Commissioner replied by letter dated 9 June 1981:

"...the letter you received, dated 25 Sep 1979, referred to the options available had you been retired on the grounds of invalidity.

2. As your application for benefit stated that you had resigned and not retired the only benefit payable is a refund of accumulated contributions..."

On the Commissioner's file copy of this letter, the

following note appears:

"I rang Lesley Spinks who confirmed Mr. Scott had resigned and had advised Telecom he did not wish to be considered for invalidity as he

was planning to receive a Social Security pension.

M. Staples 28.7.81"

On 17 August 1981, Mr. Scott wrote to Telecom:

"Could you inform me on this matter, I retired on the grounds of invalidity last October (1980). All I have received to date, 1s accum. Super refund conts, amount \$8,638.43. I have one letter which reads.

- (c) On election, the lump sum that would have been payable under the provisions of the superseded Provident Account, that is 3 times accumulated basic contributions and a refund of any accumulated supplementary contributions; 1n your case, an amount of approximately \$21,680.

Benefit should be adjusted on medical grounds,
retired, not resigned..."

The Commissioner responded by a letter written in September 1981 in which he confirmed his previous position. By letter dated 5 February 1982, Mr. Scott again wrote to the

Commissioner:

"In my confused state of mind, it has taken me over 12 months to realise this has happened to me. I thought I had retired on invalidity, fully expecting what was due to me _ in Superannuation, I had previously made inquiries, as to what I was entitled to, long before I had retired."

On 2 March 1982, the Commissioner responded, informing Mr. Scott that his letter had been accepted as an

application under s.7(2) of the Act. Thereafter, the

Commissioner sought, and obtained, medical opinions with

respect to Mr. Scott's state of health prior to and at the time of his resignation. By letter dated 10 March 1983, the delegate of the Commissioner informed Mr. Scott that:

"...[he is] not satisfied that at the time you ceased to be an eligible employee by way of resignation you were by reason of physical or mental incapacity unfit to perform your duties and therefore has not deemed you to have been retired on the ground of physical or mental incapacity.

3. As a result of this decision there is no further entitlement to benefit under' the

Superannuation Act 1976."

By letter dated 20 March 1983, Mr. Scott sought a review of this decision. By s.154 of the Act, jurisdiction to

review such a decision is conferred upon the Tribunal.

The principal issue before the Tribunal was whether, at the time of cessation of his employment, Mr. Scott was unfit, by reason of physical or mental incapacity, to perform his duties. Having heard medical evidence, the Tribunal concluded that Mr. Scott satisfied this condition of s.7(2). But the Tribunal was also of the view that, because of complications which were perceived to have arisen from the circumstances that Mr. Scott had applied for and was in receipt of a pension under the Repatriation Act 1920, the discretion conferred by s.7(2) should not be exercised in his favour.

Before going to the reasoning of the Tribunal on this aspect of the matter, reference should be made to some

evidence given to the Tribunal by Mr. Scott as to the

circumstances of his signing the application form already mentioned on 3 October 1980. In examination in chief, he

said:

"...do you remember signing a resignation form for Telecom?---I think I did put one in. I thought I - resign ~ I thought I retired, you know.

Where did you sign the document?~---When they sent it to me I think because I could not go because I could not walk.

How was it sent to you? ----By post. No-one came to see me or anything, it was just done by post.

Did you receive any instructions with the form that you signed on your resignation?----Probably, but I do not understand it - probably there was, I do not know. '

Did you understand the difference between resignation and retirement?~---I thought I was retired. Resign is another one, is it? I thought they were all the same, I do not know..."

eee

Did anyone approach you from Telecom to explain the difference between resignation and retirement?----No, I still do not know to this day. I think it is just all the same, you know, because Veterans Affairs wanted me to resign and they fixed my pension up, see. I told them I wanted to retire. I thought it was both the same, you know.

Had you approached Veterans Affairs before you actually signed the resignation?----Yes, and they said to me 'If you resign, Mr. Scott, and see Telecom we will fix your pension up for you'.

Do you remember what you said to Veterans Affairs?----I had to fill in forms to say I wanted to resign. Then I had to have a certificate from Dr Williams to state I should be on the pension, you know.

If Telecom had approached you and explained the difference between the words, resignation
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and retirement, and made it quite clear, what would have happened in the event of you resigning rather than retiring and seeking medical advice from their medical officer - would you have resigned?----It is hard to say. If I had it explained it might have been a different thing, you know, because I just did not know. I was too sick to know anything, really. I do not know the difference now, really, but I just take notice of what other people tell me, you know, take their advice.

Again, did they explain to you so that you could understand it the difference between resignation and retirement?----No-one ever explained nothing, no - I cannot remember that. No-one spoke to me or even explained nothing. I was just left on my own with it - my own judgment, that is all."

Mr. Scott was cross-examined on this evidence:

"Do you recall Telecom sending you a telegram asking you to contact Lesley Spinks about your resignation; do you recall a Lesley Spinks?---~I cannot think at the moment.

You cannot remember getting a telegram asking

you to ring Telecom?---Yes, I think - yes, I do. It comes through now. It takes me a while.

And you remember ringing her back and talking to her about your resignation?---Most likely.

Did she outline the different options that you could have under superannuation when you rang her back?---I cannot remember.

You cannot recall?---No, I cannot recall.

Do you recall telling her that you wanted her resignation to proceed because you' were receiving the Veteran Affairs pension?---~Most likely, yes.

Given that you were able to ring Lesley Spinks when she sent you a telegram, could not you have rung Telecom on your own initiative anyway to find out whether your resignation was going to give you superannuation or

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not?---Well, I did not have the phone on. I used to have to walk up to a friend's place.

How far was that?---At the top of Brennan Street where I live.

100 metres, 200 metres?---300 or 400, and that was a long way for me to walk them days, at that time it was.

But you managed to ring Lesley Spinks?---Only rare occasions I went out to ever do anything.

So you were virtually housebound, were you?---Yes, more or less."

When you telephoned Telecom in relation to the telegram that you received, did [Lesley] Spinks set out the difference between resignation and retirement? Did she tell you there was a difference?----No one ever did, no. I thought it was all the same. I did not think it mattered anyway because I realise even now that to retire, I cannot retire myself, I realise that now, but it took me all that years to realise now that I cannot retire myself. I can resign or leave or go to another job, but I cannot retire myself, can I? I realise that part of it. That is about the only thing that I - now.

So you are aware now that maybe you should have approached it differently?~---Yes. If I were to know now what I did then, it may have helped, or someone would advise me, it may have helped to - I had neither, see.

Did they talk to you about if you got the pension whether it would have affected your superannuation or pensions from any other source?----No advice at all. They were just anxious to help me get it. They said, 'Mr. Scott, if you get your doctor's certificate and see Telecom and resign -' I said, 'I have got to resign, have I? I thought I was retiring'. They said, 'You have got to resign and see us then and we will fix your pension up'. There was no advice, no advice."

Lesley Spinks was not called to give evidence. The

Commissioner called evidence from Mr. J.R. Coles, an officer

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of Telecom in charge of "Medical Redeployment and Retirements". His evidence in chief included the following reference to Mr. Scott's notification of his intention to resign (it appears that Mr. Coles was not speaking from his

personal knowledge):

"What action did Telecom take after they received this form?----Because of the grounds mentioned in it, that he was resigning on medical grounds, Mr. Scott was contacted by Telecom and asked if he could contact our area to discuss the method of resignation.

Did he contact your area?----Yes. He rang in on the 27th of the 10th and advised that he wished the resignation to proceed as he would be receiving a pension from Veterans Affairs.

What action did Telecom then take?----Telecom proceeded in the normal method of resignation."

In the course of his cross-examination, Mr. Coles said:

"Do you have any knowledge of the telephone conversation between [Lesley] Spinks and Mr. Scott? Did [Lesley] Spinks ever report back

to you?----There is a note on the file, yes. Do you have that note with you?----Yes, I have.

Could you - - -? --- Would you like me to

read it out? It says:

Mr. Scott advised that he wishes his resignation to. proceed. He will be receiving pension from Veterans Affairs.

It is dated 27th of the 10th.

Did [Lesley] Spinks, to your knowledge, point out any procedure that needed to take place?----In the normal line of their duties they would have, yes.

But he was not aware of Mr. Scott's mental condition or health condition?----No, there was no medical fitness file on Mr. Scott held by Telecom."

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The Tribunal found that although he had been a good tradesman, Mr. Scott had reached the end of his effective working life by 1980 when only 57 years of age. (Mr. Scott could have retired by reason of age on 18 June 1983 on attaining 60 years of age.) By a certificate dated 15 August 1980, Dr. R.G. Williams, Mr. Scott's general medical

practitioner, expressed the following opinion:

"This is to certify that Mr Ernest Scott 57 yrs ---Of 2 Brennan St Yagoona has been under my care since October 1974.

He suffers from anxiety state or neurosis with noise intolerance which he blames on the effects of his war service for four years in theatres of war in New Guinea and New Britain during world war 2. He states that this neurotic state is now getting worse and is aggravated by taunts of younger members amongst his workmates, whom he considers are misbehaving and drinking excessively at work.

He also suffers from mild hypertension and is on Aldomet and Chlotribe.

He also suffers from painful arthritis and tendonitis of both feet which is aggravated by standing. He may have some impaired arterial circulation in his feet as well.

He appears to have reached the stage where he

will no longer be able to continue his present

job and should retire permanently from it

because of his health, and to have therefore

reached the stage of permanent

unemployability."

Dr. Williams confirmed this opinion in evidence to the Tribunal, saying that Mr. Scott had become permanently

unfit for work, the main causes being anxiety neurosis and noise intolerance.

The Tribunal said (at pp.7-8):

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"It is unfortunate that the above report by Dr Williams was not then communicated to Telecom and, further, that Mr. Scott did not have a full discussion with superior officers or personnel officers at Telecom. We think that, as Dr Williams said in evidence, Mr Scott had come to a stage where he found his work intolerable and we would add to that that he found travel intolerable. He felt unable to present himself for work. He remained off work during August and September 1980 pursuant to certificates of Dr Williams which were forwarded to Telecom. He believed, correctly, that if he retired on the ground of invalidity he could obtain a lump sum payment under the Act and that, if he did so, and did not receive a pension, he could at the same time apply for and receive a Service pension under

the Repatriation Act 1920 (Cth).

On 3 October 1980, Mr. Scott forwarded a document of resignation on 'medical grounds'. We believe that his failure to ascertain the

proper means of obtaining retirement on the ground of invalidity resulted from his medical problems including the anxiety and depression

from which he was then suffering. He felt

that he was unable to continue to work and

unable to cope with the travel and

conversations necessary to fully discuss the

Matter with Telecom."

However, the Tribunal declined to exercise the discretion under s.7(2) for reasons which may be summarised as follows: if the direction were then to be given, it would operate retrospectively to the date of the cessation of employment; unless it is "fair" to treat the employee as having retired on the ground of invalidity, as from the date of cessation of employment, the discretion ought not to be exercised; in 1980, it would have been to Mr. Scott's advantage to exercise his option to receive a lump sum payment under the Act, for to do so then would have permitted him to

receive that lump sum and also to obtain (as he did) a service

pension under the Repatriation Act; however, at the time the

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Tribunal dealt with the matter (the hearing was in November 1986; a reserved decision was given in April 1987), the repatriation legislation was different: repatriation pensions are now tested not only against income but also against assets. It followed that it was no longer possible to put Mr. Scott into the position he would have been had he retired on the ground of invalidity and it would be unjust to permit him to receive a "double benefit" in the form of a pension under the Act together with a repatriation pension.

The Tribunal said (at p.12):

"TE the s.7(2) discretion is exercised favourably to Mr Scott, he will be entitled to insist on payment of arrears of superannuation pension from October 1980 to the present date and a continuing pension hereafter. In such event, he will also be entitled to retain, as a double benefit, the pension received from 1980 to date under the Repatriation Act 1920 (Cth) and the Veterans' Entitlements Act 1986 (Cth).

In our opinion, the possibility of this double benefit makes it unjust to exercise favourably the s.7(2) discretion. It may be unfortunate that this is so, but of course one of the reasons for the early resignation was that Mr Scott wished to obtain the benefit of a pension under the Repatriation Act 1920 (Cth). He has had that benefit and, having done so, it is now impossible for the Commissioner or the Tribunal to reverse the situation."

On behalf of Mr. Scott, it is submitted that the Tribunal fell into error in failing to exercise the discretion under s.7(2) in Mr. Scott's favour. It is said that the discretion is limited by the subject matter, scope and purpose

of the Act; and that the evident object of s.7(2) is to avoid

injustice where an employee might be thought to be morally

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entitled to a pension but not within s.7(1) although effectively forced out of his or her employment for health reasons. It is then argued that the Tribunal wrongly took into account an irrelevant matter, namely, Mr. Scott's entitlement to a repatriation pension; and that the Tribunal erred in law in failing to take into account the circumstances, first, that Mr. Scott had been deprived of a benefit under the Act to which he would have been entitled since 1980 had he followed the appropriate procedures and, secondly, that had Mr. Scott received invalidity benefits under the Act in 1980, he would then have been entitled to his service pension also.

The operation of s.7(2) was considered by a Full

Court (Woodward, Keely and Wilcox JJ.) in Commissioner for

Superannuation v. Hastings (1986) 70 A.L.R. 625. The Court said (at p.630):

"...it is too simplistic to describe s.7(2) as creating a power intended to be used for the benefit of persons who comply with its pre-conditions. Rather, we see it as a provision designed to avoid injustice in cases where an employee might be thought to be morally entitled to a pension, because effectively forced out of his or her employment for health reasons, but is not within sub-s (1). Because the circumstances of individual cases must differ widely, it is impossible to cast such a provision in a rigid form; a discretion must be vested in a suitable person, to be exercised upon the merits of the individual case."

In Hastings, the Court rejected an argument that the reference to "may" in the phrase "may direct" in this

provision imported a duty to act in an appropriate case. It

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was held that these words were facultative only so that the Commissioner was not bound to make a direction in a case where the precondition, that an employee was unfit to perform his duties, was satisfied. The Court said (at p.631):

"The ultimate question for the Commissioner is whether it would be reasonable, having regard to the interests not only of the applicant for a pension but of other contributors to the Superannuation fund, to treat the applicant as being entitled to the same benefits as if he or she had retired on the ground of invalidity." (Emphasis added)

If we were concerned with a private superannuation fund, a balancing exercise of the kind described in this passage could readily be perceived. However, we are dealing here with a statutory public fund. It is true that provision is made by Part III of the Act for the establishment and Management of a Superannuation Fund Investment Trust ("the Trust") (Division 1 of Part III) and for the establishment and management of a Superannuation Fund ("the Fund") (Division 2 of Part III). But the relevant invalidity benefits are not payable out of the Trust or the Fund. The benefits are paid

out of the Consolidated Revenue Fund (see s.112(2) and State

Superannuation Board v. Trade Practices Commission (1982) 150

C.L.R. 282 at p.308; see also s.159). Since the payment of a benefit to an eligible employee cannot affect the entitlement, or the amount of the entitlement to a benefit in the case of any other employee, it is not apparent how, for the purposes of s.7(2), the interests of other contributors are to be taken into account. If that is so, it is difficult to see how the

contemplated balancing of the interests of the applicant, on

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the one hand, and of other contributors, on the other hand, could be achieved.

In Hastings, it was said that s.7(2) was designed to avoid injustice where an employee might be thought to be morally entitled to an invalidity benefit. In our opinion, Mr. Scott has established such a moral entitlement here. In substance, although not in form, Mr. Scott was entitled to invalidity benefits when he ceased employment in October 1980. It is not, and could not be, suggested that his qualification for a service pension would then have disqualified him from invalidity benefits under the Act. The only reason why Mr. Scott did not secure invalidity benefits in October 1980 was his failure to follow the procedures which were appropriate in his case and that failure was adequately explained. In declining to exercise the discretion under s.7(2), the Tribunal relied upon the changes in policy in the means test for service pensions which were introduced after Mr. Scott ceased employment. With all respect, it is difficult to see how such a collateral, supervening consideration could properly be taken into account adversely to Mr. Scott. At the time of ceasing employment, Mr. Scott could have established an entitlement under each legislative scheme provided he had then followed the prescribed formalities. That he failed to do so was no fault of his. There was ample evidence, and the Tribunal found, that, at the time he considered ceasing employment, Mr. Scott was confused with respect to, and did not properly understand, his several entitlements under the

Act and under the repatriation legislation. Moreover, once
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alerted to the problem, Mr. Scott acted reasonably promptly by seeking clarification of his position in May 1981. It is true that more than seven years have now elapsed since Mr. Scott ceased employment. But, having raised the matter within seven months of his ceasing to be employed, the subsequent passage of time, involving, as it apparently did, a change in the means test for service pensions, cannot be attributed to any
fault on Mr. Scott's part.

In our opinion, a strong moral case for the exercise of the statutory discretion emerges from the following circumstances: first, the finding by the Tribunal of actual invalidity; secondly, the finding by the Tribunal that Mr. Scott was confused in 1980 with respect to his legal position; and thirdly, the absence of any suggestion of unreasonable
delay by Mr. Scott in seeking the direction.

We accept that the existence of special circumstances may justify a refusal to exercise the discretion given by s.7(2). That is to say, we accept that, even if an employee can demonstrate that he ceased employment on invalidity grounds, a residual discretion remains in the Commissioner to decline to give the statutory direction. If, for instance, Mr. Scott had held an adequate understanding of what was involved in dealing with his several pension entitlements or if he had been guilty of unreasonable delay in seeking invalidity benefits, it may have been proper that no

direction be given under s.7(2). But this is not the present case. All

of the relevant considerations indicate that the statutory

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discretion should have been exercised in Mr. Scott's favour. Sub-section 43(1)(c)(i) of the Administrative Appeals Tribunal Act 1975 empowered the Tribunal to make a decision setting aside the decision under review and making a decision in substitution for the decision so set aside. Sub-section 44(4) empowers this Court, on the appeal from the Tribunal to make such order as is thought appropriate by reason of its decision. In our view the Commissioner should have been ordered to give an appropriate direction (cf. *The Queen v.*

Anderson; *Ex parte Ipec-Air Pty. Ltd.* (1965) 113 C.L.R. 177

per Kitto J. at p.188, *Minister for Immigration and Ethnic*

Affairs v. Conyngham (1986) 68 ALR 441 at p.448 per Sheppard

J., Beaumont and Burchett JJ. concurring).

We would propose that the appeal be allowed with costs; that the decision of the Tribunal be set aside; and that in lieu thereof, it be ordered that the decision of the Commissioner be set aside with a direction that' the

Commissioner give an appropriate direction under s.7(2).

I certify this and the WTM£TEEW (9) preceding pages to be a true copy of the Reasons for Judgment of

their Honours Mr Justice Beaumont and

Mr. Justice ee

Associate: 4.2 Feats

Date: 23 December 1987

Counsel for the

Counsel for the

Date of

Date Judgment delivered:

and Solicitors Applicant:

and Solicitors Respondent

hearing:

21.

D.H. Murr instructed by MacDonald Edgerton & Watts

G. Hosking instructed by Australian Government Solicitor

21 October 1987

23 December 1987

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