

AUSTRALIA / JUDGMENT

Whitehouse v Repatriation Commission [2017] FCA 1085

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Whitehouse v Repatriation Commission [2017] FCA 1085

Appeal from: Whitehouse and Repatriation Commission (Veterans' Entitlements) [2016] AATA 996

File number(s): TAD 56 of 2016

Judge(s): TRACEY J

Date of judgment: 15 September 2017

Catchwords: ADMINISTRATIVE LAW – appeal from a decision of the Administrative Appeals Tribunal on a question of law pursuant to s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) – where the Tribunal had affirmed a decision of the Veterans' Review Board, which in turn had affirmed a decision of the Repatriation Commission to refuse an application for an increase to the intermediate pension rate under the Veterans' Entitlements Act 1986 (Cth) – where the applicant had been working as a full-time partner of a law firm – where, because of his war-caused incapacity, he subsequently worked as a part-time consultant solicitor – where he was engaged in that part-time work at the time of his application – whether his full-time work should be considered to be his "remunerative work (last paid work)" for the purpose of s 23(3A)(d) of the Veterans' Entitlements Act 1986 (Cth)

STATUTORY INTERPRETATION – meaning of "remunerative work (last paid work)" in s 23(3A)(d) of the Veterans' Entitlements Act 1986 (Cth)

DEFENCE AND WAR – whether the Administrative Appeals Tribunal erred in the construction and application of s 23(3A)(d) of the Veterans' Entitlements Act 1986 (Cth) by failing to find that the veteran's "last paid work" was the full-time work that he was prevented from continuing to undertake by his war-caused incapacity

Words & phrases: "Remunerative work (last paid work)"

Legislation: Administrative Appeals Tribunal Act 1975 (Cth) s 44

Veterans' Entitlements Act 1986 (Cth) ss 5Q, 13, 14, 15, 17, 18, 19, 19(9), 22, 23, 23(1), 23(1)(c), 23(2), 23(3), 23(3A), 23(3A)(a), 23(3A)(b), 23(3A)(c), 23(3A)(d), 23(3A)(e), 23(3A)(f), 23(3A)(g), 23(3A)(h), 23(3B), 24, 24(2A)(d), 24(2A)(g), 27, Pt II, Div 4

Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Bill 1994 (Cth)

Cases cited: Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41

Allianz Australia Insurance Ltd v GSF Australia Pty Ltd (2005) 221 CLR 568; [2005] HCA 26
Carter v Repatriation Commission (2001) 113 FCR 314; [2001] FCA 992
Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378; [2012] HCA 56
Combet v The Commonwealth (2005) 224 CLR 494; [2005] HCA 61
Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55
Grant v Repatriation Commission (1999) 57 ALD 1; [1999] FCA 1629
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Nominal Defendant v GLG Australia Pty Limited (2006) 228 CLR 529; [2006] HCA 11
Ralph v Repatriation Commission (2016) 69 AAR 462; [2016] FCAFC 89
Re Bolton; Ex parte Beane (1987) 162 CLR 514
Repatriation Commission v Connell (2011) 197 FCR 228; [2011] FCAFC 116
Repatriation Commission v Haskard (2002) 126 FCR 1; [2002] FCA 1493
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252; [2010] HCA 23
Whitehouse and Repatriation Commission (Veterans' Entitlements) [2016] AATA 996

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National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 44

Solicitor for the Applicant: Ms P Sutherland of Murdoch Clarke Lawyers

Counsel for the Respondent: Ms C Dowsett

Solicitor for the Respondent: Australian Government Solicitor

ORDERS

TAD 56 of 2016

BETWEEN: DAVID MILNE WHITEHOUSE

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: TRACEY J

DATE OF ORDER: 15 september 2017

THE COURT ORDERS

THAT:

1. The application be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

REASONS FOR JUDGMENT

TRACEY J:

1 The applicant, Mr David Whitehouse, is a veteran who suffers from a number of war-caused injuries. He has been in receipt of a pension by reason of his war-caused incapacity. His entitlement to the pension is conferred by the Veterans' Entitlements Act 1986 (Cth) ("the Act"). He has been paid at the general rate. He has sought to have the rate of pension which is paid to him increased to what the Act describes as an "intermediate" rate. The Repatriation Commission

("the Commission") refused his application and its decision was affirmed by the Veterans' Review Board ("the Board"). Mr Whitehouse then applied to the Administrative Appeals Tribunal ("the Tribunal") for review of the Board's decision. The Tribunal affirmed the Board's decision on 7 December 2016: see *Whitehouse and Repatriation Commission (Veterans' Entitlements)* [2016] AATA 996. Mr Whitehouse has "appealed" to this Court from the Tribunal's decision. The appeal is on a question of law under s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) ("the AAT Act").

2 The question of law framed by Mr Whitehouse is:

Whether, on the evidence before the Tribunal, the Tribunal erred in the construction and application of section 23(3A)(d) by failing to find that the veteran's "last paid work" was the full-time work that he was prevented from continuing to undertake by his war-caused incapacity.

3 The construction issue raised by this question does not appear to have been directly considered in earlier proceedings before this Court.

THE FACTUAL BACKGROUND

4 The circumstances in which the question of law arises are not contentious. They were the subject of factual findings made by the Tribunal.

5 Mr Whitehouse has worked as a solicitor in the firm Murdoch Clarke since 1976. He was a full-time partner in the firm between 1977 and 2012.

6 In about June 2012 Mr Whitehouse was suffering from the side effects of treatment for one of his war-caused disabilities. As a result he reduced his hours of work to between four to five hours per day and retired as a partner. He became a consultant to the firm.

7 Mr Whitehouse made his application for an increase in his rate of pension on 5 February 2014 on the basis that his level of incapacity had increased. At that time he was 67 years old and continued to be employed as a part-time solicitor consultant to the firm. He was paid for the work which he performed.

THE LEGISLATION

8 The Act provides for the payment of veterans' pensions to those who have become incapacitated by war-caused injury or disease: see s 13. A veteran who wishes to receive a pension must make a claim pursuant to s 14. The claim is investigated under s 17 and a determination is made by the Commission pursuant to ss 18 and 19.

9 Once a veteran is in receipt of a pension he or she may apply for an increase in the rate at which the pension is paid on the ground that the incapacity has increased since the rate was last assessed: see s 15.

10 The rates at which pensions are paid are determined in accordance with the provisions of Division 4 of Part II of the Act. There are three categories of rates: the general rate (s 22), the intermediate rate (s 23) and the special rate (s 24). The Division also provides for the payment of increased rates in certain cases of severe incapacity such as that caused by the amputation of limbs (s 27).

11 At all relevant times Mr Whitehouse has been receiving a pension at the general rate. His eligibility to receive a pension at the intermediate rate depended upon him satisfying criteria prescribed by s 23 of the Act. That section provides for different conditions of eligibility depending on whether the veteran is under or over the age of 65 at the time at which his or her claim or application is made. Subsections (1) to (3) deal with veterans who are under 65; subsections (3A) and (3B) deal with those over that age.

12 At the time of the Tribunal's decision, s 23 of the Act relevantly provided:

23 Intermediate rate of pension

(1) This section applies to a veteran if:

(aa) the veteran has made a claim under section 14 for a pension, or an application under section 15 for an increase in the rate of the pension that he or she is receiving; and

(aab) the veteran had not yet turned 65 when the claim or application was made; and

(a) either:

(i) the degree of incapacity of the veteran from war-caused injury or war-caused disease, or both, is determined under section 21A to be at least 70% or has been so determined by a determination that is in force; or

(ii) ...; and

(b) the veteran's incapacity from war-caused injury or war-caused disease, or both, is, of itself alone, of such a nature as to render the veteran incapable of undertaking remunerative work otherwise than on a part-time basis or intermittently; and

(c) the veteran is, by reason of incapacity from war-caused injury or war-caused disease, or both, alone, prevented from continuing to undertake remunerative work that the veteran was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his or her own account, that the veteran would not be suffering if the veteran were free from that incapacity; and

(d) section 24 or 25 does not apply to the veteran.

(2) Paragraph (1)(b) shall not be taken to be fulfilled in respect of a veteran who is undertaking, or is capable of undertaking, work of a particular kind:

- (a) if the veteran undertakes, or is capable of undertaking, that work for 50 per centum or more of the time (excluding overtime) ordinarily worked by persons engaged in work of that kind on a full-time basis; or
- (b) in a case where paragraph (a) is inapplicable to the work which the veteran is undertaking or capable of undertaking—if the veteran is undertaking, or is capable of undertaking, that work for 20 or more hours per week.
- (3) For the purpose of paragraph (1)(c):
 - (a) a veteran who is incapacitated from war-caused injury or war-caused disease, or both, to the extent set out in paragraph (1)(b) shall not be taken to be suffering a loss of salary or wages, or of earnings on his or her own account, by reason of that incapacity:
 - (i) if the veteran has ceased to engage in remunerative work for reasons other than his or her incapacity from that war-caused injury or war-caused disease, or both;
 - (ii) if the veteran is incapacitated, or prevented, from engaging in remunerative work for some other reason; or
 - (iii) if the veteran has been engaged in remunerative work on a part-time basis or intermittently for reasons other than his or her incapacity from that war-caused injury or war-caused disease, or both; and
 - (b) where a veteran, not being a veteran who has attained the age of 65 years, who has not been engaged in remunerative work satisfies the Commission that he or she has been genuinely seeking to engage in remunerative work, that he or she would, but for that incapacity, be continuing so to seek to engage in remunerative work and that that incapacity is the substantial cause of his or her inability to obtain remunerative work in which to engage, the veteran shall be treated as having been prevented, by reason of that incapacity, from continuing to undertake remunerative work that the veteran was undertaking.
- (3A) This section applies to a veteran if:
 - (a) the veteran has made a claim under section 14 for a pension, or an application under section 15 for an increase in the rate of the pension that he or she is receiving; and
 - (b) the veteran had turned 65 before the claim or application was made; and
 - (c) paragraphs (1)(a) and (1)(b) (as affected by subsection (2)) apply to the veteran; and
 - (d) the veteran is, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from continuing to undertake the remunerative work (last paid work) that the veteran was last undertaking before he or she made the claim or application; and
 - (e) because the veteran is so prevented from undertaking his or her last paid work, the veteran is suffering a loss of salary or wages, or of earnings on his or her own account, that he or she would not be suffering if he or she were free from that incapacity; and

- (f) the veteran was undertaking his or her last paid work after the veteran had turned 65; and
 - (g) when the veteran stopped undertaking his or her last paid work, the veteran:
 - (i) if he or she was then working as an employee of another person—had been working for that person, or for that person and any predecessor or predecessors of that person; or
 - (ii) if he or she was then working on his or her own account in any profession, trade, employment, vocation or calling—had been so working in that profession, trade, employment, vocation or calling;
- for a continuous period of at least 10 years that began before the veteran turned 65; and
- (h) section 24 or 25 does not apply to the veteran.

(3B) ...

13 The term "remunerative work" is defined in s 5Q of the Act to include "any remunerative activity".

THE TRIBUNAL'S DECISION

14 The Tribunal considered the legislation and the submissions made to it by the parties.

15 It concluded that Mr Whitehouse was not eligible to receive the pension at the intermediate rate because he failed to satisfy the criterion prescribed by s 23(3A)(d) of the Act. At [28] it rejected his argument that the "last paid" remunerative work for the purposes of paragraph (d) was his full-time work:

This Tribunal does not accept the contention made on behalf of the applicant that in this case "the remunerative work" (last paid work) undertaken by Mr Whitehouse before lodging this claim would relate back to his work as a full-time solicitor which ceased in June 2012, some 19 months before his claim for an increase in pension was made.

16 It summarised its conclusions at [30] as follows:

The Tribunal determines that Mr Whitehouse does not satisfy s 23(3A)(d) because the remunerative work (last paid work) that he was last undertaking before he made his claim was as a solicitor, or part-time solicitor. He is not prevented from undertaking that work and it continues. As Hill J said in *Repatriation Commission v Haskard* (2002) 126 FCR; [2002] FCA 1493, (at paragraph 31):

"... Either the veteran is or the veteran is not prevented from continuing to undertake the last paid work he undertook. If that last paid work was, as here acting as a property valuer on his own account, the question to be asked is whether that last paid work has ceased or it has continued. On the facts here it has not ceased but continued. All that has happened is that the quantity of the work has declined but that does not mean that the work itself has ceased."

17 The implications of this conclusion were then set out at [32]-[34] of the Tribunal's reasons:

32. Because the Tribunal has determined that the last paid work is Mr Whitehouse's work as a solicitor, he does not satisfy the provisions of s 23(3A)(e). Mr Whitehouse is not suffering a loss of salary or wages or earnings because the loss is contingent on him being prevented from continuing to undertake the last paid work.
33. The applicant concedes that if the Tribunal determines that Mr Whitehouse's last paid work was his part-time work, then he cannot satisfy subsection s 23(3A)(g) because he has not stopped and nor is he prevented from undertaking his last paid work.
34. Because the subparagraphs within s 24(3A) are conjunctive, requiring that each must be satisfied for a veteran aged over 65 years to qualify for the intermediate rate of pension, Mr Whitehouse's application for an increase in pension must fail. The Tribunal accordingly affirms the decision under review.

It is apparent that the reference in [34] to "s 24(3A)" is a typographical error and that the Tribunal intended to refer to "s 23(3A)".

THE SUBMISSIONS OF THE PARTIES

18 It was common ground before the Tribunal that Mr Whitehouse satisfied the requirements of paragraphs (a), (b), (c), (f) and (h) of subsection 23(3A). The principal area of dispute related to the construction of paragraph (d) and there were consequential issues arising in relation to paragraphs (e) and (g).

19 Mr Whitehouse submitted that, in determining the meaning of "remunerative work" for the purposes of s 23(3A)(d), a distinction must be drawn between full-time and part-time work. At [15]-[16] of his written submissions he contended that:

15. The Learned Tribunal member's decision was based on her being of the view that the Applicant's "remunerative work" ("last paid work") which he was last undertaking before he made the claim or application was work as a solicitor which was continuing and he was not therefore prevented from undertaking it within the meaning of Section 23. That is, no account was taken of the transition of the Applicant from being a full-time solicitor to a part-time one solely caused by a war-caused disability contemplated by Section 23. Put another way, the Learned Member did not consider that this transition was the necessary "discontinuance" required by paragraph 23(3A)(d) or "stoppage" required by paragraph 23(3A)(g).
16. It appears from the decision of the Learned Tribunal member that she considered that the "Connell interpretation" of "remunerative work" applies to paragraph 23(1)(c) but does not extend to paragraph 23(3A)(d).

The "Connell interpretation" is a reference to the Full Court's decision in *Repatriation Commission v Connell* (2011) 197 FCR 228; [2011] FCAFC 116 that full-time and part-time work may constitute different remunerative work for the purposes of s 23(1)(c): at 233 [28] (Marshall, Downes and Bromberg JJ).

20 Mr Whitehouse further contended that the relevant remunerative work, which he was last undertaking before making his application for an intermediate-rate pension, was as a solicitor working full-time as a partner of the firm. His war-caused incapacity prevented him from continuing to undertake such work and, accordingly, so he submitted, he satisfied the requirements of paragraph (d).

21 Mr Whitehouse supported these contentions by arguing that, if the paragraph were to be interpreted in the manner adopted by the Tribunal, it would give rise to an "absurd" result. That result would be that an application for an increase of pension to the intermediate rate would be denied unless the application was made at the point in time at which the veteran was forced to cease full-time work and before he had taken up part-time work. What was critical, he submitted, was the date on which he had ceased to be able to carry out full-time work because of his war-caused incapacity (which he called the "qualifying event") and not the date on which he made his application.

22 Mr Whitehouse conceded that, if he did not satisfy the requirements of s 23(3A)(d), he could not satisfy paragraph (g) of that subsection.

23 The Commission submitted that there was no warrant for departing from the plain words of paragraph (d). It was contended that the paragraph was not designed to facilitate a transition from full-time work, through part-time work, to retirement. Rather it required a determination of what was the veteran's last paid work at the time at which he made his claim or application for an intermediate rate pension. The Commission argued that Mr Whitehouse's last paid work before making his application was as a part-time consultant solicitor.

24 The Commission further contended, at [28] of its written submissions, that the Tribunal's reasons disclosed an implicit acknowledgement that full-time and part-time work can constitute different remunerative work and "[t]o the extent that such a distinction exists, the [Tribunal] found that Mr Whitehouse's last remunerative work was part-time."

25 The Commission placed reliance on the Second Reading Speech of the Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Bill 1994 (Cth), which was delivered on 9 June 1994 and which is recorded from p 1806 of the Parliamentary Debates of the House of Representatives. The Minister with the carriage of the Bill explained the purpose of the amendments to ss 23 and 24 of the Act at p 1809:

The second initiative relates to changes to the eligibility criteria for special and intermediate rate pensions. The former being known in the past as the TPI, or totally and permanently incapacitated, pension. The criteria for these higher rates of disability pension were changed in 1985 when it became clear that the outmoded terminology of the old Repatriation Act was

enabling these pensions to be paid to veterans who had completed a full working life, after retiring on superannuation and other retirement benefits. This was never intended. The original intention of these higher levels of pension was to compensate those severely disabled veterans who could not work to support their families on their return from service. It was to be in only very rare cases that any veteran beyond the normal retirement age would be eligible for such rates of pension.

Subject to certain exceptions and to protection of existing special and intermediate pensions, the changes being made by this bill reinforce that intention. They will mean that these pensions will not normally be granted to veterans who are over 65. An exception to this rule will apply if the veteran was engaged in remunerative work after the age of 65 and that work was in the same business or employment in which the veteran had been working for 10 continuous years. This would include, for example, many in the farming community.

(Emphasis added.)

CONSIDERATION

26 Section 23(3A)(d) falls to be construed having regard to its text, context and the legislative intention. The relevant principles were summarised by French CJ and Hayne J in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388-389; [2012] HCA 56 at [23]-[24]. Their Honours there said:

23 It is as well to begin consideration of this issue by re-stating some basic principles. It is convenient to do that by reference to the reasons of the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:

"This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the test of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

24 The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, the "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute" (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision "by reference to the language of the instrument viewed as a whole", and "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is construed".

(Citations omitted.)

27 Their Honours then turned their attention to the manner in which a Court should approach determination of the purpose of particular statutory provisions. That purpose was to be discerned from the text, structure and context of the legislation through application of the processes of statutory construction and not from the subjective intention of the legislators. They concluded (at 390 [25]) that: "The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention."

28 Resort to secondary material such as second reading speeches or explanatory memoranda cannot displace the ordinary and natural meaning of the statutory text: see *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 517-518 (Mason CJ, Wilson and Dawson JJ). See also *Combet v The Commonwealth* (2005) 224 CLR 494 at 567; [2005] HCA 61 at [135] (Gummow, Hayne, Callinan and Heydon JJ); *Nominal Defendant v GLG Australia Pty Limited* (2006) 228 CLR 529 at 538, 555; [2006] HCA 11 at [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ), [82]-[84] (Kirby J); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47; [2009] HCA 41 at [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265; [2010] HCA 23 at [32]-[33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 598; [2011] HCA 10 at [61] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519; [2012] HCA 55 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

29 It may be permissible, however, to have regard to a second reading speech to "demonstrate that a purpose of the Act was to narrow the law as laid down in [previous] cases": see *Nominal Defendant* at 538 [22], citing *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 592-593, 598; [2005] HCA 26 at [80]-[81], [101] (Gummow, Hayne and Heydon JJ).

30 The starting point must, therefore, be the text of s 23(3A)(d).

31 The ordinary and natural meaning of the language employed in s 23(3A)(d) was considered by a Full Court which was called upon to construe the equivalent paragraph in s 24.

32 In *Grant v Repatriation Commission* (1999) 57 ALD 1; [1999] FCA 1629 the Full Court (Merkel, Goldberg and Weinberg JJ) considered the construction of s 24(2A)(d), which is in the same terms as s 23(3A)(d). At 4-5 [8]-[12] the Court held that:

In order for a decision-maker to be satisfied that the criterion in s 24(2A)(d) has been met the decision-maker must determine:

- the "remunerative work" that the veteran was last undertaking before he or she made the claim or application;
- whether the veteran is, at any time during the assessment period, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from continuing to undertake that remunerative work.

Determination of the "remunerative work" referred to in s 24(2A)(d) requires the characterisation of the specific remunerative activity or activities that the veteran was last undertaking before making the claim or application rather than the capacity in which that work was undertaken. The particular capacity in which the work was undertaken is dealt with as a separate criterion in s 24(2A)(g). Thus, whether or not the work was undertaken as an employee or as a self-employed person is irrelevant to the characterisation to be given to that work under s 24(2A)(d).

...

Section 24(2A)(d) can be contrasted with s 24(1)(c) which provides for a pension at the special rate for veterans under the age of 65 who are prevented by war-caused injury or disease from undertaking "remunerative work that the veteran was undertaking"; a term which has been construed as referring to the type of work that the veteran previously undertook: see *Banovich v Repatriation Commission* (1986) 69 ALR 395 at 401; 11 ALN N142. Although by focusing upon the last paid work s 24(2A)(d) may be more restrictive than s 24(1)(c), which focuses upon the remunerative work of the type the veteran previously undertook, neither subsection is concerned with the capacity in which the work is undertaken.

Having identified the last paid work for the purposes of s 24(2A)(d) the decision-maker is then required to determine whether at any time during the assessment period because of incapacity from war caused injury or disease or both, alone, the veteran was prevented from continuing to undertake that remunerative work. Thus, the reason why the veteran may have ceased to undertake the past paid work prior to the date of the claim is relevant to, but not determinative of, the inquiry required by s 24(2A)(d).

A veteran who has satisfied the requirements of s 24(2A)(d) must also satisfy the criterion in s 24(2A)(e) that, because the veteran was so prevented from undertaking his or her last paid work, the veteran is suffering a loss of salary or wages, or of earnings on his or her account, that he or she would not be suffering if he or she were free from the incapacity.

(Emphasis added.)

The references to "capacity in which the work was undertaken" in the Full Court's reasons are references to the legal employment status of the veteran at relevant times, namely, whether he or she was an employee or working on his or her own account. That status fell to be assessed for the purposes of paragraph (g) of subsection 24(2A). The "assessment period", to which the Court referred, is the period starting on the day on which a claim or application is received at an office of the Department and ending on the day on which it is determined: see s 19(9).

33 A similar analysis may be applied to s 23(3A)(d) and a similar contrast drawn with s 23(1)(c). Sections 23 and 24 form part of the same statutory scheme. There is no textual or contextual basis for construing s 23(3A)(d) any differently from the construction placed on s 24(2A)(d) by the Full Court.

34 The distinction drawn between veterans under and over the age of 65 at the date of application is significant. This was the normal retiring age for workers at the time at which the scheme was enacted. So much is clear from the passages from the Second Reading Speech quoted above at [25]. The distinction was observed by the Full Court in *Connell* at 234 [33]. It was also remarked on by Hill J in *Repatriation Commission v Haskard* (2002) 126 FCR 1 at 10; [2002] FCA 1493 at [28]-[29]. His Honour said:

In s 23 capacity is dealt with in s 23[(1)](b), as supplemented by s 23(2). In the case of the Intermediate Rate, the veteran's capacity to work must be such as not to permit the veteran to work other than intermittently or on a part-time basis.

When one comes to look at the Intermediate Rate pension as applicable to someone who had turned 65, having still been in the last paid work when this happened, it can be seen that the veteran may still be capable of undertaking remunerative work on a part-time basis or intermittently, and in fact be undertaking work, for example, of less than twenty hours per week and still be entitled to the pension. However, that fact itself has nothing to do with the question whether the veteran has been prevented, by virtue of the war-caused injury or disease incapacity from continuing to undertake the particular remunerative work that he was last undertaking.

In these passages the word "capacity" or its variants is used in a different sense from that adopted by the Full Court in *Grant*. It is used to refer to the veteran's "ability" to work as a result of war-caused injury or disease. The qualifying criteria for a veteran who is over 65 at the time at which a claim is made are more restrictive than those which apply to a claimant who is under 65 because the older claimant has passed the normal retirement age. People over 65 were not normally to be compensated for incapacity to work because of war-caused injury or disease.

35 Had Mr Whitehouse been under 65 when he made his application for an intermediate pension, s 23(1)(c) would have applied. He could have been successful on the basis that he was "prevented from continuing to undertake remunerative work that [he] was undertaking ..." in mid-June 2012. The temporal immediacy prescribed by s 23(3A)(d) ("the remunerative work (last paid work) that the veteran was last undertaking before he or she made the claim ...") would not have operated as an impediment. Section 23(1)(c) would have allowed Mr Whitehouse's full-time work as a partner in the firm up to June 2012 to be brought into account because he would have been prevented, by his disabilities, from working full-time in that role prior to the designated normal retirement age. Further, so long as his subsequent part-time work as a consultant solicitor constituted different "remunerative work" to his full-time work as a partner, it would be no impediment that he was undertaking that part-time work at the time of his application: *Connell* at 234 [33].

36 It may be accepted, as Mr Whitehouse contends, that his prior full-time work as a partner is remunerative work that is capable of being distinguished from his later remunerative work as a part-time consultant solicitor: cf *Connell* at 233 [28]; see also *Carter v Repatriation Commission* (2001) 113 FCR 314 at 319; [2001] FCA 992 at [22] (*Branson J*); *Haskard* at 11 [32] and 13 [38] (*Hill J*).

37 Nevertheless, it is also apparent that the Tribunal implicitly accepted this distinction. At [28] it rejected the submission that Mr Whitehouse's "work as a full-time solicitor" was his last paid work. At [30] it found that his last paid work was his work "as a solicitor, or part-time solicitor". At [32] it referred to its finding that the "last paid work is Mr Whitehouse's work as a solicitor". The Tribunal's repeated use of the word "solicitor", when read with the last line of the extract from Haskard which it quoted at [30], may be thought to give rise to some uncertainty as to whether it distinguished between Mr Whitehouse's full-time and part-time work. However, in my opinion, when the finding at [30] is read with [28] and [33] and without "an eye keenly attuned to the perception of error" (see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh, Gummow JJ)), it is tolerably clear that the Tribunal did find that Mr Whitehouse's last paid work as a solicitor was remunerative work that was distinguishable from his prior full-time work.

38 The fact that Mr Whitehouse's full-time and part-time work may constitute different "remunerative work" for the purpose of s 23(3A)(d) does not provide an answer to the question posed in this proceeding. What s 23(3A)(d) requires is the identification of the particular remunerative work which constituted Mr Whitehouse's "last paid work" at the time that he made his application for an increased pension rate and then consideration of whether he was prevented from continuing to undertake that work.

39 On the facts found by the Tribunal, Mr Whitehouse ceased to be engaged in full-time remunerative work in about June 2012. At that time he had already turned 65. He then commenced working between four and five hours per day as a consultant solicitor in the same firm. At the time at which he made his application for an intermediate rate of pension, over a year later, he was continuing to perform this work as a part-time consultant solicitor. This was the "remunerative work" which he was last undertaking and for which he was last paid before he made the application. He continued to perform this particular remunerative work after he made his application and was so engaged at the time his application was heard and determined by the Tribunal, that is, during the whole of the "assessment period". At no time during that period was Mr Whitehouse prevented, by his war-caused disabilities, from continuing to undertake his last paid remunerative work as a part-time consultant solicitor.

40 The characterisation of Mr Whitehouse's "specific remunerative activity" as that of a practising solicitor who worked part time is not affected by the answer to the separate question in s 23(3A)(g) of whether he was an employee or practising on his own account and whether he had been doing so for a continuous period of at least 10 years that began before the veteran turned 65: cf *Grant* at 4 [9]; *Ralph v Repatriation Commission* (2016) 69 AAR 462 at 472; [2016] FCAFC 89 at [33] (Collier, Logan and McKerracher JJ).

41 The question of law posed by Mr Whitehouse should be answered: "No".

42 This finding means that Mr Whitehouse also failed to meet the criteria prescribed by paragraphs (e) and (g) of s 23(3A).

43 If the construction of s 23(3A)(d) which I consider to be correct is thought to be, in some way, "absurd" or anomalous the solution lies in legislative amendment: cf Ralph at 476-477 [56].

DISPOSITION

44 The application must be dismissed with costs.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.

Associate:

Dated: 15 September 2017

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