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Administrative Appeals Tribunal decisions

Invalid pension: Permanent incapacity for work

?ANKE and DIRECTOR-GENERAI)F SOCIAL SERVICES (No. V81/30)

)ecided: 23 July 1981 by J. D. Davies J, A ٧. Hall and M. Glick.

)n 24 September 1979, Willy Panke injured' ıis back while working as a foreman elec- :roplater at a factory in Ballarat. Panke was then aged 57. He claimed workers' compensation and, in July 1980, that claim was set- :led with a lump-sum payment of $25 000.

On 23 July 1980, Panke applied to the DSS for an invalid pension. The qualifica- tions for this pension are set out in the following provisions of the *Social Services Act*:

> 23. For the purposes of this Division, a person shall be deemed to be permanently incapacitated for work if the degree of his permanent incapacity for work is not less than eighty-five per centum.
>
> 24. (1) Subject to this Act, a person above the age of sixteen years who is not receiving an age pension and—
>
> (a) is permanently incapacitated for work or is permanently blind; and
>
> (b) is residing in, and is physically present in, Australia on the date on which he lodges his claim for a pension,
>
> shall be qualified to receive an invalid pension.

Panke's claim was rejected and he appealed to an SSAT which recommended that the appeal be disallowed. On 17 February 1981, a delegate of the Director-General affirmed the original decision rejecting Panke's claim.

Panke then applied to the AAT for review of that decision.

The evidence

Evidence of Panke's injury and continuing disability was given by Panke, a Ballarat surgeon (Drury) who had treated Panke since his accident and an orthopædic surgeon (Critchley) who had examined Panke once on behalf of the DSS, in November 1980.

Panke had been lifting a heavy weight at work when he suffered a severe pain in his back. He had found he could not bend, could hardly walk and was in constant pain. After treatment, he still suffered pain, found that he could not work for more than an hour at a time and 'was prone to collapse when he moved'. He could drive his car on short trips but it was very difficult to drive for more than half an hour without stopping to rest.

Drury had found very advanced degenerative changes in Panke's spine and an unusual condition caused by lack of calcium in the bone structure—osteoporosis. Drury had prescribed rest, physiotherapy and medication to reduce pain. Recovery was slow and a spinal brace had been fitted.

In December 1979, Drury had given an opinion that, because of his worn lower back he could not do any kind of strenuous work but he might recover sufficiently to do a light job. By June 1980 Drury had concluded that Panke was permanently unfit for work: any sort of regular work would almost certainly disable him again.

Critchley agreed that Panke had 'widespread degenerative changes in the lumbar spine . . . which I think precludes him from an occupation which requires repeated bending or lifting'. But Critchley said that Panke was not 'by any means 85% permanently incapacitated for work'. Before the AAT, Critchley said that he would put Panke's incapacity at about 60–65%, and that he could undertake any job that did not require repeated bending, lifting or standing for a long time. When asked if he had considered the probability of Panke finding a job, Critchley answered:

> I did not look upon it as part of my job to work out whether it was possible, I was trying to work it out on a purely orthopædic basis. I would be very prepared to state that I think he would have difficulty getting a job.

(Reasons for Decision, para. 35.)

An officer of the Commonwealth Employment Service, Mehegan, gave evidence to the AAT that Panke had been assessed 'as having the possibility of working in an extremely light, non-labouring capacity'. (The CES said Panke had no capacity for clerical work.) Mehegan said that 'a 59-year-old with a bad back . . . would be extremely unattractive to a poten-

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tial employer'. 'An employer would be very unlikely to employ Panke if he knew the facts'. At present there was no suitable work available for Panke in Ballarat and, even in times of full employment, or if Panke moved from Ballarat, his chances of finding work would improve only marginally. According to the AAT,

> Overall, Mr Mehegan considered Mr Panke to be virtually unemployable on the labour market at Ballarat and he could not see that position changing.

(Reasons for Decision, para. 27.)

'Permanent incapacity for work'

Counsel for the DSS argued that permanent incapacity for work 'was a fixed objective concept' and could not depend 'upon impermanent factors such as the present state of the economy or of the labour market reasonably accessible to an applicant'. It was necessary to consider the type of jobs which exist in the community and which would be suitable for the applicant; 'but whether such work can in fact be obtained by the person was irrelevant', except in a claim for unemployment benefit: Reasons for Decision, para. 52.

The AAT rejected this argument. But there was a difference in emphasis between the members of the Tribunal. Two sets of Reasons for Decision were delivered: one by Davies J (the President of the AAT) and another by Hall (a Senior Member) and Glick (a Member with medical qualifications).

Hall and Glick observed that decisions on workers' compensation claims (where the term 'incapacity for work' had been considered) provided considerable assistance, although invalid pension did not stand 'on exactly the same footing as workers' compensation': Reasons for Decision, para. 49.

They said that a permanent incapacity must be contrasted with a 'temporary incapacity' (as used in s.108, dealing with sickness benefit) and must refer to an incapacity which is likely to last indefinitely: para. 50.

Basic to the idea of permanent incapacity was the loss of the capacity to earn a wage: para. 53. But one must distinguish (as workers' compensation cases did) 'between, one the one hand, a person's capacity for work and, on the other, his ability in fact to earn a wage, by exploiting that capacity in the labour market'. That distinction was reinforced by the provision, in s.107, of unemployment benefits for people with capacity for paid work who are unable to find that work: para. 54.

In the following paragraph these two members of the AAT compared invalid pension with unemployment benefit and identified three different situations produced by a person's disability:

> 61. The operation of s.23 of the Act needs to be considered, in our opinion, against the backdrop of the other relevant provisions of the Act particularly those relating to the qualifications for unemployment benefits. Before a person can so qualify he must satisfy the Director-General (*inter alia*) that throughout the period of his unemployment he was capable of undertaking and willing to undertake paid work that, in the opinion of the Director-General, was suitable to be undertaken by him. A disabled person who, regardless of fluctuations in the labour market, lacked any capacity for suitable paid work could not qualify for unemployment benefit. No doubt such a person would be able to establish that he was 'permanently incapacitated for work' within the meaning of s.24 of the Act. Where, by contrast, a residual capacity for suitable paid work exists, the question whether such a person may be regarded as permanently incapacitated for work within the meaning of s.24 depends ultimately upon an assessment of the degree of incapacity of the individual concerned. But where the capacity for earning has gone 'except for the chance of obtaining special employment of an unusual kind' (see *Wicks* v *Union Steamship Co. of New Zealand Ltd—supra* at 338), it seems improbable that a person so disabled would fail to meet the requirements of s.23 and be regarded as otherwise than permanently incapacitated for work.

Accordingly, the assessment of the *degree* of incapacity was critical. How was this to be done?

> 66. The assessment of the degree of incapacity for work in fact involves two quite distinct steps—firstly, an evaluation in purely medical terms of the person's physical or mental impairment and secondly, the ascertainment of the extent to which that physical or mental impairment affects the person's ability to engage in paid work (see *Attorney's Text Book of Medicine*, 3rd Edn 1979, by R. Gray, Vol. 4, Chapter 181 including Preface). The first question is entirely within the competence of a suitably qualified medical practitioner. The second question, depending on the nature and extent of the physical impairment and the experience of the medical practitioner may not be. Whilst medical practitioners frequently turn their minds to such issues in workers' compensation, motor vehicle and industrial accident claims, it may be a question which, in some cases, is more appropriate for consideration by an administrator with a wider knowledge of the type of work which a person so disabled may be capable of performing.

A medical practitioner who assesses the degree of permanent incapacity for work must have some knowledge of the general labour market—what jobs 'exist as jobs':

> Furthermore, those jobs, if they exist, exist in an economic environment. Whilst it may not be relevant to enquire whether a particular job is available for the disabled person, some understanding of the types of paid work suitable to be done by a person carrying the particular physical impairments of that person must be required.
>
> 68. In our view, it is not enough for the purposes of s.23 of the Act, to have regard in any abstract sense, simply to 'jobs that exist as jobs' in the community. The provisions of the Act with respect to unemployment benefits [see in particular s.107(1)(c) above] indicate that when the Act refers to capacity for work, it is concerned with the capacity to undertake paid work that is suitable to be undertaken by a person. It is only after a fair assessment of the extent of the person's physical or mental impairment and the impact which that impairment is likely to have upon his capacity to undertake suitable paid work that, in our view, a proper assessment of the degree of incapacity can be made.
>
> 69. The assessment of what work is suitable to be undertaken by a person would appear to require consideration of matters such as the nature and extent of his disabilities, his capacity to sustain his work effort throughout a normal working day or week, his age, his previous work experience and the types of paid work available in the community which a person with those characteristics may reasonably be expected to be able to perform.

(Reasons for Decision, paras 67–69.)

Turning to the facts of Panke's case, the two members said they preferred the assessment of Panke's surgeon, Drury, to that of the surgeon who examined for the DSS, Critchley, and that they found him to be permanently incapacitated for full-time work of any kind: they thought he was not capable of undertaking 'as paid work within a normal working week any of the types of light work' suggested by the CES officer, Mehegan; and his residual capacity for work was less than 15%

Davies J agreed 'with the substance of the reasons' of the other two members of the AAT and with their conclusion. But he expressed 'additional views upon the crux of the issue'.

He said the term 'permanent incapacity for work' should be construed having regard to the scope and object of the *Social Services Act*. The Act was 'welfare legislation designed to supplement the income of . . . persons in need'; it was, in ss.23 and 24, concerned 'with the economic effects of a disabling medical condition': Reasons for Decision, p.2. He referred to two workers' compensation cases (*Ball* v *William Hunt* [1912] AC 496, at 499–500, and *Wicks* v *Union Steamship* (1933) 50 CLR 328, at 338) and said 'the term "incapacity for work" in the *Social Services Act* denotes incapacity to engage in remunerative employment, that is to say, a lack of capacity for earning'; and went on to observe that the ability to earn 'involves an ability to attract an employer who is prepared to engage and remunerate the disabled person' (a point made by Lord Atkinson in *Ball* v *William Hunt* at 505, and by Ellicott J in a recent Federal Court decision *Bowman* v *Repatriation Commission*, 12 May 1981, unreported): Reasons for Decision, pp.2–4.

Having observed that the orthopædic surgeon (Critchley) consulted by the DSS had not seriously considered whether Panke could get a light job, Davies J said that Critchley had

> approached his assessment of the applicant's incapacity upon a basis which does not determine the applicant's 'incapacity for work' for the purposes of the *Social Services Act*. That test looks to capacity to engage in and therefore to obtain remunerative employment.

(Reasons for Decision, p.5.)

Davies J concluded that it was unlikely that Panke could obtain paid work. It was unlikely that a sympathetic employer could be found to pay him for the limited work of which he was physically capable. Potential employers would be discouraged by his back condition which made him a bad risk for sick leave and workers' compensation. Panke was, in the view of Davies J, 'virtually unemployable' that is, he had 'little prospect of earning income from his work'; and he was therefore permanently incapacitated for work to the extent of more than 85%.

Davies J pointed out that this case did not raise some of the complex questions which other invalid pension claims could involve:

> For the purposes of this review it is not necessary to consider the position of a person

who, having been temporarily or partially incapacitated, is unable to re-enter the workforce because of economic conditions, or that a person who, having been temporarily incapcitated, is unable to obtain remunerative employment because of his advanced years. The applicant is permanently incapacitated and it is because of his medical condition that he is unable to obtain employment.

Because of his medical condition, it is not feasible that the applicant leave Ballarat in search of employment. Therefore, it is not necessary that I discuss what might be the extent of the work market available to a reasonably mobile person.

(Reasons for Decision, p.6.)

Comment

This application for review was treated as a test-case by the DSS and the applicant: senior and junior counsel appeared for each side (the applicant's counsel was briefed with legal aid from the Australian Legal Aid Office: see *Social Security Reporter*, no. 1, p. 8).

However, the AAT was not able, in its reasons for decision, to resolve many of the difficult areas of disagreement in the assessment of eligibility for invalid pensions. This was largely because Panke's disability was found to be substantial; accordingly, two members of the Tribunal said that he was incapacitated for *any* type of work. They did not have to cope with the problem of a person whose disability left him capable of performing light work or clerical work but whose prospects of obtaining that work were very small, because of his age or educational qualifications or family commitments or because the work was located away from his place of residence.

However, there are strong suggestions in the reasons (and especially in those of Davies J) that the AAT will eventually adopt an approach to the assessment of 'incapacity for work' similar to that outlined in the DSS guidelines of 7 May 1981 (see *Social Security Reporter*, no. 1, pp. 7–8). All members of the AAT emphasized that incapacity involved *both* physical (or mental) impairment *and* the personal characteristics of the applicant, while Davies J stressed the relevance of this applicant's chances of actualy finding a job.

As there are many invalid pension appeals pending before the Tribunal, we can expect future decisions to explore the other controversial questions.

Jurisdiction: review of earlier decision

GEE and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N80/108)

Decided: 27 March 1981 by J. D. Davies J, M. J. Cusack and I. Prowse.

This was a decision on a preliminary challenge to the jurisdiction of the AAT. The challenge raised some technical questions about the sequence of events necessary to establish jurisdiction for the AAT: and some general questions about which decision the AAT is meant to review in its social security jurisdiction.

Background

Patricia Gee was receiving supporting parent's benefit.

(1) In February 1979 the DSS decided that she had failed to notify the Department of an increase in her private income; that she had been overpaid $1630; and that the overpayment should be recovered by deducting $53 per fortnight from future payments of her benefit. (The power to make these deductions is set out in s.140(2)—reproduced in *Thomson* in this issue of the *Reporter*.)

(2) In June 1979, Gee appealed against this decision to an SSAT.

(3) In July 1979, the DSS varied the February 1979 decision: the 'overpayment' was fixed at $1310 and the deductions from Gee's benefit were fixed at $16 per fortnight.

(4) In September 1979 Gee informed the DSS that she had commenced full-time employment and asked the Department to cancel her benefit, which the DSS did.

[Accordingly, the dispute between Gee and the DSS now had several components: (a) had there been an overpayment? (b) should deductions have been made under s.140(2) up to September 1979? (c) was the balance of the overpayment recoverable by court action under s.140(1) of the Act?]

(5) In the same month, September 1979, the SSAT recommended that Gee's appeal be upheld, because she 'had notified the Department of her increased earnings in January 1976'.

(6) On 24 March 1980, a delegate of the Director-General rejected that recommendation and affirmed the decision that there was an overpayment of $1310 and that the outstanding balance should be recovered by court action under s.140(1).

[**Note:** at this stage there was no right to appeal to the AAT, as the DSS decision was affirmed before 1 April 1980.]

(7) Later in 1980, following a request from a member of Parliament, the DSS reviewed the matter. On 1 September 1980 a delegate of the Director-General decided to reduce the overpayment 'to $1210 and to seek recovery of this amount from Mrs Gee pursuant to section 140(1)'.

(8) Gee then applied to the AAT for review of that decision.

The argument on jurisdiction

The jurisdiction of the AAT required the following sequence of events:

(1) Original decision of DSS.

(2) Review by an SSAT.

(3) Decisions of the Director-General (on or after 1 April 1980), affirming, varying or annulling original DSS decision.

The DSS argued that there could be no jurisdiction here because the decision of 24 March 1980, which followed an SSAT review and affirmed an original DSS decision, was made before 1 April 1980; and the decision of 1 September 1980 was a review of the decision of 24 March 1980, not of the original DSS decision (of February 1979) and had not followed an SSAT review of the decision of 24 March 1980.

The AAT's decision on jurisdiction

This ingenious argument was rejected by the AAT. The Tribunal said:

(a) that the decision which affected Gee's rights was the decision of February 1979 as varied in July 1979;

(b) that this decision 'remained operative', did not 'cease to have effect' and was not 'replaced by' the decision of 24 March 1980 affirming it;

(c) that the decision of 1 September 1980 'was a decision varying the operative decision' of February/July 1979; and

(d) that the decision of February/July 1979 had been reviewed by an SSAT.

(Reasons for Decision, pp.11–14.)

Accordingly, the sequence of events necessary to show AAT jurisdiction had been established.

The AAT went on to observe that the decision which the Tribunal reviewed in its social security jurisdiction was *not* the Director-General's decision affirming, varying or annulling an original DSS decision but the original DSS decision:

> The Administrative Appeals Tribunal is not involved in an exercise of reviewing on the merits the Director-General's affirmation or variation of that decision. The regulations may give that particular form to the review, but the essence of the review in relation to decisions made under the *Social Services Act* is the same as it is in other jurisdictions conferred upon the Administrative Appeals Tribunal, namely, whether the decision which has affected the rights of the applicant was the correct or preferable decision, not whether a decision which reconsidered such decision was the correct or preferable one.

(Reasons for Decision, p.18.)

One of the practical consequences of this approach was that the AAT could effectively exercise the power to suspend the operation of a decision appealed against (s.41, *AAT Act*)—the suspension would apply to the original, 'operative decision, not merely to the Director-General's review decision: Reasons for Decision, p.16.

Comment

If the DSS argument had been accepted by the AAT, its impact would have been confined to a fairly narrow group of cases—that is, where the Director-General's decision following the SSAT appeal was not, for some reason, appealable to the AAT: because, as in *Gee*, that decision was given before 1 April 1980 (see also the appeal described in (1980) 5 *LSB* 190–1); or because the time limit for appealing to the AAT against that decision had expired. In those cases, a subsequent review decision by the Director-General would not (if the DSS argument had been accepted) have provided the basis for an AAT appeal. But given this decision, a person *can* now use that subsequent review decision as the basis for an AAT appeal.

The argument put by the DSS was not only technical but also relatively narrow in its impact; it did *not* have the strange implications suggested for it in the *Administrative Law Service*, Bulletin No. 13 (June 1981), p.7.