when it was putting itself in the position of the Director-General.

However, there could be situations when the Director-General (or the AAT) was quite uncertain after examining all the available information.

> If the AAT finds itself in a state of uncertainty after considering all the available material, unable to decide a question of fact either way on the balance of probabilities, it will be necessary for it to analyse carefully the decision it is reviewing. If, for example, it is a decision whether or not to cancel a pension in the light of changed circumstances, then it has failed to achieve the statutory requirement of reaching a state of mind that the pension should be cancelled. If, on the other hand, it is a decision, to be made in the light of fresh evidence, whether or not the pension should ever have been granted in the first place, then it has failed to be satisfied that the person ever was permanently incapacitated for work.

(Judgment, p. 10)

The present case fell into the first categoery : if there had been uncertainty in the mind of the AAT, the question whether the pension should be cancelled should have been resolved in the applicant's favour. However, the AAT had experienced no indecision and had correctly dealt with this aspect of the review.

**Jenkinson J.** adopted a similar approach to the question of onus of proof but concluded that the Tribunal had made an error. Unless there was some 'special legislative direction', the AAT should not adopt any formal onus of proof. However, if the AAT found itself unpersuaded or uncertain that some circumstance existed, the uncertainty would be resolved by looking at the terms of the *Social Security Act*:

- Or did the Act require that the pension be cancelled unless she were found to be permanently incapacitated for work?
- Did the Act require the pension to be cancelled if the applicant was found not to be permanently incapacitated for work?

In the former case, lack of persuasion would preclude cancellation. In the latter case, it would result in cancellation.

Jenkinson J said that the question posed by the *Social Security Act* fell into the first of the two categories : cancellation depended on the Tribunal finding that McDonald was not permanently incapacitated for work. But the AAT had adopted a different approach, Jenkinson J said; it had, in effect, said that McDonald's pension should be cancelled unless it could be satisfied that she was permanently incapacitated. That was the wrong approach and it amounted to an error of law.

**Northrop J.** took a different view of the onus of proof question : A pension, he said, should only be paid for so long as the pensioner was qualified:

> If a change in circumstances occurs, it is unreal to suggest that the Director-General, or his delegate, has an onus of proof, whether evidentiary or not, to be satisfied before varying a pension entitlement. The ultimate question is whether the person is qualified to receive the pension and, if so, at what rate. These questions must be decided after a consideration of all the material before the Director-General, or his delegate, when the decisions are made.

(Judgment, pp. 11-12)

Similar principles, Northrop J. said, applied in proceedings before the AAT.

**'Permanent incapacity'**

Counsel for McDonald argued that the AAT had adopted the wrong definition of 'permanent' when assessing whether she had a permanent incapacity. The AAT had said that, in order to establish permanency, 'the decision-maker should be able to form on the evidence, a settled expectation' that the incapacity for work was likely to continue indefinitely. That, it was argued, stated the meaning of 'permanent' too strongly.

**Woodward J.** (whith whom **Northrop J.** agreed on this point) accepted this argument. He said that the *Social Security Act* drew a line between 'permanent' and 'temporary' incapacity for work. The Act obviously intended 'that all relevant forms of incapacity must fall on one side or the other of that line': Judgment, p. 12.

In determining the degree and duration of incapacity for work, Woodward J. said, 'factors such as physical and mental health, skills, training, qualifications and the state of the labour market will all be relevant' : Judgment, p. 13.

The contrast between temporary and permanent incapacity had to be based on an assessment of future prospects. A permanent incapacity was one which 'more likely than not . . . will persist in the foreseeable future' :

> This test involves two questions. The first is whether it is more likely than not that the disability will terminate (or fall below 85% in the sense referred to above) at some time in the future. Even if the answer to this question is 'Yes', I think it would be inaccurate in the context of employment to describe as 'temporary' a condition which was likely to last for a number of years. Hence the two elements of degree of likelihood of improvement and time-span for that improvement, should be weighed together in determining what is permanent and what is temporary. The greater the likelihood of substantial improvement and the earlier that it is likely to occur, the more accurate will be a 'temporary' label. The longer the period and the less probable the improvement, the more appropriate will be a finding of permanent incapacity.

(Judgment, p. 14)

In this case, the AAT said that the decision-maker should have some strong degree of satisfaction ('settled expectation') that the incapacity would continue indefinitely, and that anything else would render the incapacity temporary only. That was the wrong approach. In any borderline case it was not necessary to have a 'settled expectation' of permanency:

> a belief – even on a fine balance – that indefinite duration is more likely than foreseeable termination, will suffice.

(Judgment, p. 16)

As this case fell into the borderline area, the adoption by the AAT of this wrong approach could have affected its decision.

**Jenkinson J.**, in a very short passage, disagreed that the AAT had adopted the wrong approach to the question of what 'permanently' means in s.24.

**Formal decision**

The Federal Court set aside the decision of the AAT and remitted the matter to the Tribunal to be reheard and decided in the light of the Court's reasons for judgment.

# Background

## 'INCAPACITATED FOR WORK': WHAT HAPPENS WHEN THE WORK DRIES UP?

The decisions of the AAT in *Fliedner* (1983) 17 *SSR* 117 and *Fraser* (1983) 17 *SSR* 176 offer an interesting contrast in their assessment of 'incapacity for work' for the purposes of qualifying for invalid pension.

Both cases dealt with persons who, because of a combination of medical and non-medical factors, could be termed 'unemployable'. In both cases the applicant had applied for and been refused invalid pension. Each sought review by the AAT.

### FLIEDNER

Mr Fliedner was 51 years old. He suffered from a multiplicity of physical symptoms (including stomach problems and arthritis) and also from a psychiatric condition, namely a chronic anxiety state. He had left school at 12 and had worked as a farm labourer and shearer. He could not read or write. He had not worked since 1977.

#### Incapacity: arising from medical condition

It was clear from earlier decisions that the 'incapacity for work' referred to in s.24 of the *Social Security Act* must 'result from' a medical condition. The Tribunal quoted from *Sheeley* (1982) 9 *SSR* 86:

> . . . the 'permanent incapacity' must result from a medical disability using the term in the sense I have already described. In my view, it is not sufficient that the medical disability be a material factor in the incapacity, it must be of such significance that the incapacity can be said to arise or result from the medical condition. If it were not so, the term 'invalid pension' would not be appropriate.

Thus, the medical condition must result in an incapacity for work or, in other words, an inability to attract an employer (see *Panke* 1981) 2 *SSR* 9). The difficulty, said the AAT, was that expressed in *McGeary* (1983) 11 *SSR* 113, where the Tribunal had said:

> The problem in having regard to a persons's inability to attract an employer, however, is in differentiating between, on the one hand, difficulties which truly reflect an *incapacity* for work . . . and, on the other, difficulties which merely reflect an inability to exploit a capacity for work due to depressed job opportunities . . . or the lack of any genuine interest in obtaining paid employment.

#### The labour market: how relevant?

How far can this differentiation be taken? It was this point which the AAT pursued in *Fliedner*. The Tribunal examined unemployment statistics over the past 92 years. These demonstrated that 'normal' economic conditions involved an unemployment rate of between 4.5% and 11%: see Reasons, para. 31.

Further considerations applied to older people. In a report by the Bureau of Labour Market Research of the Department of Employment and Industrial Relations entitled 'Retired, Unemployed or at Risk : Changes in the Australian Labour Market for Older Workers', it was shown that the workforce participation rate of older people was significantly lower than those for younger people. Further, the duration of unemployment for older workers had increased more than for younger workers over the period studied, 1961 to 1981.

The Report suggested two sets of reasons for 'the trend to early retirement'. One set involved voluntary factors : superannuation, possibility of income from other sources, etc. The other set related to involuntary factors attributable to the effects of the economic recession. In particular there has been a rise in the number of 'discouraged workers'. This is explained in the Report:

> The argument is that older workers have been hit particularly hard by the economic recession both in terms of the rate of job loss and difficulties in regaining employment. Older workers who lose jobs have difficulty in competing with younger job seekers. Rather than search for jobs which they feel do not exist, many leave the workforce relying on pensions, superannuation benefits or private non-labour sources of income for financial support. Jobless older workers who continue to look for employment have very long periods of unemployment.

(Quoted in Reasons, para. 33)

The Tribunal then commented:

> Thus, it can be seen that the inability of an unskilled man of fifty to obtain employment, whatever the reason for that inability, should be considered as a manifestation of the continuing and normal state of the labour market, rather than as a merely temporary and abnormal phenomenon.

(Reasons, para. 25)

There was no question that Mr Fliedner needed to be supported under the *Social Security Act*. The question was under which head this would occur:

> An applicant for invalid pension must, in order to show that his incapacity for work results from his medical condition . . . Once such a result is established, the effect of other factors on his ability to obtain employment should not be overemphasised.

(Reasons, para. 37)

The indication is that older persons will, because of their age, be at a disadvantage in attracting an employer. This should not of itself result in the incapacity being described as not arising from a medical condition, but rather be the background against which the claim is assessed.

The Tribunal concluded that Mr Fliedner was entitled to an invalid pension.

### FRASER

Mr Fraser was 53 years old. He had been unemployed since 1979. He was described as suffering from slight mental retardation, asthma and arthritis. He had work as a messenger for a chemist and in the despatch department of a department store. He had also worked as an assistant in a canteen and in maintenance sections of a factory and hotel.

#### Qualifying for invalid pension: four steps

The Tribunal identified the four necessary steps in deciding whether a person is qualified to receive invalid pension.

The first was to evaluate his physical and mental impairment in purely medical terms to measure the extent that the impairment affected his ability to engage in paid work. Secondly, to ascertain the type of work suitable for him it was necessary to look to his age, previous work experience and the types of paid work availale to such a person with his attributes. Thirdly, one had to consider whether he is capable of attracting an employer to employ him. Finally, the incapacity must be permanent.

The AAT referred to the different reasons why a person may not be capable of attracting an employer. It might be due to an incapacity for work, an inability to exploit depressed job opportunities or a lack of genuine interest in obtaining paid employment. (See the passage from *McGeary*, cited in *Fliedner*, above.)

#### Incapacity must result from medical condition

Of Mr Fraser, the AAT said:

> . . . there can be little doubt that he is practically unemployable because of his age, his physical and mental condition (including his relatively low IQ) and the fact that he has been unemployed for the past four and a half years.

(Reasons, para. 21)

However, his physical or mental condition were not of such significance that his incapacity for work could be said to result from it. His physical or mental condition (alone?) did not disable him from doing the types of jobs which he did during the course of his working life: see Reasons, para. 23. Therefore, Fraser did not qualify for invalid pension.

In this regard the Tribunal in *Fraser* relied heavily on the requirement set out in *Sheely* (above) that the medical condition be of 'such significance' that the incapacity can be said to arise from it.

For the AAT in *Fraser*, the age of the applicant (and his resulting difficulty in obtaining employment) was not so much a basis for assessing incapacity as a basis for changing the Act to creat new benefits applicable to these 'unemployable' but not 'invalid' persons: see Reasons, para. 24.

### STAMBERG

Since the decisions in *Fliedner* and *Fraser* the AAT has decided *Stamberg* (see this issue of the *Reporter*). In that case the decision to refuse the invalid pension of a 57-year-old former clerk who suffered from arthritis was set aside.