

MATHLIN AND SECRETARY TO DSS

(No. W86/197)

Decided: 5 June 1987 by J.O.Ballard, J.G.Billings and N. Marinovich

Brian Mathlin was refused an invalid pension by the DSS and applied to the AAT for review of that decision.

Mr Mathlin suffered from a congenital foot abnormality, obesity and arthritis. He was restricted to sedentary work. He had worked in clerical jobs and in the hotel area, including work as a discjockey. He had applied for many jobs since leaving his last job in October 1985 but had failed to gain employment. The reason given for rejection was usually his age and disability.

Ability to do clerical work no bar to eligibility for invalid pension

Medical evidence suggested that the applicant could do clerical work, if he could get it. But other medical evidence stated that it was his medical disability which made the difference between him getting work and not getting work. He had difficulty travelling because of his legs which would, in one doctor's opinion, make it difficult for him to hold down a job as he would have problems in travelling to and from work.

The Tribunal concluded:

'Clearly it is the applicant's disability which prevents him from continuing to work as a barman in the hotel industry. There is

evidence that he is applying for clerical work and that in theory he could do this. But we accept Dr Anastas' evidence of the applicant's difficulty in getting to work and in holding down a job. He has had a knee injury since he last worked and the abnormality of his feet can only have been worsening...We are thus of the view that it is the applicant's medical disabilities that make the difference between his working and not working.'

(Reasons, paras. 9-10)

Formal decision

The Tribunal set aside the decision under review and decided that the applicant was entitled to the invalid pension.

GATSOPOULOS and SECRETARY TO DSS

(NO. N85/583)

Decided: 28 May 1987 by R.A. Hayes, M.S. McLelland and J.H. McClintock

The applicant applied to the AAT for review of a DSS decision to reject his claim for invalid pension.

The applicant was 36 years old. In 1983 he had been injured seriously at work. He suffered a fractured pelvis, severe lacerations and sprains to his lower back and knees. He had not worked since that accident. He has also suffered soreness since the accident in his back and knees as well as a range of emotional problems.

There was a conflict of medical

evidence as to whether the applicant was depressed. Also, one doctor thought that the applicant was capable of being rehabilitated. But the Commonwealth Rehabilitation Service had rejected him and the AAT found that his prospects of being rehabilitated were slim.

The AAT had difficulty in concluding that it was the applicant's medical condition that rendered him incapacitated for work.

'Rather, it is the circumstances in which he, as an individual, with his limited education, training, and opportunities, now finds himself. These include the circumstances of having lost his job in 1983 in what must have been a shocking and physically serious work accident. But the accident provides context, not explanation for his unemployment.'

(Reasons, p.6)

The Tribunal also commented that unless the applicant was rehabilitated he would soon become permanently incapacitated for work. 'His "illness conviction" will become ineradicable, and in the realm of illness.' (Reasons, p.6)

However, in the meantime the AAT recommended that priority be given to accommodating the applicant in a rehabilitation programme.

Formal Decision

The AAT affirmed the decision under review.

Jurisdiction: no decision

WIGLEY and SECRETARY TO DSS

(No. W87/104)

Decided: 12 October 1987 by R.D. Nicholson.

Terence Wigley was granted sickness benefit in 1983. While still on sickness benefit, he began working; but he did not tell the DSS of his employment. The DSS later accepted that this was not a deliberate deception on Wigley's part.

Wigley claimed that in about February 1986, shortly after the DSS had announced an 'amnesty' for people who had been overpaid, he telephoned the DSS 'amnesty hotline' and inquired whether he would be eligible for the amnesty. He claimed to have made a similar inquiry in April 1986. On each occasion, he later told the AAT, he was informed that he would not be eligible for the amnesty; and that he could be prosecuted. However, he did not reveal his identity to the DSS on either occasion.

Wigley then applied to the AAT for review of what he described as the refusal of the DSS to extend the amnesty to him.

The legislation

Section 45 of the *Social Security Act* provides that a person who has been overpaid is exempt from prosecution and from recovery action, if the overpayment was due to the person's failure to notify the DSS of a change in circumstances, and if the person 'voluntarily informed' the DSS of the overpayment between 12 February and 31 May 1986.

Section 17 (formerly s.15A) of the Act allows an application for review to be made to the AAT for review of a decision under the Act.

No decision

The AAT accepted that Wigley had received advice from DSS officers. But this advice did not amount to a 'decision':

'How could it be said that any decision was made of relevance to the Applicant when his identity and any other relevant facts were unknown to the Departmental officers? They made no decision in relation to his application; they appear merely to have expressed an

opinion which, perhaps because of his depressive anxiety state, caused the Applicant not to approach the Department overtly. The Departmental officers made no determination; they did nothing which was final and conclusive although what they did perchance materially affected the Applicant because in his case it caused him not to pursue the matter further. The consequence is that there is no 'decision' coming before this Tribunal pursuant to s.17(1) . . . to give the Tribunal jurisdiction to review.'

(Reasons, p.6)

Formal decision

The AAT decided that, because it had no jurisdiction, the application should be removed from the list of matters set down for hearing.