Formal decision

The Federal Court set aside the decision of the AAT and remitted the matter back for re-hearing in accordance with the law.

[C.H.]

[Contributor's Comment: Hill J's comments that 'it is for an applicant to put all relevant factors before the Tribunal' would appear to run counter to the observations of the Full Court in *McDonald v Director-General of Social Security* (1984) 6 ALD 6, that there is no legal onus of proof before the AAT. Pursuant to s.33(1)(c) of the *Administrative Appeals Tribunal Act 1975* the AAT is not bound by the rules of evidence and 'may inform itself on any matter in such manner it thinks appropriate'. Presumably this would have enabled the AAT to make further inquiries to establish whether Garnys had gone to see a doctor on 25 May.
Although newstart recipients no longer enter CMAAs, the comments by Hill J on these agreements would apply equally to Newstart Activity Agreements (see s.601(4)).]

Disability support pension: continuing inability to work

SECRETARY TO THE DSS v PUSNJAK
(Federal Court of Australia)

Decided: 22 July 1999 by Drummond J.

The DSS appealed against the decision of the AAT that Pusnjak was entitled to be paid the disability support pension (DSP).

Background

Pusnjak was 56 years old at the time of the appeal, having been born in 1942. He had a poor grasp of English and was poorly educated with no trade skills. He had spent his working life as a labourer. He was granted the invalid pension in 1988, which was replaced by the DSP in 1991. The pension was cancelled in 1996 because Pusnjak had an impairment of less than 20%. The SSAT agreed with that decision. The AAT decided that Pusnjak's back problem left him with an impairment of more than 20% and that he had a continuing inability to work.

The law

The qualification for DSP pension is set out in s.94 and provides:

> **94.(1)** A person is qualified for disability support pension if:
>
> (a) the person has a physical, intellectual or psychiatric impairment; and
>
> (b) the person's impairment is of 20 points or more under the Impairment Tables; and
>
> (c) one of the following applies:
>
> (i) the person has a continuing inability to work;
>
> ...
>
> **94.(2)** A person has a continuing inability to work because of an impairment if the Secretary is satisfied that:
>
> (a) the impairment is of itself sufficient to prevent the person from doing any work within the next 2 years; and
>
> (b) either:
>
> (i) the impairment is of itself sufficient to prevent the person from undertaking educational or vocational training or on-the-job training during the next 2 years; or
>
> (ii) if the impairment does not prevent the person from undertaking educational or vocational training or on-the-job training — such training is unlikely (because of the impairment) to enable the person to do any work within the next two years.
>
> **94.(3)** In deciding whether or not a person has a **continuing inability to work** because of an impairment, the Secretary is not to have regard to:
>
> (a) the availability to the person of educational or vocational training or on-the-job training; or
>
> (b) if subs. (4) does not apply to the person — the availability to the person of work in the person's locally accessible labour market.

Continuing inability to work

It was accepted before the Court that Pusnjak had a 20% or more impairment rating. The DSS argued that the AAT had not confined itself to assessing the impact of Pusnjak's impairment on his ability to work. It had also taken into account Pusnjak's personal circumstances, limited work skills and experience. The DSS argued that the wording of s.94(2) *the impairment of itself*, meant that these other matters could not be taken into account. It was argued by the DSS that the test was whether there was any work, occupation or activity available anywhere in Australia that the person would be able to do despite having the particular impairment.

According to Drummond J s.94(2) should be considered in the following way. First, the person must satisfy the requirement in s.94(2)(a) and then s.94(2)(b)(i). If the person does not satisfy s.94(2)(b)(i), then consideration must be given to whether he can meet the requirements of s.94(2)(b)(ii).

The Court then considered the argument of the DSS that s.94(2) should be narrowly interpreted. It concluded that very few people in Australia would ever satisfy the test.

> I therefore see no reason for finding in the existence of other welfare benefits a ground for adopting the extremely restrictive test of eligibility for the disability support pension which the Secretary (to the DSS) urges upon me.

(Reasons, para. 14)

Drummond J found the meaning of s.94(2) to be ambiguous or obscure. Applying s.15AB *Acts Interpretation Act 1901* he referred to extraneous material. The Court found that it could not be the purpose of the legislation to restrict the DSP to a relative handful of grossly disabled people. Parliament had identified 20% as the initial eligibility criterion, and this was quite low. Extraneous material revealed the clear legislative intent or purpose of s.94(2). The Explanatory Memorandum introducing the amendments to s.94 in 1995 stated that s.94(2)(b) was amended:

> To ensure that a person will not qualify for DSP if the person's impairment does not prevent the person from undertaking educational, vocational or on-the-job training unless such training would be unlikely (because of the impairment) to enable the person to do any work within two years.

Drummond J decided that:

> The only circumstance peculiar to the particular claimant that the Secretary can take into account is whether the claimant's impairment itself may prevent him from completing what would ordinarily be no more than a two-year retraining course in that time.

(Reasons, para. 26)

According to the Court it was also clear that attitudinal factors, such as lack of motivation to work, should be disregarded. However, this did not mean that the term 'impairment' was a narrow concept. It incorporated any psychiatric condition that might result from a physical injury. Also, the limited range of work activities that a person is fitted for by their actual skills and experience, could not be ignored.

Section 94(2)(a), according to Drummond J, was intended:

> to focus the decision makers' attention on whether the impairment by itself might prevent the particular pension applicant from doing any kind of work for which that person was already fitted by reason of his actual work skills and work experience, ie., work of the kind he was (the impairment apart) capable of doing without the need for any retraining.

(Reasons, para. 30)

Section 94(2)(b) then proceeds logically to identify the impact occupational retraining might have on the person's eligibility for the DSP.

To decide whether a person is qualified for the DSP, the decision-maker must consider:

- Section 94(2)(a) — does the impairment of itself have such an impact on the person's capacity to work that it prevents him from doing work available anywhere in Australia which the person could do given his work skills and experience?
- Section 94(2)(b)(i) — is the impairment of itself sufficient to prevent the person commencing in the next two years, retraining that would fit him for a class of work available in Australia that he is currently unable to do, even if unimpaired? If so, then the person satisfies the criterion 'continuing inability to work'. If not, look to s.94(2)(b)(ii).
- Section 94(2)(b)(ii) — if there is training available which is capable of fitting the person for work within the two-year period, but which he could not perform without retraining, is it likely that he will acquire those skills within two years given the only impediment is caused by his impairment? If so, then the person will satisfy the 'continuing inability to work' criterion.

The Court then went on to note that:

> Training that necessarily takes an able bodied person longer than two years to complete is not training of the kind covered by this provision.

(Reasons, para. 32)

The Court found no error of law in the AAT decision and reasons.

Formal decision

The Federal Court dismissed the appeal by the Secretary to the DSS.

[C.H.]

Disability support pension: continuing inability to work

SECRETARY TO THE DSS v CHIN (Federal Court of Australia)

Decided: 3 February 1998 by Nicholson J.

The DSS appealed against the decision of the AAT that Chin should be granted the disability support pension (DSP).

The facts

Chin was born in Malaysia in 1980 and has suffered from profound deafness since birth. She immigrated to Australia in 1987. When she arrived in Australia Chin had no knowledge of English or AUSLAN. At school in Australia she learned both English and AUSLAN. Chin completed her secondary education and obtained entry to a tertiary institution in a course teaching fashion, computer and art studies. According to an occupational health specialist, Dr Home, Chin was capable of undertaking this course.

Dr Blackmore, a specialist in the problems facing the deaf in society assessed Chin as very intelligent, capable and balanced. She was highly motivated to succeed in a challenging occupation. If she was required to undertake menial tasks she would feel devastated and let down. The Tribunal found that Chin was motivated and had the capacity to successfully complete a tertiary qualification.

The law

Section 94 sets out the qualifications for the DSP. It was accepted that Chin had an impairment of 20 points or more. The issue in dispute was whether she had a continuing inability to work, and in particular the meaning of *any work* as set out in s.94(2)(a) (see legislation set out above).

'Any work'

It was noted that the term 'any work' is not defined in the Act. The AAT considered whether the concept of suitability in relation to work was applicable. This concept had been incorporated into the newstart allowance provisions. The AAT rejected the argument that there must have been a deliberate intention to disqualify a person from the DSP where the person can only do work which is clearly unsuitable.

The AAT had referred to the *Disability Discrimination Act 1992* and concluded that a decision-maker was prevented from discriminating against a person with a disability, except where expressly authorised to do so by an Act. Because s.94 of the Act was not clearly discriminatory, Chin should not be discriminated against. The AAT accepted that the menial jobs suggested for Chin did not recognise her intelligence and ability and would undermine her sense of self worth and motivation.

The DSS argued that the AAT had incorrectly interpreted the provision *the impairment is of itself sufficient to prevent the person from doing any work within the next two years*, and that there was no evidence that Chin had suffered a detriment to her psychological health.

The evidence

The AAT had accepted Dr Blackmore's evidence that any work that failed to recognise Chin's intelligence and ability would tend to undermine her sense of self worth. Chin's treating doctor had given evidence that he was not able to say whether there would be any psychological repercussions if Chin were required to do fairly menial work. Chin herself said that her deafness did not prevent her from doing household tasks. Nicholson J accepted that Dr Blackmore's report made no reference to a psychological impairment or even to the possibility that an impairment might develop if Chin did unskilled work. In his report, Dr Home had listed a number of unskilled jobs Chin should be able to undertake with her impairment. Under cross-examination Dr Blackmore had accepted that it was both Chin's intelligence and deafness which would contribute to any detriment suffered by Chin. Because Chin had a stable personality, strong character and good intelligence, she would be more likely to be able to surmount such difficulty. Dr Blackmore gave evidence that it was only a possibility that Chin would have a psychological effect from doing menial work. The Court concluded that there was nothing in the evidence which entitled the AAT to conclude that doing menial work would undermine Chin's psychological health.

The Court then looked at the meaning of *work* and whether Chin's impairment prevented her from working. The evidence showed that it was difficult for deaf people to communicate in the workplace without some allowance being made by an employer. It was not up to the AAT to find that communication for a deaf person could only occur through a 'benevolent' employer. Nicholson J noted:

> If causative effects of a particular condition are to be relied upon in the claim process, it would appear necessary that the effects be identified at an early stage in order that the claim to that extent can be addressed with procedural fairness at all levels of the appeal process.

(Reasons, para. 57).

The Court concluded that even if the AAT had been correct in considering 'any work' meant 'any suitable work', there was no evidence to support the AAT's finding that Chin was not able to undertake any suitable work.

Formal decision

The Federal Court allowed the appeal, set aside the AAT's decision, and affirmed the decision of the authorised review officer that Chin's claim for DSP be rejected.

[C.H.]