Administrative Appeals Tribunal

Disability support pension: 'whether undertaking a course of rehabilitation'

CHHIT and SECRETARY TO THE DFaCS
(No. 2004/744)

Decided: 16 July 2004 by J Handley, G.D. Friedman, E. Shanahan.

Background

Chhit was charged with a criminal offence in Victoria and was remanded to appear on 19 October 2001. On that day, the Court made an Order pursuant to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* that Chhit be committed to custody in an approved place, being the Thomas Embling Hospital (TEH), for a nominal term of 20 years.

Chhit lodged a claim for disability support pension (DSP) on 14 November 2001 which was rejected on the basis he was not undertaking a course of rehabilitation. The SSAT ultimately affirmed the rejection, finding that Chhit was suffering significant psychiatric symptomatology but that until his mental state was stabilised, he was not able to meaningfully engage in a rehabilitation program designed to return him to work and community life, and he could not, therefore, be said to be engaging in a 'course of rehabilitation'. Before the AAT, it was also argued by the Department that Chhit did not meet the qualification criteria for DSP at the date of his claim or within 13 weeks as he did not then have a physical, intellectual or psychiatric impairment which had been treated, investigated and stabilised.

Chhit was granted DSP in a subsequent claim in February 2003.

The law

Section 1158 of the *Social Security Act 1991* ('the Act') provides that an instalment of DSP, amongst other things, is not payable to a person 'in gaol' or 'undergoing psychiatric confinement because the person has been charged with an offence'.

Sections 23(8) and 23(9) provide:

> **23.(8)** Subject to subsection (9) 'psychiatric confinement' in relation to a person includes confinement in:
>
> (a) a psychiatric section of a hospital; and
>
> (b) any other place where persons with psychiatric disabilities are, from time to time, confined.
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> **23.(9)** The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.

The issue

The central issue for the AAT was whether Chhit was, during relevant periods, 'undertaking a course of rehabilitation'. If that was so, he was not taken to have been in psychiatric confinement and there was no prohibition to him receiving DSP.

Discussion

The AAT heard evidence from Dr Poulter, a social worker at TEH who was involved in the creation of Chhit's individual service plan (ISP):

> It was asked of Dr Poulter ... whether he would agree with the proposition that Mr Chhit was not undertaking a course of rehabilitation during the period he was experiencing 'acute' symptoms and was placed in isolation. Dr Poulter replied:
>
> Absolutely not correct. Our efforts are even more intensive in those times to ensure that the rehabilitation program is put into effect. As I said before, these are times that we focus very much on one on one, we developed very clear management plans, and with Mr Chhit we had a very clear management plan as to how staff were to engage with him ... In these periods we can constantly monitor not only their mental state but the implications it has for their socialisation within the hospital and the ward and their involvement in their rehabilitation plan.
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> Dr Poulter was also of the opinion that:
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> The mere fact that someone is placed in a Unit that may be called an acute Unit, for whatever reason, doesn't undermine your professional opinion that the person is, depending on the circumstances, still participating in a course of rehabilitation ... The trajectory of each patient through the rehabilitative process is highly individualised and cannot be conceptualised in the terms of clearly separable primary, secondary or tertiary stages.

(Reasons, paras 23, 24)

Dr Poulter went on to respond to the suggestion that Chhit was receiving psychiatric treatment and not being rehabilitated: 'The two are not divisible, it is a false dichotomy. That our mandate is rehabilitative, and that occurs, and psychiatric treatment does not occur independent of rehabilitative treatment' (Reasons, para. 27).

The AAT considered a number of authorities, including *Franks v Secretary, Department of Family & Community Services* [2002] FCAFC 436 and *De Alwis-Edrisinha and Department of Family and Community Services* [2001] AATA 760. The AAT concluded:

> Having heard Dr Poulter in evidence, having read the documents generated by him and being mindful particularly of the decision in *Franks* we are satisfied that Mr Chhit was engaged in rehabilitation and that rehabilitation was provided to him by the staff of TEH.

(Reasons, para.70)

The AAT was ultimately satisfied that the evidence revealed Chhit's ISP was in place at the time of his admission. The AAT stated:

> ... Even in the absence of an ISP we would find that a course of rehabilitation was being undertaken by reason of the activities, services and treatments offered to Mr Chhit and he in turn undertaking those activities, services and treatments. A 'course of rehabilitation' does not have a technical or legal meaning but is to be found as a fact from all the surrounding circumstances ...

(Reasons, para. 72)

Furthermore, the AAT was satisfied Chhit was engaged in a 'course' of rehabilitation and that he was 'undertaking' it. The AAT observed:

> ...We are satisfied that the rehabilitation program for Mr Chhit as devised was 'suited' to him and 'designed to assist his long term progress' (refer *Franks*). That he achieved a number of goals, as devised by the ISP, satisfied us that Mr Chhit was successfully 'undertaking', the 'course' ...

(Reasons, para. 76)

The AAT commented on the suggestion that during periods where Chhit was withdrawn, in confinement or suffering effects of assault or medication, that he could not, during those periods, be undertaking a course of rehabilitation. The AAT was satisfied that during such periods, Chhit remained a person undertaking a course of rehabilitation. The AAT had regard to *Franks* in which it was held that undertaking a course of rehabilitation included planned activities, including medical or other treatment which was designed to improve physical, mental or social functioning.

The AAT concluded that Chhit was not undergoing 'psychiatric confinement' for the purposes of s.1158 of the Act.

The final question for the AAT was whether Chhit was medically qualified for DSP. The AAT rejected the Department's submission that Chhit's condition was fluctuating and not stabilised for the purposes of s.94 of the Act. The AAT stated: ' ... With respect we suggest that there is a failure to distinguish the condition from its symptoms' (Reasons, para. 95). The AAT was fully satisfied Chhit met the qualification criteria at the time of his claim.

Formal decision

The AAT set aside the decision and determined Chhit was qualified for DSP at the time of his claim.

[S.L.]

Disability support pension: whether 'in gaol'

JOZWIAK and SECRETARY TO THE DFaCS
(No. 2004/610)

Decided: 16 June 2004 by D. Muller.

Background

In August 2002, Jozwiak was convicted of property offences and sentenced in the Toowoomba Magistrates Court to serve a term of imprisonment for one year and nine months with the earliest date of release being 13 November 2003. On 4 October 2002, he escaped lawful custody, committed three further property offences, and was recaptured three days later. On 15 April 2003, the General Medical Officer at the Toowoomba watch house recommended Jozwiak should undergo psychiatric assessment, and a magistrate so ordered the following day. Jozwiak was referred to the Wolston Correctional Centre, and then to the Toowoomba Base Hospital Mental Health Unit, and on 19 April 2003, was examined by a consultant psychiatrist who diagnosed a mental illness and identified a need for immediate and ongoing treatment at the Toowoomba Mental Health Service.

On 22 April 2003, Jozwiak applied for Disability Support Pension (DSP) and on 23 April 2003, he was removed to Baillie Henderson Hospital and detained as a classified patient under the *Mental Health Act 2000* (Qld). That hospital was not a place declared to be a prison under the Corrective Services Regulations. On 6 May 2003, a report was provided to the Director of Mental Health stating Jozwiak was unfit at the time to stand trial, although he was likely to have been of sound mind at the time of the offences. On 13 May 2003, Centrelink rejected Jozwiak's claim for DSP on the basis that he was in gaol and that decision was ultimately upheld by the SSAT.

On 22 September 2003, the Mental Health Review Tribunal decided to continue Jozwiak's Involuntary Treatment Order, and on 13 November 2003, his sentence was discharged with the time spent in Baillie Henderson Hospital counting towards his sentence. He was granted DSP from 15 November 2003 and at the date of the hearing on 24 March 2004, remained an involuntary patient pursuant to the *Mental Health Act* (Qld).

The law

Section 1158 of the *Social Security Act 1991* ('the Act') provides that an instalment of DSP, amongst other things, is not payable to a person 'in gaol' or 'undergoing psychiatric confinement because the person has been charged with an offence'. Section 23(5) provides:

> For the purposes of this Act, a person is in gaol if the person:
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> (a) is imprisoned in connection with the person's conviction for an offence; or
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> (b) is being lawfully detained in a place other than a prison, in connection with the person's conviction for an offence; or
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> (c) is undergoing a period of custody pending trial or sentencing for an offence.

Sections 23(8) and 23(9) provide:

> **23.(8)** Subject to subsection (9) 'psychiatric confinement' in relation to a person includes confinement in:
>
> (a) a psychiatric section of a hospital; and
>
> (b) any other place where persons with psychiatric disabilities are, from time to time, confined.
>
> **23.(9)** The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.

The issue

The issue for the AAT to determine was whether Jozwiak was 'in gaol' within the meaning of that term in s.1158(a) of the Act. If that was so, his DSP claim was rightfully rejected.

Discussion

The Tribunal indicated that the material before it did not indicate that Jozwiak was undertaking any specific course of rehabilitation at the time he made his claim for DSP. The Tribunal accepted, however, that 'any hospitalisation would involve a degree of rehabilitation' (Reasons, para. 6).

The AAT observed it was common ground between the parties that Jozwiak was not undergoing psychiatric assessment because he had been charged with an offence and s.1158(b) was not relevant. The AAT observed that s.23(5) set out three alternative criteria for determining whether a person is 'in gaol'. The AAT stated:

> ... In the case of Mr. Jozwiak the relevant criterion is contained in subsection 23(5)(b). That is, was Mr. Jozwiak being lawfully detained in a place other than a prison, in connection with his conviction for an offence?

(Reasons, para. 9)

Jozwiak submitted that his detention in hospital was because he was suffering from a mental illness, not in connection with the original property convictions. It was submitted that Jozwiak was not 'in gaol' for the purposes of the Act. The Department contended that Jozwiak had been detained in connection with his convictions for property offences and was therefore 'in gaol'.

The AAT considered the relevant authorities:

> In Franks' case the Full Court, Spender, Drummond and Marshall JJ were concerned with deciding whether the AAT made an error of law in concluding that Mr. Franks was not undergoing '*psychiatric confinement*' within s.1158(b) because he was undertaking a '*course of rehabilitation*' within s.23(9). The crucial discussion was about what constituted a course of rehabilitation. The Court discussed the cases of *Blunn v Bulsey* and *Garden v Secretary, Department of Family and Community Services,* mentioned above, and noted the differences in the judgments of Einfield J and Gray J, but did not need to choose between them for the purposes of deciding *Franks'* case. The Court did, however, specifically approve of Gray J's identification of the relationship between s.23(9) and the then s.1158(1)(a)(ii) (now s.1158(b)). That is, s.23(9), relating to a person undertaking a course of rehabilitation, only removes the bar to the receipt of a social security pension for those who are undergoing psychiatric confinement because of having been charged with committing offences, but not convicted. It is therefore not relevant in Mr. Jozwiak's case whether or not he was undergoing a course of rehabilitation whilst he was in Baillie Henderson Hospital.

(Reasons, para. 15)

The AAT observed that prisoners could be taken to hospital for medical treatment such as fixing broken bones, having skin cancers removed or having psychiatric treatment. The AAT observed that the reasons for placing prisoners in other places would rarely have a