

Full Federal Court judgment — *Repatriation Commission v Connell*

In *Repatriation Commission v Connell* [2011] FCAFC 116, the Full Court of the Federal Court considered whether a person who was forced, by incapacity from war-caused injury or disease, alone, to reduce the number of hours per week of their usual remunerative work was entitled to the intermediate rate of disability pension, or whether, as the Commission argued, the person had to have ceased undertaking that type of work entirely.

The Court rejected the Commission’s argument and held that:

‘[27] ... The prevention of some of the work that the veteran was undertaking is also encompassed by the phrase “prevented from continuing to undertake remunerative work”. ...

‘[28] ...A person who works as a painter on a full time basis but who, due to incapacity, can now only do that work on an intermittent or part-time basis is not continuing to perform the same remunerative work. The restricted nature of the work gives it an entirely different character. Being able to perform work without restriction because of illness or injury is a situation far removed from being able to perform the same work, but with restrictions due to illness or injury. Each is remunerative work of the same type, in this case, painting. But it is not the same remunerative work considering the nature and quality of the work. If one is performing full-time work without any health related restrictions that reduce one’s hours on account of such restrictions it cannot be sensibly said that the later work is a continuation of the work previously undertaken. It is of an entirely different nature and quality, although identical in terms of describing the relevant occupation.’

The Court also held that a person need not have been undertaking full-time work before the effects of war-caused injuries or diseases caused a reduction in hours. Their Honours said:

‘[29] We do not consider that a worker must be working full-time prior to the worker becoming entitled to payment at the Intermediate Rate. A worker who ceases to be able to work 30 hours a week (whether these hours are voluntary or the result of the war-caused injury or disease) and who becomes incapacitated for work for more than 15 hours because of the war-caused injury or disease will be entitled to the Intermediate Rate pension. The veteran is prevented from undertaking remunerative work that he was undertaking, namely, the work he was undertaking in the 15 hours each week which he can no longer work.’

This is the first time that the Federal Court has held that the phrase ‘remunerative work that the veteran was undertaking’ can refer to the quality or extent of the work rather than the type of work (though there was a suggestion that this might be the case by Branson J in the case of *Carter* [2001] FCA 992).

Being a judgment of the Full Court, it is a significant win for veterans. Previously the Commission has interpreted the legislation to require that a veteran must have been forced to cease to undertake the type of work they had been undertaking, and if they had capacity to work in some other type of employment, they could be eligible for the intermediate rate if they were able to undertake that type of work only on a part-time or intermittent basis.

As a result of this judgment, veterans are now entitled to the intermediate rate if the effect of their accepted disabilities is such that they must reduce their hours of work to less than half the usual number of hours for the relevant type of work, or, if that cannot be readily ascertained, 20 hours a week.

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