

FEDERAL COURT OF AUSTRALIA

**Military Superannuation and Benefits Board of Trustees No 1 v Batt**

[2005] FCA 1865

Kenny J

22 April, 19 December 2005

*Superannuation — Superannuation Complaints Tribunal — Review jurisdiction — Decision of Incapacity Classification Committee — Consideration of scope of powers on review — Superannuation (Resolution of Complaints) Act 1993 (Cth), ss 14, 37.*

The Superannuation Complaints Tribunal (the Tribunal) had determined that the respondent be reclassified for pension entitlements and that the applicant pay him interest on the difference between his original and reclassified pension amount for a specified period.

The applicant appealed from the Tribunal's determination. The applicant contended that the decision under review by the Tribunal had been a decision of the Incapacity Classification Committee (ICC) that had in turn been the subject of the applicant's reconsideration.

The applicant argued that as the ICC had no power under the *Military Superannuation and Benefits Rules 1992* (Cth) to approve an interest payment and in the absence of any decision by the applicant on interest, the Tribunal had exceeded its review jurisdiction under ss 14 and 37 of the *Superannuation (Resolution of Complaints) Act 1993* (Cth).

*Held* (1): The decision under review by the Tribunal was the decision of the ICC. [38]

(2) As the primary decision-maker did not have the power to approve an increase, by way of interest, in the rate of pension payable, the Tribunal exceeded its power when it made the decision that interest was payable by the trustee in the present case. [45]

**Cases Cited**

*Attorney-General (Cth) v Breckler* (1999) 197 CLR 83.

*Briffa v Hay* (1997) 75 FCR 428.

*Colonial Mutual Life Assurance Society Ltd v Brayley* [2002] FCA 1333.

*Fischer v PSS Board* (unreported, Fed Ct of Aust FC, Burchett, Moore, Lindgren JJ, 29 May 1997, NG1/1997).

*Fletcher v Commissioner of Taxation (Cth)* (1988) 19 FCR 442.

*Lees v Comcare* (1999) 29 AAR 350.

*Melbourne Authority, Port of v Anshun Pty Ltd* (1981) 147 CLR 589.

*Military Superannuation and Benefits Board of Trustees No 1 v Batt* [2003] FCA 71.

*Military Superannuation and Benefits Board of Trustees No 1 v Drake* [2003] FCA 78.

*Retail Employees Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359.

*Social Security, Secretary, Department of v Hodgson* (1992) 37 FCR 32.

### **Application**

*P Hanks* QC and *J Jagot*, for the applicant.

*J Kennan* SC and *L De Ferrari*, for the respondent.

*Cur adv vult*

19 December 2005

### **Kenny J.**

1 On 26 June 2003, the Superannuation Complaints Tribunal (the Tribunal) determined that the applicant should pay the respondent interest on the difference between the class B pension and the class A pension from the first pension pay-day on or after 12 June 1997 until the date of payment at the relevant 90 day bank bill rates, as specified.

2 The applicant, the Military Superannuation and Benefits Board of Trustees No 1 (the Board), appeals from this determination pursuant to s 46(1) of the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (the SRC Act).

3 An appeal under s 46(1) of the SRC Act is limited to questions of law. The questions of law raised by the Board's appeal relate to the proper construction of s 37 of the SRC Act and rr 19(1), 22, 23 and 69 of the *Military Superannuation and Benefits Rules 1992* (Cth) (the Rules) contained in a schedule to a deed made under the *Military Superannuation and Benefits Act 1991* (Cth) (the MSB Act). The Board contends that the Tribunal:

- (a) erroneously assumed the power to decide that interest should be paid on the difference between the class B pension and the class A pension by reference to considerations of fairness and reasonableness; and
- (b) exceeded its power in so deciding having regard to:
  - (i) the proper construction of rr 19(1) and 69(2) of the Rules and s 37(4) of the SRC Act; and
  - (ii) the absence of any decision by the Board on interest which was the subject of complaint to the Tribunal.

### **Legislative framework**

#### *The MSB Act, Trust Deed and Rules*

4 Section 4(1) of the MSB Act requires the Minister to establish, by deed, an occupational superannuation scheme for the benefit of certain persons, including members of the permanent forces: see, Pt 3, s 6 and cl 2(1) of the deed made under s 4(1) of the MSB Act (the Trust Deed). The Trust Deed must be in the form set out in the Schedule to the MSB Act (s 4(2)). Section 18 of the MSB Act establishes the Board, which, pursuant to s 20, has the functions and powers set out in the Trust Deed. The functions of the Board are to administer the Military Superannuation and Benefits Scheme (the Superannuation Scheme) established by cl 2(1) of the Trust Deed and to manage and invest the relevant fund (cll 2(2) and 3(1) of the Trust Deed).

5 Clause 3(2)(g) of the Trust Deed provides that the Board has power to establish an Incapacity Classification Committee (ICC) to determine members' incapacity classification under the Rules. Rule 17 provides that the ICC has the functions identified in r 19(1). Rule 19(1) provides:

The functions of the Committee are to exercise, at the request of the Board and subject to any directions given by the Board, the powers and functions under rules 22, 22A, 23, 32, 33 and 34.

6 Part 3 of the Rules (which are to be read as part of the Trust Deed (cl 1(1))) identifies the benefits that are payable to members under the Superannuation Scheme. According to r 22(1), where a member of the Superannuation Scheme is retired, or is about to be retired, on the ground of invalidity, the Board or the ICC must determine the percentage of incapacity in relation to civil employment of the retiree and must classify the retiree according to the percentage of the retiree's incapacity into one of three classes of incapacity, namely, A, B or C. Rule 23(1) authorises the Board or the ICC to reclassify an invalidity pensioner where it is satisfied that there has been a sufficient change in the percentage of incapacity in relation to civil employment of the invalidity pensioner. Rule 23(4) states that where the Board or the ICC reclassifies a person, the Board or the ICC must specify the date from which the reclassification has effect.

7 Part 8 of the Rules concerns "General Provisions Applicable to Contributions and Benefits". Pursuant to r 67(1), pensions are to be paid in fortnightly instalments on pension pay-days. Rule 69 enables the Board to approve an increase in the amount of a benefit payable as a lump sum; alternatively, the Board may approve an increase, by an amount of interest, in the rate of pension payable to a person. Rule 69 provides:

- (1) Where a benefit is payable as a lump sum to a person and the payment of the benefit is delayed, the Board may, in accordance with this rule, approve an increase, by an amount of interest, in the amount of the benefit payable to the person.
- (2) Where a pension is payable to, or for the benefit of a person and the commencement of the payment of that pension is delayed, the Board may, in accordance with this rule, approve an increase, by an amount of interest, in the rate of the pension payable to the person for such period as the Board determines.
- (3) A pension is not to be increased under sub rule (2) if the Board is of the opinion that the amount of the increase would not be significant.
- (4) Interest applicable under this rule is calculated in such manner as the Board determines:
  - (a) in the case of a lump sum payment — in respect of the period of the delay; and
  - (b) in a case of a pension — in respect of:
    - (i) each instalment of the pension delayed; and
    - (ii) the period of delay of that instalment.
- (5) In this rule, "benefit" means employer benefit or member benefit.

8 Part 9 of the Rules prescribes the procedure for reconsideration of decisions by the Board on the recommendation of a reconsideration committee established under cl 3(2)(h) of the Trust Deed (a reconsideration committee). Rule 74 relevantly provides that the functions of a reconsideration committee are to review any decision referred to it by the Board and, in accordance with a

request of the Board, amongst other things, to make recommendations to the Board in relation to the decision (r 74(1)(b)(i)). A person who is affected by a decision of a delegate of the Board may apply to the Board for reconsideration of the decision pursuant to r 76(1). Upon such an application, the Board must refer the decision to which the application relates to a reconsideration committee (r 76(3)). Rule 76(5) provides that, if the Board requests a reconsideration committee, under r 74(1)(b)(i), to make recommendations, then, after receiving the committee's recommendations, the Board must take into account the recommendations and any other matter that the Board considers relevant; and affirm or vary the decision, or set the decision aside and substitute another decision for it. The Board is also required to state in writing the results of the reconsideration, including the reasons for the Board's decision (r 76(5)(c)). Rule 77 enables a person affected by a decision of the Board, including a decision under r 76(5), to apply to the Board for a reconsideration of that decision.

*Review under the SRC Act*

9 The SRC Act establishes a system for the conciliation of complaints and, if a complaint cannot be resolved by conciliation, the review of a decision or conduct in the administration of regulated superannuation funds (being the regulated superannuation funds as defined in the *Superannuation Industry (Supervision) Act 1993* (Cth) (the SIS Act): see, SRC Act, s 3(1)). It was common ground that the Superannuation Scheme established a regulated superannuation fund.

10 Subject to exceptions that are not presently relevant, s 14(2) of the SRC Act authorises a person to make a complaint to the Tribunal that a decision made by a trustee of a regulated superannuation fund is or was unfair or unreasonable. Section 18(1) specifies the parties to a complaint under s 14.

11 The Tribunal cannot deal with a complaint under s 14 unless the complainant satisfies the Tribunal that a complaint about the same subject matter was previously made under certain arrangements. I return to this provision below.

12 Part 6 of the SRC Act sets out the procedures and powers of the Tribunal when undertaking its review functions. The central provision is s 37, which deals with the Tribunal's powers in respect of complaints under s 14. Section 37(1) gives the Tribunal, for the purpose of reviewing a decision of a trustee of a fund that is the subject of a complaint under s 14, all the powers, obligations and discretions that are conferred on the trustee; and, subject to s 37(6), requires the Tribunal to make a determination in accordance with s 37(3). Section 37(3) obliges the Tribunal, on reviewing the decision of a trustee that is the subject of, or relevant to, a complaint under s 14 to make a determination in writing in the terms of any of paras (a)-(d). Amongst other things, the Tribunal may affirm the decision (s 37(3)(a)) or set it aside and substitute its own decision (s 37(3)(d)). I refer to the effect of s 7(3), (4) and (6) below.

13 Section 41(1) provides that, subject to s 41(2), a determination of the Tribunal comes into operation immediately upon the making of the determination. Section 41(2) provides that the Tribunal may specify that the determination is not to come into operation until a later date. Section 41(3) provides, so far as relevant, that a decision made by the Tribunal in substitution for a decision of a trustee is, for all purposes (other than the making of a complaint about the decision) taken to be a decision of a trustee; and, unless the

Tribunal otherwise orders, the decision has effect, and is taken to have had effect, on and from the day on which the original decision has or had effect.

### **Factual background**

14 The respondent, Mr RA Batt, was retired from the Australian Defence Force on 30 July 1994 on the ground of invalidity. On 14 October 1994, the ICC determined under r 22 that he qualified for a class B pension with effect from 31 July 1994. On 12 June 1997, the ICC reviewed his classification under r 23 and determined that he should retain his class B classification. On 28 August 1999, pursuant to r 76(5), the Board affirmed the decision of the ICC that Mr Batt had a class B pension classification under r 23 of the Rules. On 29 September 1999, Mr Batt lodged a complaint with the Tribunal under s 14 of the SRC Act. On 22 June 2000, Mr Batt's wife sought reconsideration on Mr Batt's behalf of the Board's decision of 28 August 1999. On 22 December 2000, a reconsideration committee established under r 72 of the Rules considered Mr Batt's case but deferred it pending the receipt of an independent specialist's opinion. On 31 October 2001, the Tribunal set aside the decision of the ICC, affirmed by the Board, and substituted a decision that Mr Batt was entitled to payment of a class A pension with effect from 12 June 1997. The Tribunal further decided that interest on the difference between the class B pension and the class A pension should be paid from the first pension pay-day on or after 12 June 1997 at the fund earning rate or the rate as otherwise provided by the Rules.

15 The Board appealed to this Court in relation to that part of the decision concerning interest upon much the same grounds as it advances in this proceeding. On 10 February 2003, North J allowed the Board's appeal upon the basis that the Tribunal had failed to give reasons for its decision that interest was payable. His Honour set aside the Tribunal's determination regarding the payment of interest and remitted that matter to the Tribunal: see, *Military Superannuation and Benefits Board of Trustees No 1 v Batt* [2003] FCA 71.

16 Although the Board contended that the Tribunal had no power to make a decision regarding interest, the Tribunal subsequently decided that interest should be paid on the difference between the class B pension and the class A pension, in the terms already stated.

### **The Tribunal's reasoning**

17 The Tribunal gave three reasons for its decision that it had power to determine that interest was payable to Mr Batt. First, the ICC had not been joined as a party to the complaint and its joinder would have been necessary if the ICC was "a separate decision-maker to the [Board]". Second, the ICC acted under the Trust Deed as an agent or delegate of the Board in respect of its decision to reclassify Mr Batt. The Tribunal reasoned:

As such, its decision regarding the reclassification of the Complainant was effectively a decision of the [Board], who also has the power to pay interest.

Third, the Tribunal held that the Board's argument that the ICC was not its delegate was not fair and reasonable in its operation in relation to Mr Batt in the circumstances.

18 The Tribunal also held that the requirements of r 69(2) of the Trust Deed were satisfied. The Tribunal decided that the preconditions in r 69 (that a pension is payable to a person and commencement of the payment of the

pension is delayed) were both satisfied by reference to s 41(3)(b) of the SRC Act; and that the contrary conclusion would not, in the circumstances, be fair and reasonable in its operation in relation to Mr Batt.

- 19 The Tribunal rejected the Board's contention that the Tribunal should not address the question of interest as it had not been raised by the parties. Referring to the decision of Allsop J in *Retail Employees Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359, the Tribunal held that the question of interest was directly related to the relationship between Mr Batt and the Board regarding the non-payment of a class A pension and that, in conformity with s 37(4) of the SRC Act, the Tribunal was required to consider the question of interest irrespective of whether or not a complainant specifically raised that issue as part of the subject matter of the complaint.

#### **The parties' submissions**

- 20 The Board contended that the Tribunal's reasons disclosed that it misunderstood s 37(4) of the SRC Act as either a source of power in and of itself, operating to enlarge the Tribunal's jurisdiction, or as a consideration relevant to the determination of the scope of its powers. The Board maintained that the Tribunal's reasoning on the existence of its powers was materially affected by its mistaken approach to s 37(4).

- 21 Referring to *Lees v Comcare* (1999) 29 AAR 350 and *Fischer v PSS Board* (unreported, Fed Ct of Aust FC, Burchett, Moore, Lindgren JJ, 29 May 1997, NG1/1997), the Board submitted that the review jurisdiction of the Tribunal was defined by ss 14 and 37 of the SRC Act. This meant the Tribunal was unable to make a decision on an aspect of the trustee's powers that was not the subject of the trustee's decision or the complaint to the Tribunal. The Board submitted that s 37(1) confined the Tribunal's review to the decision of the ICC that was the subject of the Board's reconsideration. It contended that there was no issue before the Tribunal relating to r 69(2) of the Trust Deed and the payment of interest because: (a) the ICC had no power to consider r 69(2) and did not do so; (b) the Board had not, on reconsideration, considered r 69(2); and (c) the complaint to the Tribunal did not raise r 69(2).

- 22 The Board argued that the Tribunal's reference to the ICC as the Board's agent or delegate disclosed a misunderstanding of the Tribunal's review function. The Board submitted that the relevant governing rule of the Superannuation Scheme was r 23. Accordingly, the Tribunal had those "powers, obligations and discretions" that r 23 conferred on the ICC. Rule 23, so the Board contended, authorised the ICC to reclassify Mr Batt and to fix a date of effect for any such reclassification, but it did not authorise the ICC to make a decision under r 69(2). The Board submitted that the decision in *Crocker* did not call for a contrary conclusion.

- 23 In the Board's submission, the decision that was the subject of complaint to the Tribunal was the decision of the ICC. This was the only decision that had been reconsidered and affirmed under r 76, thereby satisfying s 19 of the SRC Act. The Tribunal was, so the Board submitted, in error in equating the ICC's decision under r 23 with a decision of the Board, at large, concerning the Board's relationship with Mr Batt. As counsel put it:

It is the decision of the committee that constitutes the decision of the trustee and no other decision. Wherever one sees in section 37 the reference to a decision of the trustee that is the subject of a complaint, one understands that to mean in the context of this case the decision of the ICC to maintain the classification of

Mr Batt as class B; that being the decision which was subject to reconsideration. The Board contended that the ICC's decision-making under r 23 did not vest the Tribunal with jurisdiction to determine all aspects of the relationship between the Board and Mr Batt.

24 The Board also submitted that, in any event, the requirements of r 69(2) were not satisfied. The Board contended that s 41(3)(b) did not convert a decision made on 31 October 2001 which takes effect from an earlier date into a decision in fact made on that earlier date. There could be no delay in the payment of a pension until the Board had an opportunity to make the payment. Citing the *Oxford English Dictionary*, counsel for the Board submitted that:

The concept of delay ... involves some deferral, some postponement, of payment some action on the part of the board, or it may even be inaction, that holds back the payment; some failure on the part of the board to act promptly as it's required to act by rule 67 ...

The rule has in mind a concurrent situation ... The first element is the pension is payable and the second, concurrently with that, the payment of the pension is delayed and delayed in a sense that it is held up in some way, put off through some failure of the board properly to discharge its functions.

The critical distinction, for the purposes of r 69(2), was, so the Board submitted, the distinction between the date on which a pension is payable (namely, the date of the determination) and the date from which that determination may take effect (which may be an earlier date).

25 At the hearing, pro bono counsel for Mr Batt emphasised the remedial nature of the SRC Act. Counsel submitted that, under the SRC Act, Mr Batt's complaint to the Tribunal was in respect of the decision of the trustee of a regulated superannuation fund. That is, contrary to the Board's submission, the Tribunal was reviewing a decision of the Board. The SRC Act required that the decision under review was the decision of the trustee, although a person wishing to apply to the Tribunal must first have sought one level of internal review.

26 Mr Batt submitted that he had raised the matter of interest when he complained that he should have been in receipt of a class A pension from 1994. He relied on the reasoning of Allsop J in *Crocker* at [128]-[133]. In any event, whether or not he raised the interest issue, the Board was, so Mr Batt argued, "at least bound to consider whether or not to exercise that power" once the facts established that the conditions precedent for an interest determination existed. Accordingly:

By reason of the Tribunal, standing in the shoes of the trustee, having found that the Class A pension was the one that was payable, all of the facts are established.

According to Mr Batt, the Tribunal did not misunderstand the nature of s 37(4) of the SRC Act.

27 Moreover, there was, so Mr Batt contended, no basis for the "extremely strained" reading of s 41 of the SRC Act that the Board advocated. He argued that, when s 41 was read in its entirety, it was clear that a decision of the Tribunal in substitution for a decision of a trustee was the decision of the trustee from the date of the original decision, which in this case was 12 June 1997. He maintained that the original decision "was (and must be taken to be) that the Class A pension was and *is* payable to Mr Batt" (emphasis in original) from 12 June 1997. Further, according to Mr Batt, the Tribunal was correct in determining that payment of his class A pension is delayed, relying in part on

the use of the present tense. As senior counsel for Mr Batt put it, “where the commencement date is set some time prior, clearly the payment of pension has been delayed”.

- 28 In written submissions and at the hearing, counsel for Mr Batt conceded that the circumstances fell short of an *Anshun* estoppel (*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589), but, referring to the policy considerations underlying such an estoppel, submitted that the Board impermissibly sought to enlarge upon the arguments it had put to North J on the last occasion the matter was in this Court.

### Consideration

- 29 In his complaint to the Tribunal, Mr Batt said:

I wish for my case to be reviewed. My pension upgraded to an “A” Grade and backdated to 1994.

...

I believe the board were wrong in their assessment of my impairment and should have classified me as having over 60% incapacity and therefore granted me an “A” grade pension.

...

I would like to be reclassified and back paid from 1994.

- 30 Pursuant to s 14(2) of the SRC Act, Mr Batt, being a person described in s 15(1) of the SRC Act, was entitled to make such a complaint to the Tribunal about a decision of the Board as the trustee of the Superannuation Scheme, on the ground that the decision was unfair or unreasonable. The powers of the Tribunal on review were not at large. First, for the purpose of reviewing the decision of the trustee that was the subject of complaint under s 14, the Tribunal was limited to “the powers, obligations and discretions” that were conferred on the trustee: see, SRC Act, s 37(1)(a). Second, the Tribunal was precluded from doing anything “that would be contrary to law, to the governing rules of the fund concerned” and, if relevant, any contract of insurance (s 37(5)). Third, the Tribunal was obliged to affirm the decision the subject of complaint if satisfied that its operation in relation to, amongst others, the complainant, was fair and reasonable in the circumstances (s 37(6)). Fourth, the Tribunal could only exercise its determination-making power for the purpose of removing “the unfairness, unreasonableness, or both” that it perceived in the decision that was the subject of the complaint (s 37(4)).

- 31 In exercising the powers conferred on it by s 37(1), the Tribunal stood in the position, or as is commonly said “in the shoes”, of the decision-maker who made the decision that was the subject of the complaint under s 14: see, *Briffa v Hay* (1997) 75 FCR 428 at 443 per Merkel J; *Colonial Mutual Life Assurance Society Ltd v Brayley* [2002] FCA 1333 at [32]-[33] per Branson J; *Crocker* at [24] per Allsop J; and *Military Superannuation and Benefits Board of Trustees No 1 v Drake* [2003] FCA 78 at [20] and [37] per Merkel J. In this position, the Tribunal was required to determine whether the unfairness or unreasonableness that it identified in the decision under review could be removed in whole or in part, consistently with the general law and the governing rules of the fund. No issue arose here concerning any contract of insurance. If the unfairness or unreasonableness that it perceived could not be removed in whole or part unless the Tribunal did something contrary to the general law or the governing fund rules, then the Tribunal could not deal with that unfairness or unreasonableness.



32 As we have seen, s 14 is framed so that it applies “if the trustee of a fund has made a decision” (s 14(1)) and the only entitlement that s 14 confers is to make a complaint “that the decision [of the trustee] is or was unfair or unreasonable” (s 14(2)). In conformity with this, s 37(1) enables the Tribunal to exercise all the powers, obligations and discretions that were conferred on the trustee for the purpose of reviewing the trustee’s decision. In these circumstances, counsel for Mr Batt contended that the Tribunal was engaged in reviewing the Board’s decision and that the Board was wrong in its submission that the decision under review was that of the ICC.

33 A difficulty with the Board’s argument was that, in order to bring Mr Batt’s complaint within ss 14(1) and 37(1) of the SRC Act, the decision of the ICC of 12 June 1997 has to be treated as a decision of the Board (being the trustee). Rule 79 of the Rules provides that, for the purposes of Pt 9 (and thus the Board’s reconsideration under r 76) a determination of the ICC under, amongst others rules, r 23 is taken to be the decision of a delegate of the Board. Rule 79 does not state that a determination or decision of the ICC under r 23 or otherwise is to be treated as the decision of a delegate of the Board for other purposes. It was not suggested that the Board had delegated any relevant power under cl 12, assuming that it could have done so.

34 In support of its contention that the Tribunal was reviewing the decision of the ICC, the Board relied on the decisions in *Lees v Comcare* and *Fischer*. In *Lees v Comcare*, a Full Court held that the Administrative Appeals Tribunal did not have power to review Ms Lees’ application for compensation for permanent impairment because it had neither been the subject of a decision by a primary decision-maker nor the subject of reconsideration under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) because s 64 of that Act only authorised that Tribunal to review “reviewable decisions”, which were “reconsideration decisions”, as specifically defined in the governing legislation. The Court held, at 362-363, that the only reviewable decision was a decision that was founded on decisions at the primary and secondary tier and that the powers of the Tribunal “were powers that it was authorised to exercise for the purpose of reviewing only that determination”.

35 In *Fischer*, a Full Court held that it was not open to the appellant to agitate, on appeal from the Tribunal, a rule that was not raised in his initial complaint to the Tribunal, had not been considered by the Tribunal and had not been raised in the appeal.

36 Neither decision provides much assistance in the present case. *Lees v Comcare* turned on particular legislative provisions in question in the case. *Fischer* primarily concerned a party’s ability to raise a new issue on appeal. In this case, the question, whether the Tribunal was engaged in reviewing the primary decision of the ICC or the reconsideration decision of the Board, depends on the terms of the SRC Act and the Trust Deed, including the Rules.

37 The Board also relied on s 19(1) of the SRC Act. Section 19(1) specifically says:

The Tribunal cannot deal with a complaint under section 14 or 14A unless the complainant satisfies the Tribunal that:

- (a) a complaint about the same subject matter was previously made to an appropriate person under arrangements for dealing with such complaints made under section 101 of the *Supervision Act*; and
- (b) the complaint so made was not settled to the satisfaction of the

complainant within 90 days or such longer period as the Tribunal allows.

Part 12 of the SIS Act places “special duties on the trustees and investment managers of superannuation entities” (s 100). Section 101(1), which falls within Pt 12, provides that:

[e]ach trustee of a regulated superannuation fund ... must take all reasonable steps to ensure that there are at all times in force arrangements under which:

- (a) a person referred to in subsection (1A) has the right to make an inquiry or a complaint of the kind specified in that subsection in relation to that person; and
- (b) an inquiry or complaint so made will be properly considered and dealt with within 90 days after it was made.

Subsection (1A) provides, amongst other things, that, for the purposes of s 101(1)(a), a beneficiary of a regulated superannuation fund may make an inquiry into, or complaint about, the operation or management of the fund in relation to the beneficiary. As Merkel J explained in *Drake* at [28]-[29], “[t]he purpose of s 19(1) is to ensure that the Tribunal does not deal with the complaint unless the trustee has had an opportunity to consider and settle that complaint”.

38 Section 19(1)(a) requires that the complainant satisfy the Tribunal that the subject matter of the complaint under s 14 (ie, the complaint before the Tribunal) and a complaint previously made to the trustee are the same. That is, the provision requires satisfaction of an identity between the subject matters of the complaints before the Tribunal and previously made to the trustee. In this case, the subject matter of a previous complaint to the trustee was the 12 June 1997 decision of the ICC under r 23 of the Trust Deed that Mr Batt’s “incapacity in relation to civil employment is 50% and that his classification under Rule 22 remain[ed] Class B”. In order to satisfy s 19(1), the subject matter of the complaint to the Tribunal under s 14 had to be the decision under r 23 that Mr Batt’s classification under r 22 remained class B. I accept, therefore, that, as the Board contended, this circumstance supports its contention that the decision under review by the Tribunal was the decision of the ICC.

39 I accept that s 19(1) does not require that the same relief be sought in the two complaints. I agree with the observations of Merkel J in *Drake* at [28] that:

It is significant that the statutory requirement in s 19(1)(a) is not that the complaint to the Tribunal and to the trustee be the same complaint or be a complaint that makes the same claim for relief. The two complaints may still be about the same subject matter, notwithstanding that the way in which a complainant may wish to have the complaint resolved might differ in each complaint.

In making his application to the Board, Mr Batt sought reconsideration by the Board of the decision of the ICC in accordance with r 76. Whilst he necessarily sought relief of a different kind before the Tribunal, the subject matter of both complaints was the same, as evidenced by the fact that, in both, he sought a decision that his incapacity entitled him to a class A classification.

40 As we have seen, however, the effect of s 14 is to limit entitlement to review to a decision of a trustee and the effect of s 37(1) is, for the purposes of reviewing the trustee’s decision, to confer on the Tribunal the powers of the trustee. There is a question whether a decision of the ICC under r 23 can be

taken to be a decision of the Board (being the trustee) for the purposes of review by the Tribunal, as well as for the purposes of reconsideration by the Board.

- 41 Counsel for the Board submitted that the Board was accountable for the decision of the ICC and, for the purposes of the review procedures, the ICC's decision to maintain Mr Batt's classification was to be treated as a decision of the trustee. As counsel put it:

It is the decision of the committee that constitutes the decision of the trustee and no other decision. Wherever one sees in section 37 the reference to a decision of the trustee that is the subject of a complaint, one understands that to mean in the context of this case the decision of the ICC to maintain the classification of Mr Batt as class B; that being the decision which was subject to reconsideration.

- 42 It seems to me that this submission should be accepted in preference to the alternative submission advanced on Mr Batt's behalf. It is true that the position for which the Board contends might have been more easily reached had the Rules specifically said that, in exercising the powers and functions under rr 22, 22A, 23, 32 and 34, the ICC was a delegate of the Board. In practical terms, r 79 achieves much the same result, albeit by a more circuitous route, by deeming a decision of the ICC under these rules to be a decision of a delegate of the Board for the purposes of Pt 9, which provides for the reconsideration of a decision of a delegate of the Board. In this sense, it is correct to say, as counsel for the Board did, that the Board is accountable for the decision of the ICC under r 23. The primary decision of the ICC is to be taken to be the decision of a delegate of the Board for the purposes of reconsideration by the Board (r 79). There is nothing in the Rules or elsewhere that would cause that primary decision to lose that status upon a complainant making a complaint to the Tribunal under s 14 of the SRC Act.

- 43 There is a further consideration that militates in favour of the Board's contention that the decision under review was that of the primary decision-maker. If the decision that is the subject of complaint under s 14 is treated as the decision of the primary decision-maker (the ICC), then, by virtue of s 37(1), for the purposes of reviewing that decision, the Tribunal has all the powers that were conferred on the primary decision-maker. In this case, these are the powers, obligations and discretions conferred by r 23. They enable the Tribunal to deal with Mr Batt's complaint that he was entitled to a class A classification and that this classification should be backdated.

- 44 On the other hand, if the decision under review is regarded as the decision of the Board under r 76, then, by virtue of s 37(1), the Tribunal would, for the purposes of reviewing that decision, also have the powers that were conferred on the Board under r 76 in aid of reconsidering a primary decision. Some of these powers are ill-suited to the review function of the Tribunal since they do not conform to the statutory regime established by the SRC Act. Further, if the decision under review were the decision of the Board under r 76, s 37(1) would operate to confer powers, the exercise of which might defeat the purpose of s 19(1).

- 45 The conclusion that, for the purposes of review by the Tribunal, s 37(1) operates to confer on the Tribunal the powers of the primary decision-maker is important in this case, because the ICC, which was primary decision-maker, did not have the power to approve an increase, by way of interest, in the rate of pension payable. Rule 69(2) in terms gave this power to the Board. Neither r 19

nor any other rule conferred the power contained in r 69(2) on the ICC. To adapt what the Full Court said in *Fletcher v Commissioner of Taxation (Cth)* (1988) 19 FCR 442 (at 452 per Lockhart, Wilcox and Burchett JJ), the powers referred to in s 37(1) are the powers vested in the original decision-maker for the purposes of making the decision under review and do not include any powers that may be vested in the decision-maker for another purpose. A fortiori, the powers conferred by s 37(1) do not include powers that the original decision-maker did not have for the purpose of making the decision under review or at all. Although the power in r 69(2) is exercisable by the Board when the occasion to use it arises and, subject to s 19(1), by the Tribunal on a review of a decision to exercise this power, the power in r 69(2) is not relevant to the making of the decision under review in this case: see, *Secretary, Department of Social Security v Hodgson* (1992) 37 FCR 32 at 40 per Hill J. It follows from this that the Tribunal exceeded its power when it made the decision that interest was payable by the trustee in the present case.

46 Section 37(4) presupposes that the Tribunal has power that it might otherwise exercise subject to the constraints imposed by this provision. That is, any power that the Tribunal would otherwise have by virtue of s 37(1) can only be exercised for the purpose of removing the unfairness or unreasonableness that the Tribunal perceives in the decision under review. To the extent that the Tribunal treated s 37(4) as an independent source of power, it was in error. Further, the Tribunal was also in error to the extent that it sought to determine all aspects of the relationship between the Board and Mr Batt.

47 The present case differs from the situation that Allsop J considered in *Crocker*, where his Honour held that the Tribunal did not err in exercising the power to compound a claim, notwithstanding that the trustee had not considered the exercise of the power. In *Crocker*, it had been open to the trustee to consider compounding the claim as contemplated by cl 7(c) of the Trust Deed (at [130]). In this case, the relevant decision-maker had no power to make a decision under r 69(2) regarding the payment of interest by the trustee. Allsop J described the trustee's failure to do so as "the source of the unfairness or unreasonableness of the decision" (at [133]).

48 In *Crocker*, his Honour was of this opinion in part because circumstances prior to the making of the decision under review had raised the possibility of a decision under cl 7(c) (at [129] and [132]). It must also be borne in mind that, in this case in contrast to the position in *Crocker*, there was nothing in the circumstances prior to the decision by the ICC or prior to the reconsideration decision by the Board that could be said to have raised a claim for interest. Further, I reject the proposition that a claim for interest was implicit in the terms of the complaint made by Mr Batt to the Tribunal: see [29]. The relief that he sought was the relief that could be given under r 23.

49 If I am wrong in concluding that s 37(1) did not operate to confer on the Tribunal the power in r 69(2) and the Tribunal had this power available to it, then there is a further question whether the requirements of r 69(2) were satisfied in the circumstances of the case. For the reasons I am about to give, I do not think they were.

50 As noted above, pensions are to be paid in fortnightly instalments on pension pay-days. Rule 69(2) permits an approval of an award of interest in the rate of the pension to a pensioner for such period as the decision-maker determines if two conditions are satisfied. The first is that a pension *is* payable and the second

is that the commencement of the payment of that pension *is* delayed. The amount of interest is calculated in respect of each instalment of the pension delayed and the period of the delay of that instalment (r 69(4)).

51 Under r 26, a person who is classified as class A or class B under r 22 (whether on retirement or by reason of reclassification under r 23) is entitled to invalidity benefits in accordance with Subdiv B of Div 2 of Pt 3 of the Rules. An invalidity pension, as defined in the Rules, is a pension payable under r 27 or r 28 (which appear in Subdiv B of Div 2 of Pt 3). A pension, as defined in the Rules, is a pension payable under the Rules. It is plain enough from this that the pension payable to a person on a class A classification is not payable to the person until the person is classified as class A under r 22. Mr Batt was not classified as class A until the Tribunal made its decision on 31 October 2001. It follows that, under the Rules, it is only on and from this date that it is possible to say that a pension is payable to Mr Batt on a class A classification.

52 The fact that, under r 23(4), the decision-maker must specify the date from which the reclassification is to take effect and that the person is taken to be classified under r 22 on and after that date does not alter this conclusion. The fact that the decision-maker may determine that a reclassification is to take effect from a date prior to the reclassification decision does not affect the conclusion that, as a matter of fact, the pension at the reclassified rate *is* payable from the date of the reclassification decision.

53 Section 41 of the SRC Act does not require a different conclusion. Section 41(1) does no more than provide that, subject to s 41(2), a determination of the Tribunal comes into operation immediately upon the making of the determination. Section 41(3) further provides that a decision made by the Tribunal in substitution for a decision of a trustee is taken to be the decision of the trustee (s 41(3)(a)) and unless the Tribunal otherwise orders “has effect, and is taken to have had effect on and from the day on which the original decision has or had effect”. As Kirby J explained in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [91], in making a determination under s 37(3), the Tribunal creates new rights, albeit in the form of a decision which is then substituted for the decision of the trustee which is set aside. The fact that pursuant to statute a decision of the Tribunal would ordinarily take effect at a date prior to its decision on classification does not alter the fact that the pension at the reclassified rate *is* payable only from the date of the decision of the Tribunal.

54 Further, the fact that the reclassification is to take effect from a date prior to a reclassification does not entail the consequence that the commencement of the payment of the pension at the reclassified rate is “delayed” for the purpose of r 69(2). In order for there to be a relevant delay in the commencement of the payment of the pension that is payable, there must be a classification or reclassification decision that makes the pension payable and delay between the date of this decision and the first payment of the pension in accordance with the Rules (and the decision). The period between the date of reclassification and the date on which, in the SRC Act or under the Rules, the reclassification takes effect is not a period of delay in respect of any instalment of the pension within r 69(4). This is because no right to receive the pension at the reclassified rate arises before the decision on classification or reclassification is made.

55 For the reasons stated, I would set aside the determination of the Tribunal given on 26 June 2003 and declare that there was no power in the Tribunal, in

the circumstances of the case, to approve an increase, by an amount of interest, in the rate of pension payable to Mr Batt from 12 June 1997. The Board accepted that there should be no order as to the costs of the appeal. It is to be borne in mind that, although the Board has succeeded on the appeal, the questions that it raised are significant for the discharge of its functions and powers under the Trust Deed.

56 Further, the fact that Mr Batt did not take any part in the proceedings in *Military Superannuation and Benefits Board of Trustees No 1 v Batt* occasioned some difficulty for the Court on that occasion because it was not assisted by any argument contradicting that of the Board. The Court was much assisted on this occasion by pro bono counsel, who appeared for Mr Batt. The Court acknowledges the very great service rendered to the Court and to litigants in person by members of the profession who agree to act without fee as counsel (or solicitor) in the presentation of argument or in the preparation of a case.

*Orders accordingly*

Solicitor for the applicant: Australian Government Solicitor.

CATHERINE SYMONS