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Case Note

Edser v QSuper Board and Australian Financial Complaints Authority [2023] FCA 1120 (20 September 2023)

Approach of Federal Court and role of Australian Financial Complaints Authority

1 *Edser v QSuper Board and Australian Financial Complaints Authority* [2023] FCA 1120 (Meagher J's judgment), and the related earlier judgment, *Edser v QSuper Board and Australian Financial Complaints Authority* [2021] FCA 1437 (Perram J's judgment), illustrate the Federal Court's approach on an appeal "on a question of law" from a determination by the Australian Financial Complaints Authority of a superannuation complaint.

2 Meagher J's judgment also confirmed AFCA's role when making such a determination.

3 The complaint in the present matter concerned a declined claim for a Total and Permanent Disablement benefit.

Introduction

4 Mr Edser was employed by Queensland Health and, thus, became a member of the State Public Sector Superannuation Scheme, a fund.

5 QSuper Board is, pursuant to s 3 of the *Superannuation (State Public Sector) Act 1990 Act* (Qld), a body corporate and, pursuant to s 4 of that Act, it was the trustee of that fund. QSuper Board arranged certain insurance for the benefit of insured members (such as Mr Edser) which, relevantly, contemplated the payment of a benefit if a member satisfied the TPD definition.

6 Mr Edser made a claim for a TPD benefit, based on psychiatric illness, which QSuper Board rejected, because QSuper Board did not form the "opinion, the member's total and permanent disablement … was not related to a pre-existing medical condition", for the purposes of an exclusion clause in the insurance terms.

7 Mr Edser, pursuant to s 1053 of the *Corporations Act 2001* (Cth), made a superannuation complaint to AFCA about QSuper Board's rejection of his claim.

8 AFCA, in accordance with s 1055 of the Corporations Law, made a determination on the complaint, which affirmed QSuper Board's rejection, because AFCA also accepted the illness which rendered Mr Edser TPD was "related to" a pre-existing medical condition.

9 Mr Edser, pursuant to s 1057(1) of the Corporations Law, appealed AFCA's determination, on a "question of law", which resulted in Perram J's judgment.

10 Perram J's judgment addressed four questions of law, each of which are considered separately below. His Honour, ultimately, set aside AFCA's determination and remitted the matter to AFCA for redetermination in accordance with his judgment.

11 AFCA, in due course, made a determination on the remitted matter.

12 Mr Edser, however, also appealed AFCA's determination on the remitted matter, which lead to Meagher J's judgment.

13 Meagher J's judgment observed AFCA's role in making a determination on a complaint, and addressed six questions of law, each of which are also considered separately below.

Whether AFCA failed to consider a mandatory relevant consideration, and determine the period of time in which Mr Edser was an "insured member"

14 Mr Edser argued AFCA failed to determine the period of time in which he was an "insured member", in circumstances where an alternative insurance clause might have allowed payment of a TPD benefit, had he been a member for more than two years.

15 Perram J rejected this argument "because it is clear that if (AFCA) had considered whether Mr Edser was eligible under (the alternative clause) it would have been bound to conclude that he was not."

16 AFCA, in this regard, had determined Mr Edser had become a member on 31 October 2011, which was not disputed.

17 Perram J then identified and applied the clause which brought the insurance to an end. The insurance ended on 3 January 2013, being the date of Mr Edser's TPD. His Honour thus demonstrated Mr Edser was an insured member for less than two years and, accordingly, ineligible for payment of a TPD benefit pursuant to the alternative clause.

18 Perram J rejected a submission that AFCA had operated under a "misconception", and said AFCA held "an accurate understanding of what the undisputed facts inevitably implied."

19 Perram J considered this was reinforced by the fact that neither party submitted to AFCA that the alternative insurance clause applied. His Honour said at [24], [26]:

> "This was not one of those cases, therefore, where the hearing before a decision-maker has gone awry because some significant matter was overlooked. Rather, it is a case where an attempt is being made to persuade on appeal a point not seriously considered by any party below because it was correctly understood to be wrong.
>
> … the suggested error must be immaterial to the outcome. Even if (AFCA) had considered (the alternative insurance clause), as Mr Edser suggests it should, on the findings (AFCA) had itself made it would have been bound to conclude that he was not eligible under it."

Whether AFCA's construction of the definition of "pre-existing medical condition" was too broad

20 Perram J considered, contrary to Mr Edser's submission, there was no "construction" argument about the definition of "pre-existing medical condition". His Honour noted AFCA preferred the view that, over many years, there was a single underlying depressive condition instead of the alternative view, which was that, throughout that period of time, there were several medical conditions, each of which had fully resolved, which did not reflect the existence of a single underlying depressive condition.

21 Perram J, in highlighting the distinction between a question of law and a question of fact, said at [31]:

> "… That being (AFCA's) factual conclusion, I am unable to see how it can be said that (AFCA) misapplied the definition …. On the facts (AFCA) had found it plainly was."

22 Perram J, in rejecting this question of law, also noted the pleaded question of law did "not match up with the argument which was advanced in support of it".

The proper construction of the words "not related to" in the exclusion clause

23 Perram J accepted "there is a degree of ambiguity in the approach that (AFCA) took to the question of the requisite connection" concerning the phrase "related to", and considered AFCA's determination was "inconsistent" in this respect.

24 Perram J observed AFCA accepted the clause in question operated as an "exclusionary provision". That is, the intention and purpose of the exclusion clause was to preclude the payment of a TPD benefit where the TPD was connected to a previous medical condition, see below.

25 Perram J accepted AFCA misapplied what was required by "not related to". His Honour accepted the most likely purpose of the "exclusionary provision" was that the insurer "needed for prudential reasons to reduce its exposure to pre-existing claims" where members became insured without having to make an application for that insurance.

26 Perram J, in this regard, concluded at [67]:

> "It seems to me that the most plausible interpretation of (the exclusion clause) is the one proposed by QSuper: that the connection required is one of clear causation. This standard will not be satisfied by the mere satisfaction of the but-four test. The decision-maker will need to be satisfied that the pre-existing medical condition is causally connected to the TPD in a way which is clear. Consequentially, I accept that (AFCA) did not correctly apply the correct causal standard…."

27 Perram J, accordingly, allowed Mr Edser's appeal because, as explained above, AFCA misconstrued and misapplied the phrase "not related to" in the exclusion clause.

28 Perram J, pursuant to s 1057(3) of the Corporations Law, which empowers the Federal Court to make orders it thinks fit, therefore, remitted the matter to AFCA and, in a subsequent short decision, ordered QSuper to pay Mr Edser's costs of the appeal, notwithstanding Mr Edser failed on each of his other pleaded questions of law.

Whether AFCA denied Mr Edser procedural fairness with respect to its decision that the Insurance Contracts Act 1984 (Cth) did not apply

29 Perram J, otherwise, rejected Mr Edser's contention that AFCA denied him procedural fairness by its decision that the *Insurance Contracts Act 1984* (Cth) did not apply to his complaint.

30 Perram J considered it was "difficult to see" how AFCA's decision that this Act did not apply was adverse to Mr Edser's interests because Mr Edser did not submit AFCA should have applied that Act.

AFCA's role in making a determination on a complaint

31 Meagher J noted that, on remitter, AFCA affirmed its prior determination.

32 Meagher J said AFCA's role in considering a complaint was set out in *Board of Trustees of the State Public Sector Superannuation Scheme v Edington* [2011] FCAFC 8 (Kenny, Lander and Logan JJ), which considered similar provisions in relation to the previous scheme. Meagher J noted Kenny and Lander JJ explained the following principles, citations omitted:

> "(1) The Authority stands in the shoes of the decision maker and, based on all the information and evidence before it, determines whether the decision made by the decision maker was fair and reasonable in all the circumstances: at [46].
>
> (2) In determining whether a decision is "fair and reasonable", the question is "directed to whether the actual decision, rather than the process led to it, was fair and reasonable": at [46].
>
> (3) The Authority must make its own findings of fact only for the purpose of determining whether the decision was fair and reasonable. It does not make all of the factual findings afresh, and only makes such findings of fact that are necessary for it to complete its task: at [50] ….
>
> (4) If the Authority determines that a decision is not fair and reasonable, it will substitute that decision for a decision that is fair and reasonable in accordance with the law, rules of the fund or terms of insurance. If the Authority is satisfied that a decision is fair and reasonable, it must affirm the decision: [47]-[48]."

Whether, in finding there was a "key single common element" in the diagnosed conditions, AFCA made a "legally unreasonable" finding

33 Meagher J did not accept Mr Edser's question in this regard was a question of law. Her Honour considered Mr Edser's submissions, which were not supported by authority, did not address how AFCA's finding was *legally* unreasonable. Her Honour said "[a]lthough the question is drafted as a question of law, the submissions to the Court made it clear that the applicant sought a reappraisal of the merits."

Whether AFCA erred in concluding the pre-existing medical condition was causally connected to the TPD in a way which is "clear"

34 Meagher J said, at the outset of her consideration of this question, the purpose of only allowing questions of law to be raised is to ensure the Court does not deal with the merits of the case: *Haritos v Commissioner of Taxation* (2015) 233 FCR 315; [2015] FCA the 92 at [194].

35 Meagher J said this question was also an attempt to re-argue the merits of the factual findings made by AFCA rather than a question of law.

Whether AFCA was required to make findings as to whether the predisposition to mental illness had a clearly causative role in rendering Mr Edser TPD

36 Meagher J, while accepting this was a question of law, considered AFCA's determination, when read as a whole, *did* make findings as to the causative connection between the predisposition to mental illness and becoming TPD. Her

Honour, accordingly, concluded there was no error by AFCA in failing to make such findings.

Whether AFCA erred by misconstruing and/or misapplying the phrase "causally connected to his TPD in a way which is clear"

37 Mr Edser submitted AFCA preferred the opinion of the psychiatrist retained by QSuper and, as such, invalidly "bound itself" to the views of that psychiatrist, and invalidly fettered its statutory decision-making function.

38 Meagher J, however, said AFCA's preference for the opinion of QSuper's psychiatrist over other medical opinion was "entirely a matter for (AFCA)." Her Honour said AFCA made factual findings after considering the available evidence. Her Honour emphasised AFCA's determination must be read in its entirety, and rejected Mr Edser's argument that AFCA erred by misconstruing and/or misapplying the phrase "causally connected to his TPD in a way which is clear".

Whether AFCA erred in failing to consider whether the effect of the traumatic events that occurred during employment was so substantial such that they denied any clearly causative role to the pre-existing medical condition

39 Meagher J, in this regard, quoted extracts of AFCA's determination in order to show AFCA did not merely recognise Mr Edser's argument and fail to consider it. Rather, AFCA reached conclusions, which read in the context of the entirety of its determination, made it clear AFCA considered the role played by the traumatic events that occurred during employment.

40 Meagher J considered AFCA was ultimately satisfied that, notwithstanding the effect of the trauma during employment, the clear causation test (specified by Perram J, and extracted above at paragraph [26]) was satisfied. Her Honour indicated there was no error merely because AFCA omitted to use "the exact phrasing contained within the judgment of Perram J", and to suggest such an error "would be to read the decision with an eye keenly attuned to the perception of error": *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

Whether AFCA was required to resolve ambiguities in the report by QSuper's psychiatrist

41 Meagher J quoted submissions Mr Edser made to AFCA on the remitted matter. Her Honour accepted Mr Edser did not ask AFCA to resolve any ambiguity in the report in question, rather he asked AFCA to interpret the opinion in a manner that supported his case.

42 Meagher J said at [88]-[89], by contrast, on appeal, Mr Edser suggested:

> "… that a course should have been adopted which he did not urge at the time of making submissions to (AFCA) on remitter. Where the applicant contended for a particular interpretation of (the) report to (AFCA), he is not entitled to now seek to advance that the different approach should have been taken. … Based on the party's submissions, and particularly those the applicant put before (AFCA), it is not the case that (AFCA) overlooked a submission that it ought, in one way or another, to have resolved certain comments made in the report. …"

Outcome

43 Meagher J concluded AFCA, in accordance with the law, was satisfied the decision in question was "fair and reasonable in all the circumstances", and dismissed Mr Edser's (further) appeal, with costs.

Please feel free to contact me at any stage regarding any aspect of this Case Note.

Yours faithfully,

J Harrison

Jeremy L Harrison

Dated: Wednesday, 25 October 2023