



HIGH COURT OF AUSTRALIA

20 October 2010

ALAN MICHAEL FINCH v TELSTRA SUPER PTY LTD
[2010] HCA 36

The applicant, who had undergone male to female gender reassignment surgery in 1988, commenced employment with Telstra in 1992. The reassignment surgery turned out to have been unsatisfactory and distressing to the applicant. In 1996 the applicant took sick leave, reassumed a male identity and underwent surgery to reverse the gender change as far as possible. He returned to work with Telstra in 1997, but ceased employment with Telstra just under a year later in 1998. Following this, he was employed by Foxtel for one month in 1999 and by Qantas for five months in 1999-2000. From 2000, the applicant has sought a total and permanent invalidity ("TPI") benefit from Telstra Super Pty Ltd, the trustee of the applicant's superannuation fund ("the Trustee"). Despite medical opinion suggesting that the applicant was unlikely to engage in gainful work ever again, the Trustee rejected the applicant's claim for a TPI benefit on an initial assessment and a subsequent reassessment.

In the Supreme Court of Victoria, the trial judge held that the Trustee failed to give genuine consideration to the matter in that it had failed to pursue sufficient inquiries into certain aspects of the claim. The trial judge remitted the matter to the Trustee for reconsideration. The Court of Appeal allowed an appeal by the Trustee and set aside the trial judge's orders. The Court of Appeal held that for the applicant to meet a requirement in the definition of TPI in the trust deed - that the applicant be absent from active work for at least six months ("the Active Work Requirement") - the Trustee had to be satisfied that the applicant had been absent from active work with Telstra for at least six months as at the date that the applicant ceased to work for Telstra. The applicant's first period of absence in 1996-1997 had been six days short of the required six month period. On this basis, the Court of Appeal considered that the issue of genuine consideration did not arise, but in any event disagreed with the trial judge's conclusion on that issue.

Today, the High Court unanimously allowed an appeal against the decision of the Court of Appeal, and remitted the matter to the Trustee. The Court rejected the Court of Appeal's construction of the Active Work Requirement on the basis that such an approach involved unnecessarily reading words into the relevant clause. On the question of genuine consideration, the Court noted that the duty of trustees to inform themselves properly is particularly intense in respect of superannuation trusts, and considered that the determination of the question of whether an applicant fell within the definition of TPI was not a matter of discretionary power but rather an aspect of the performance of a trust duty. The Court upheld the finding of the trial judge that the Trustee did not comply with its duty of inquiry. It was not appropriate for the Court to substitute its own decision for that of the Trustee, as it had not been shown that the Trustee was incapable of approaching the task of forming its opinion satisfactorily.

The Trustee was ordered to pay the applicant's costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*