IN THE HIGH COURT OF AUSTRALIA.

re Foster

v.

REASONS FOR JUDGMENT.

Judgment delivered at Melbourne

on Wednesday, 4th April 1945

H. J. Green, Govt. Print., Melb.

C.2774

RE FOSTER

ORDER

Application for order nisi for writ of Mandamus refused.

RE FOSTER

JUDGMENT

DIXON J.

RE FOSTER

This is an application for an order nisi for a writ of mandamus directed to the Repatriation Commission and the members of the War Pensions Entitlement Appeal Tribunal. The writ sought is one commanding the Commission to hear and determine a claim made by the applicant, and the Tribunal to hear and determine his appeal to the Tribunal, according to law.

The applicant was a member of the Forces within para (a) of the definition of that expression in sec. 100 of the Australian Soldiers Repatriation Act 1920-43. He was, in fact, a member of the permanent forces who enlisted in 1925, and was discharged on medical grounds on 23rd April, 1942.

Under sec. 101 (1)(b), the applicant would be entitled to a pension in accordance with Div. (I), of Part III, if his incapacity arose out of, or was attributable to, his service as a member of the forces. Under sec. 47 (2) it was unnecessary for him to furnish proof to support his claim. The burden of proof is placed on those contending that the claim should not be granted. The Commission and the Tribunal are directed to draw from all the circumstances of the case, from the evidence furnished, and from medical opinions, all reasonable inferences in his favour. Further, under sub-sec. (I) they are to act according to substantial justice and the merits of the case, being bound by no technicalities legal forms, or rules of evidence, and are to give the applicant the

benefit of any doubt concerning any fact or matter which would be favourable to him, or any question whatsoever arising for decision. Notwithstanding the strength of the presumptions raised in his favour by this provision and the advantage of the directions it gives to those considering a claim to a pension, the applicant failed with the Repatriation Board, the Commission, and the Appeal Tribunal, and he now complains that they did not perform their duty in the manner prescribed by the statute, and that there can be no other explanation of the failure of his claim. He has no appeal to this Court, which has no authority to decide or examine the merits of the case.

To obtain a mandamus he must establish that the purported

performance of the duty of the Tribunal or Commission was no real performance because they did not act in the manner provided by law. The grounds upon which a mandamus may issue are described in R. v War Pensions Entitlement Tribunal ex parte Bott 50 C.L.R 228 at pp.242-3,and by Starke J. on p.245,and,in dealing with precise grounds in that case,pp 248 to 250. The provisions of the Act dispensing with proof and raising presumptions in the soldier's favour have been strengthened since that case,but though the duties of the Commission and of the Tribunal are affected,what is there said about the writ of mandamus [redacted] applies.

The application to me for an order nisi was based upon an allegation that - (a) no proper or any opportunity was given to the

prosecutor to meet or traverse or test the evidence and information relied and acted upon by the Commission and the Tribunal ;

(b) they failed to act according to substantial justice and the merits of the case ;

(c) they failed to give the prosecutor the benefit of the doubt (if any) as to the questions which arose for decision under the said claim and appeal ;

(d) they failed to draw from all the circumstances of the case all reasonable inferences in favour of the prosecutor ;

(e) they placed the onus of proof on the prosecutor.

It did not appear to me that the facts stated in the affidavit made out a case for a mandamus ; but, under a sub poena, issued out of the Supreme Court in some way I do not understand, the Commission's and Tribunal's files had been produced and handed to the Principal Registrar. In view of the importance of the matter to the applicant I took time to read them, but I am

confirmed in the view that I ought not to grant an order nisi. To do so would, in my opinion, result only in a costly legal proceeding, in which the applicant would be foredoomed to failure. Very few of the facts need be stated. The military career of the applicant was first at Queenscliff ; then from 1930 to 1935 at Melbourne with the Transport Company ; and later, in the organizatio and operation of the military transport service in the 6th Military District, that is in Victoria. From September 1939, to December 1940, he was at Seymour, chiefly engaged in training transport personnel. From that time to October 1941, he was assisting in training and in the work of the Army Service Corps. He was then transferred to the Second Army Training School, and was

again concerned with transport. In his medical history there was nothing material until 1940. He then began to show symptoms of a neurosis. The files contain much information as to the further development of his condition, and the course of the medical examinations and investigations. It is enough to say that degenerative changes were reported and diagnosed, that a question was raised whether the diagnosis should be cerebral atrophy, and that this description was, rightly or wrongly, adopted for official purposes. It is clear that his case received much medical attention and investigation, and that the weight of medical opinion, as recorded, was against the view that his condition was attributable to his service as a member of the

forces, or arose out of it, or had been contributed to, or aggravated, by the conditions of his war service.

An affidavit of a medical practitioner has been filed controverting this view, as well as the diagnosis of cerebral atrophy. But the question whether it is right or wrong is beside the point on this application. It is not one of the matters to be decided on mandamus. The question here is whether the Commission and Tribunal performed their legal duty in reaching a determination, not whether their decision was right or wrong. There was before them abundant material to explain and justify their conclusion.

The applicant complains that the Commission did not hear him personally or by a representative, and that the Tribunal did not hear him sufficiently. But apparently the Commission is not required to hold a hearing and, before the Tribunal, the applicant was represented by ~~counsel~~ an advocate and was present personally.

I can see no ground for saying that they placed the onus of proof on the applicant, or that they failed to draw all reasonable inferences in his favour, as two of the suggested grounds state.

There is no reason to suppose that in the minds of either body any doubt existed to the benefit of which the applicant was entitled.

To say they failed to act according to substantial justice

and the merits of the case, is on the facts little more than a challenge to their conclusion. It is not suggested that the Tribunal refused any request on the part of the applicant for information as to the materials before it, or for an opportunity of furnishing further evidence or meeting or traversing any statement or fact alleged. In any case the position of the Appeal Tribunal in relation to the files and medical reports is ENTIRELY different from the case dealt with by Lowe J. in R. v Milk Board 1944 Argus L.R. at pp. 392-3. The first suggested ground does not appear to me to be supported. In any case it would be difficult to base a mandamus on what appears

in the affidavit.

For the foregoing reasons, I refuse the order nisi. I should add that, after an appeal was taken to the Entitlement Appeal Tribunal, I should have thought that the proceedings before the Commission would be unimportant and, that if a writ were to issue, it should be directed only to the Appeal Tribunal. It, perhaps, too should be pointed out that the decision of the Tribunal was given on 28th March 1944, and a year elapsed before the application for mandamus was made. The explanation of the delay is not very adequate.

Counsel for the applicant referred to the possibility, subject to Order 47 of the Rules, of applying for certiorari, but he made no such application, nor did he suggest how the jurisdiction

of this Court to send certiorari to the Appeal Tribunal or Commission arose.

Application for order nisi for writ of mandamus refused.