McDONALD v DIRECTOR-GENERAL OF SOCIAL SECURITY

FEDERAL COURT OF AUSTRALIA — GENERAL DIVISION

WOODWARD, NORTHROP and JENKINSON JJ

12 December 1983, 27 March 1984 — Melbourne

Social security — Invalid pension — Meaning of "permanently incapacitated for work" — Likelihood of persistence in the foreseeable future — Whether any onus of proof.

Administrative law — Whether principles concerning onus of proof apply to hearings by administrative tribunals — Importance of relevant legislation — Social Security Act 1974 (Cth) ss 14, 23, 24, 46(1) and 108 — Administrative Appeals Tribunal Act 1975 (Cth) ss 33(1)(c), 43 and 44 — Administrative Appeals Tribunal — Appeal — Decision set aside.

The respondent cancelled an invalid pension held by the appellant on the ground that the appellant was not permanently incapacitated for work. On an application for review of that decision, the Administrative Appeals Tribunal affirmed the respondent's decision on the ground that there was no settled expectation of the likelihood that the appellant's incapacity for work would continue indefinitely and that, therefore, the Tribunal could not conclude that the appellant's incapacity was permanent. The appellant appealed to the Federal Court.

Held: The appeal should be allowed because, although the Tribunal had not erred in failing to place an onus of proof on the respondent, it had misconstrued the phrase "permanently incapacitated for work" in s 24 of the Social Security Act.

Onus of proof

Per Woodward and Jenkinson JJ: (i) The onus of proof was a common law concept developed to provide answers to practical problems of litigation but it was not directly applicable in administrative proceedings.

(ii) No legal onus of proof arose from the status of the Administrative Appeals Tribunal which was required, by s 43 of the Administrative Appeals Tribunal Act, to place itself in the position of the administrator and make its own decision; in particular there could be no presumption that the administrator's decision was correct.

(iii) However, the legislation being applied by the administrator (or the Tribunal) could place an onus on one or other of the parties to establish facts upon which the administrator's decision depended.

(iv) Section 24 of the Social Security Act, which sets out the qualifications for invalid pension, did not create a legal onus to prove all relevant aspects of a claim of permanent incapacity for work.

(v) Even where the legislation in question did not create an onus of proof, there could be situations where the administrator (or the Tribunal) was quite unable, after reviewing the available material, to decide a question of fact either way. In resolving that uncertainty, the decision-maker should be guided by the terms of the legislation under which the decision was being made.

(vi) When the decision-maker was deciding (under s 24 of the Social Security Act) whether an invalid pension should be granted, or reviewing (under s 14 or s 46(1) of the Social Security Act) whether an invalid pension should have been granted at some time in the past, such a state of uncertainty would mean that the decision-maker had failed to be satisfied that the applicant was, or ever had been, permanently incapacitated for work; and the pension should be refused or cancelled.

(vii) But where, as here, the decision-maker was deciding (under s 14 or s 46(1) of the Social Security Act) whether or not to cancel a pension in the light of changed circumstances, such a state of uncertainty would mean that the decision-maker had failed to achieve the required state of mind that the pension should be cancelled; and the pension should not be cancelled.

Per Woodward J: In the present case, the Tribunal had experienced no indecision and had made no error of law in dealing with this aspect of the case.

Per Jenkinson J: In the present case, the Tribunal had proceeded on the basis that the applicant's pension should be cancelled unless she were found to be permanently incapacitated for work, whereas the Social Security Act authorized cancellation only if the applicant were found not to be permanently incapacitated for work. This amounted to an error of law.

Per Northrop J: (i) When deciding (under s 14 or s 46(1) of the Social Security Act) whether an invalid pension should be cancelled in the light of changed circumstances, it was unreal to suggest that the respondent carried an onus of proof.

(ii) The ultimate question was whether a pensioner was qualified to receive the pension, to be decided after consideration of all the material when the decision was made.

(iii) Similar principles applied in proceedings before the Administrative Appeals Tribunal.

(iv) The practice, whereby the decision-maker appears to assist the Tribunal in its review of a decision, did not justify the introduction of concepts of onus of proof into the determination of claims under the legislation where no legal onus of proof arose.

(v) The Tribunal had made no error of law in dealing with this aspect of the case.

Permanent incapacity

Per Woodward and Northrop JJ: (i) The Social Security Act drew a line between temporary and permanent incapacity for work, the former being covered by sickness benefit (s 108), the latter by invalid pension (s 24).

(ii) The distinction between temporary and permanent incapacity was based on assessment of future prospects.

(iii) A permanent incapacity was one which, more likely than not, would persist in the foreseeable future.

(iv) In assessing the likelihood of persistence, two factors should be weighed together: the degree of likelihood of improvement and the time-span for that improvement. The longer the time-span and the less probable the improvement, the more appropriate would be a finding of permanent incapacity.

(v) In any borderline case, a belief, even if on a fine balance, that indefinite duration is more likely than foreseeable termination, will suffice: it was not necessary to have a "settled expectation" of permanency; and the Tribunal had, accordingly made an error of law.

Per Jenkinson J: (i) The meaning assigned by Woodward J to the word "permanent" in s 24 of the Social Security Act was correct.

(ii) But the statement of the Tribunal, that the decision-maker must have "a settled expectation of the likelihood of indefinite continuance of the incapacity" was consistent with that meaning and did not suggest that the Tribunal misconceived the meaning of "permanent". There was, accordingly, no error of law in this aspect of the Tribunal's reasoning.

Appeal

This was an appeal to the Federal Court of Australia, on a question of law, from a decision of the Administrative Appeals Tribunal affirming a decision of a delegate of the Director-General of Social Security to cancel an invalid pension held by the appellant.

Mr Rose for the appellant.

T Ginnane for the respondent.

Cur. adv. vult.

Woodward J. This is an appeal from a decision of the Administrative Appeals Tribunal which affirmed a decision of a delegate of the Director-General of Social Security to cancel an invalid pension which had previously been awarded to the applicant.

The appeal, provided for by s 44 of the Administrative Appeals Tribunal Act 1975, (the AAT Act) is limited to questions of law. The two short questions which emerged in the course of argument, and which are adequately covered by an amended notice of appeal, filed by leave of the Court, are—

(a) does either party in a case such as this before the Tribunal bear any onus of proof, and if so what is the extent of that onus?
(b) what is the meaning of the word "permanent" in the phrase "permanent incapacity"?

The facts of the case, so far as they are relevant to this appeal, may be summarized as follows:

The applicant was born in 1948 in Malta. She came to Australia as a child. She has been married twice and has four children, born between 1967 and 1974.

She applied for and was granted an invalid pension in 1979 because she was suffering from Crohn's disease; an inflammatory disorder of the bowels. The report of a Commonwealth Medical Officer (CMO) at that time certified that she was "permanently incapacitated for work to the extent of 85 per cent or more" (a figure stipulated by the Social Security Act 1947 as a prerequisite for the grant of an invalid pension).

However the certificate of the CMO went on to say that the applicant's position should be reviewed in one year's time. Such a review was duly carried out by the same CMO in May 1980. He certified that, although her condition had improved in the previous 12 months, she was still permanently incapacitated for work to the extent of 85 per cent or more. This time he recommended a further review in two years.

This report was referred to a delegate of the Director of Health who gave the formal opinion that the applicant was not permanently incapacitated to the extent of 85 per cent. Since he did not see the applicant himself this opinion must have been based on the CMO's report together with the delegate's knowledge of the disease.

A somewhat misleading letter was then sent to the applicant telling her, "As a result of your recent medical examination, it has been certified that you are regarded as not permanently incapacitated for work and therefore it will be necessary to cancel your Invalid Pension". Three months later a further letter was sent which contained the apparently quite untruthful statement (which counsel for the respondent could not explain), "Your pension was cancelled due to the Commonwealth Medical Officer deciding that you were no longer medically entitled". This letter contained a form, which the applicant could use if she wished, appealing to the Social Security Appeals Tribunal. She exercised that right and her appeal was considered and recommended for dismissal by that Tribunal in March 1981. The part played by the Social

Security Appeals Tribunal is not relevant to these proceedings. The applicant then exercised her further right of appeal to the Administrative Appeals Tribunal (the AAT).

The AAT heard evidence in August 1982 and gave its considered reasons for rejecting the applicant's appeal in September.

Medical evidence put before the AAT was somewhat conflicting. It referred to the applicant's domestic problems, and what were variously described as "personality" and "psychological" problems, as well as to Crohn's disease. The case for the applicant was that it was a combination of these factors, a major part of which amounted to physical or psychological illness, which rendered her 85 per cent incapacitated.

It is clear that there was evidence before the AAT on which it could properly find, as it did, that the applicant was not 85 per cent incapacitated, provided that it did not misdirect itself on questions of law in the process of reaching that decision.

As I have said, only two matters are alleged, on behalf of the applicant, as amounting to misdirections in law. The first relates to onus of proof. It must be said at the outset that no such question was raised by the original notice of appeal, and it was conceded by counsel for the applicant that he conducted her case before the AAT on the assumption that such onus as existed was on his client — to establish her entitlement to a pension. Further, I take the view that the AAT's reasons for decision did not depend on any onus of proof, and indeed they disclosed a clear view that the evidence showed that the applicant was not permanently incapacitated.

Any discussion of the subject thus becomes rather academic, but since questions arose in the course of argument which were then debated, and the applicant was permitted to amend the notice of appeal to raise the question, I think it is appropriate to say something about it.

The first point to be made is that the onus (or burden) of proof is a common law concept, developed with some difficulty over many years, to provide answers to certain practical problems of litigation between parties in a court of law. One of the chief difficulties of the concept has been the necessity to distinguish between its so-called "legal" and "evidential" aspects. The concept is concerned with matters such as the order of presentation of evidence and the decision a court should give when it is left in a state of uncertainty by the evidence on a particular issue.

The use outside courts of law of the legal rules governing this part of the law of evidence should be approached with great caution. This is particularly true of an administrative tribunal which, by its statute "is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate" (AAT Act s 33(1)(c)).

Such a tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do if it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating, or in considerations of natural justice or common sense, than in the technical rules relating to onus of proof developed by the courts. However these may be of assistance in some cases where the legislation is silent.

Whether the principles adopted by such a tribunal, arising from these various considerations, are appropriately dealt with under the heading "onus

of proof", becomes a matter of choosing labels. It would probably be more convenient to avoid using that expression in cases such as the present.

There is certainly no legal onus of proof arising from the fact that this is an "appeals" tribunal, because the AAT is required, in effect, by s 43 of the AAT Act, to put itself in the position of the administrator in carrying out its review and, in the light of the material before the AAT, (not the material before the administrator, *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589) make its own decision in place of the administrator's. The AAT itself, in a series of cases beginning with *Re Ladybird Children's Wear Pty Ltd* (1976) 1 ALD 1, has taken the view that there is no presumption that the administrator's decision is correct. This is clearly the right approach to the matter.

It is possible to imagine a case where the Act which the administrator is applying places a requirement or onus on one or other of the parties to an issue to establish a particular state of facts on which the administrator's decision would be based. If that were so, the same requirement or onus would apply before the AAT. But that is not this case. Here s 24 of the Social Security Act 1947 provides simply that "a person above the age of sixteen years who . . . is permanently incapacitated for work . . . shall be qualified to receive an invalid pension". Obviously someone must set in motion the process which establishes the entitlement, and that will normally be done by or on behalf of the person concerned, but the Act does not create a legal onus to prove all relevant aspects of a claim of permanent incapacity such, for example, as the state of the labour market for disabled persons. Certainly if no material is available to the decision-maker, or if available material leaves the decision-maker quite uncertain whether the person is permanently incapacitated, the claim must fail. But I think it would be artificial to describe this situation in terms of the legal onus of proof.

I say this in spite of the apparently contrary view taken by Ormerod J (as he then was) in broadly comparable circumstances in *Dickinson v Minister for Pensions* [1953] 1 QB 228 at 232, where he said: "It is, I think, axiomatic in the administration of our law that, if a person thinks that he has a claim against another person, or against a Ministry, the duty is on him to establish that claim. The mere fact that an Act of Parliament does not state that that duty is on him, if it establishes a right, must, I think, automatically establish the duty on him to prove what he thinks is his right before he can succeed in his claim."

There is however one important distinction between the case his Honour had before him and the present case. There the Royal Warrant giving entitlement to pensions made use of the expression "onus . . . to prove" in certain cases, and this led his Honour to imply the concept in the case before him.

The next question which arises is whether, once an invalid pension has been granted, there is an evidential onus on the Director-General to satisfy himself, or on appeal the AAT, of changed circumstances before cancelling the pension. This was the main issue argued before us under the first question of law.

The provisions of the Social Security Act 1947 under which the Director-General could have reviewed the applicant's pension in the present case are ss 14 and 46(1). Section 14 reads:

"Whenever it appears to the Director-General that sufficient reason exists for reviewing a determination, direction, decision or approval of an officer under this Act (including a determination, direction, decision or approval of the Director-General), the Director-General may review the determination, direction, decision or approval and may affirm, vary or annul it."

Section 46(1) reads:

"If,

(a) having regard to the income of a pensioner;

(b) by reason of the failure of a pensioner to comply with section 44 or 45; or

(c) for any other reason,

the Director-General considers that the pension which is being paid to a pensioner should be cancelled or suspended . . . the Director-General may cancel or suspend the pension . . . accordingly."

Whichever provision the Director-General chooses to act under, (and in this case, although it is not entirely clear, he seems to have purported to act under s 46(1)), if he is of the opinion that a person is not, or is no longer, permanently incapacitated, he has both a right and a duty to terminate that person's pension. In doing so he must act in good faith on the information available to him, but no question of onus arises.

In my view, the answer is the same when the AAT seeks to put itself in the position of the Director-General. It must act on the material which is before it but, as I have already pointed out, it is not bound by rules of evidence and may inform itself on any matter in such manner as it thinks appropriate.

It is true that facts may be peculiarly within the knowledge of a party to an issue, and a failure by that party to produce evidence as to those facts may lead to an unfavourable inference being drawn — but it is not helpful to categorize this common sense approach to evidence as an example of an evidential onus of proof. The same may be said of a case where a good deal of evidence pointing in one direction is before the Tribunal, and any intelligent observer could see that unless contrary material comes to light that is the way the decision is likely to go. Putting such cases to one side there can be no evidential onus of proof in proceedings before the AAT unless the relevant legislation provides for it, and in the present case the Social Security Act 1947 does not.

If the AAT finds itself in a state of uncertainty after considering all the available material, unable to decide a question of fact either way on the balance of probabilities, it will be necessary for it to analyse carefully the decision it is reviewing. If, for example, it is a decision whether or not to cancel a pension in the light of changed circumstances, then it has failed to achieve the statutory requirement of reaching a state of mind that the pension should be cancelled. If, on the other hand, it is a decision, to be made in the light of fresh evidence, whether or not the pension should ever have been granted in the first place, then it has failed to be satisfied that the person ever was permanently incapacitated for work. For a comparable analysis as to the onus of proof (properly so-called) before a judicial tribunal see *Phillips v The Commonwealth* (1964) 110 CLR 347 at 350.

The present case falls within the former category — there was some evidence of improvement in the applicant's medical condition — and the Director-General purported to act under s 46(1) of the Act. Therefore a state of indecision by the AAT (if it had existed) should have been resolved in the

applicant's favour. But, as I have said, I would prefer not to refer to the concept of onus of proof in arriving at this result. It is rather a question of a proper interpretation of the Social Security Act 1947. And in any case the AAT experienced no indecision.

Accordingly it cannot be said that the AAT was wrong in law in failing to discern an onus of proof on the Director-General in this case.

On the second question, as to whether the AAT correctly instructed itself as to the meaning of "permanent" incapacity, the AAT had this to say in its reasons for decision: "We have taken into account the interpretation given to that phrase in *Re Panke and Director-General of Social Security* (1981) 4 ALD 179 at 192, namely that 'permanent incapacity must be taken to refer to an incapacity which is likely to last indefinitely as opposed to one which is likely to last only for a time'. To this we would add that compliance with the statutory requirement of permanency demands, in our opinion, that the decision-maker should be able to form, on the evidence, a settled expectation of the likelihood of such indefinite continuance of the incapacity. We think that it would be quite wrong to conclude that the applicant's incapacity is permanent in this sense. There was evidence before us of deficiencies in her management of her medication, of the possibility of the medication itself being improved, and of the possibility of maturation of personality. She is, as we have said, only 32, and it would be in accordance neither with the letter nor the spirit of the legislation to regard the applicant as qualifying for invalid pension on the basis of the permanency of her incapacity."

In order to test the accuracy of this approach to the meaning of "permanent" incapacity it is necessary to look first at the scheme of the Social Security Act 1947. The Act provides in s 108 that a person "is qualified to receive a sickness benefit in respect of a period . . . if, and only if, . . . the person satisfies the Director-General that, throughout the relevant period, he was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he has thereby suffered a loss of salary, wages or other income".

I note in passing that this provides an example of a legal requirement, which some might call an onus of proof, being cast by statute on the person concerned to satisfy the Director-General — and thus, on review, the AAT — of certain relevant facts.

This provision has to be compared and contrasted with s 24 of the Act, referred to earlier, which entitles a person "permanently incapacitated for work" to an invalid pension. The Act obviously intends that a line be drawn between "temporary" and "permanent" incapacity and that all relevant forms of incapacity must fall on one side or the other of that line. Since the incapacity referred to is not mere physical incapacity, but incapacity for work, factors such as physical and mental health, skills, training, qualifications and the state of the labour market will all be relevant in determining both the degree of incapacity and its likely duration. The work referred to must be work generally and not restricted to the person's normal occupation. I say this, first, because the provisions can apply to a person over the age of 16 who has never worked at all and, secondly, because common sense dictates that a person who can earn a legally prescribed wage in an occupation which he is capable of performing, should not be entitled to a pension simply because he is incapacitated from performing his normal occupation.

So far as degree of incapacity is concerned, the Act provides in s 23 that "a person shall be deemed to be permanently incapacitated for work if the degree of his permanent incapacity for work is not less than 85 per cent". I assume without deciding (because the matter was not argued before us) that this means that a person who is able to work part-time or irregularly and so earn more than 15 per cent of a prescribed wage is not entitled to an invalid pension.

The vital contrast between temporary and permanent incapacity must be based upon an assessment of future prospects at the time the decision is made. It is not inconsistent with the notion of permanent incapacity that the pensioner's position should be reviewed from time to time. Unexpected improvement in the person's condition, advances in medical science, the achievement of fresh skills, or even changes in the labour market, could bring to an end an incapacity which had been thought to be permanent.

In my view the true test of a permanent, as distinct from temporary, incapacity is whether in the light of the available evidence, it is more likely than not that the incapacity will persist in the foreseeable future. (Cf *Re Tiknaz and Director-General of Social Services* (1981) 4 ALN No 19.)

This test involves two questions. The first is whether it is more likely than not that the disability will terminate (or fall below 85 per cent in the sense referred to above) at some time in the future. Even if the answer to this question is "Yes", I think it would be inaccurate in the context of employment to describe as "temporary" a condition which was likely to last for a number of years. Hence the two elements of degree of likelihood of improvement and time-span for that improvement, should be weighed together in determining what is permanent and what is temporary. The greater the likelihood of substantial improvement and the earlier that it is likely to occur, the more accurate will be a "temporary" label. The longer the period and the less probable the improvement, the more appropriate will be a finding of permanent incapacity.

I do not regard what I have just said as conflicting in any way with the passage from *Re Panke and Director-General of Social Security, supra,* quoted by the AAT. The choice is indeed between incapacities "likely to last indefinitely" — meaning for long and indeterminate time but not necessarily forever — and incapacities "likely to last only for a time" — meaning a time which is predictable and capable of being quantified, though not necessarily with any precision.

The gloss added to this decision by the AAT does however create difficulty. The Tribunal said: "To this we would add that compliance with the statutory requirement of permanency demands, in our opinion, that the decision-maker should be able to form, on the evidence, a settled expectation of the likelihood of such indefinite continuance of the incapacity. We think that it would be quite wrong to conclude that the applicant's incapacity is permanent in this sense. There was evidence before us of deficiencies in her management of her medication, of the possibility of the medication itself being improved, and of the possibility of maturation of personality. She is, as we have said, only 32, and it would be in accordance neither with the letter nor the spirit of the legislation to regard the applicant as qualifying for invalid pension on the basis of the permanency of her incapacity."

In the first sentence of this passage the AAT seems to be saying that the decision-maker must have some strong degree of satisfaction ("settled

expectation") of the likelihood of indefinite continuance of incapacity. Anything less would render the incapacity temporary only. I cannot agree with this view. There will be many cases in the difficult borderline region between temporary and permanent incapacity where the Director-General or the AAT will have to decide which is the more appropriate description. It is not necessary to have a "settled expectation" of permanency before so finding; a belief — even on a fine balance — that indefinite duration is more likely than foreseeable termination, will suffice.

Since, as the conflict of medical opinion referred to earlier demonstrates, the facts of the present case, (which I need not canvass), clearly fall in the borderline area, this misdirection of itself by the AAT on a point of law could have affected its decision.

The decision of the AAT should therefore be set aside and the case remitted to be heard and decided again in the light of this Court's reasons for decision. Whether the Tribunal will wish to hear further evidence will be a matter for it to decide. It is unfortunate that delay in the prosecution of this appeal has led to an unwarranted gap between the original hearing and the necessary rehearing.

Before leaving the matter I should say that I have not considered, because it was not raised before us, another question referred to by the AAT, but not decided. The AAT said, "In fact we think that the applicant's personality disorder is the prime and dominant feature in her condition as a whole". After quoting from a decision of the AAT, constituted by Davies J, in *Re Sheely and Director-General of Social Security* (1982) 4 ALN No 115 to the effect that "permanent incapacity" within the meaning of the Act must result from a medical disability, the AAT continued: "In this case however it may be very much doubted whether there are grounds for concluding that the disabilities suffered by the present applicant are comprehended by the words 'incapacitated for work'. There is in our opinion much to be said for the view that the applicant's real problem is her 'limited personality resources', to use Dr Nicholson's expression, rather than psychic illness in the sense described in the passage quoted."

The AAT then assumed this issue in the applicant's favour and went on to affirm the decision cancelling her pension on the ground I have already dealt with.

I only wish to say that I see this other matter raised by the AAT as a difficult question into which I would not wish to venture without the benefit of argument, even though it could possibly become relevant in the re-hearing.

Northrop J. Part III Social Security Act 1947 (the Act) comprising ss 18-52 inclusive, contains provisions relating to age and invalid pensions. In that Part, unless a contrary intention appears, the word "pension" is defined to include an age pension, an invalid pension and a wife's pension. The payment of age and invalid pensions is subject to a means test and the method of implementing that test, together with a discussion of some of the sections of the Act, is discussed in *Director-General of Social Security v Harris* (1982) 44 ALR 645 and in particular per Northrop J at 652-60. That case concerned an age pension, but the same principles apply with respect to an invalid pension.

The present case concerns an invalid pension. Under para 24(1)(a) of the Act "a person above the age of 16 years who is not receiving an age pension and . . . is permanently incapacitated for work . . . shall be qualified to

receive an invalid pension". The phrase "permanently incapacitated for work" is not defined in the Act, but under s 23, for the purposes of Div 3 of Pt III, comprising ss 23-27 inclusive, "a person shall be deemed to be permanently incapacitated for work if the degree of his permanent incapacity for work is not less than 85 per cent".

Part VII of the Act, comprising ss 106-133B inclusive, contains provisions relating to unemployment and sickness benefits. Under s 108, "a person (not being a person in receipt of a pension under Pt III . . .) is qualified to receive a sickness benefit in respect of a period (. . . 'relevant period') if and only if . . . the person satisfies the Director-General that, throughout the relevant period, he was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he has thereby suffered a loss of salary, wages or other income". The phrase "incapacity of a temporary nature" is not defined in the Act but it is readily apparent that the Act makes a distinction between a person who is "permanently incapacitated for work" and a person who is suffering an "incapacity of a temporary nature".

The substantial question of law raised by this appeal concerns the meaning to be given to the phrase "permanently incapacitated for work" appearing in para 24(1)(a) of the Act.

A reference should be made to some of the other provisions of the Act. In Pt III, unless a contrary intention appears, the word "claimant" means a person claiming a pension under Pt III. Under s 37 a claim for an invalid pension is to be made in writing in accordance with the requirements of that section. When an invalid pension is granted, it is to be paid from a date determined by the Director-General; see s 39. The office of Director-General is constituted by s 7 of the Act, which is within Pt II. Other offices are created under that part. By s 12, the Director-General is empowered to delegate to other officers all or any of his powers and functions under the Act except the power of delegation. Under s 13, the Director-General is required to determine claims, including claims for an invalid pension, but in practice those claims are determined by delegates of the Director-General. Section 14 makes provision for the Director-General, or his delegate, to review determinations of officers under the Act, while s 15 allows appeals to the Director-General, or his delegate, from decisions of other officers within the Department. Under s 15A, and subject to the requirements set out in that section, a review of a decision of the Director-General, or his delegate, may be made by the Administrative Appeals Tribunal (the AAT). In reviewing a decision, the AAT exercises all the powers and discretions conferred upon the person who made the decision; see sub-s 43(1) Administrative Appeals Tribunal Act 1975.

Where a person claims an invalid pension and except where it is manifest that the claimant is permanently incapacitated for work, the Director-General is required to direct that the claimant be examined by a legally qualified medical practitioner who is required to certify whether, in his opinion, the claimant is permanently incapacitated for work; see s 27. Where an invalid pension is granted, the invalid pension is paid fortnightly; see s 41. The Act contains special provisions applicable to persons who are permanently blind and nothing in these reasons is to be taken as applying to those persons. Under the provisions of Div 9 of Pt III of the Act, comprising ss 44 to 46 inclusive, pensions being paid are subject to regular review. It is not necessary to refer to each of those sections. They are discussed in some detail in *Harris's* case, *supra*. The relevant parts of sub-s 46(1) are set out:

"46(1) If—

. . .

(c) for any other reason,

the Director-General considers that the pension which is being paid to a pensioner should be cancelled or suspended, or that the rate of the pension which is being paid to a pensioner is greater or less than it should be, the Director-General may cancel or suspend the pension, or reduce or increase the rate of the pension, accordingly."

The facts of the present case are set out in the reasons of Woodward J and need not be repeated. It is sufficient to say that the applicant had been granted an invalid pension. A delegate of the Director-General had cancelled that pension. The applicant sought a review of that decision by the AAT. The AAT affirmed the decision of the delegate.

In its reasons for decision, the AAT carefully analysed the evidence and material before it. In considering the application of the Act to the facts found, it said:

"In *Re Sheely and Director-General of Social Security* (1982) 4 ALD No 115, Davies J (President) referred to the terms of s 23 and s 24 of the Act in the light of a number of authorities and said: 'From the context in which the term "permanently incapacitated for work" appears, it may be inferred that the incapacity must result from a medical disability, whether that disability be physical or psychic. A disability, for the purposes of these sections, includes all recognised medical conditions, injury, disease, psychosis, neurosis and the like. It comprehends the incidents of medical conditions, such as shock, upset and the functional consequences of injury or disease. It includes those cases of psychic illness which, whether or not they are properly classified as psychosis or neurosis, nevertheless have the consequence that the affected person is a sick person.' "

The AAT expressed some doubts about whether the applicant was incapacitated for work within the meaning of para 24(1)(a) of the Act, but assumed, for the purposes of the review, that she was so incapacitated. On that assumption, the AAT considered whether the applicant was permanently incapacitated for work and expressed the opinion that it, the AAT, "should not, on the evidence, and in particular the evidence of Dr Nicholson which we accept, view this 32 year old woman as being 'permanently' incapacitated". Accordingly, the AAT did not need to determine whether the applicant's degree of incapacity for work was not less than 85 per cent; see s 23 of the Act.

On the evidence and material before it, the AAT clearly was able to find that the applicant was not "permanently incapacitated for work" within the meaning of para 24(1)(a) of the Act, but in coming to that view the Tribunal added a gloss to a general statement of principle which they said should be applied. The general statement of principle was expressed as follows: "We have taken into account the interpretation given to that phrase in *Re Panke and Director-General of Social Security* (1981) 4 ALD 179 at 192, namely that 'permanent incapacity must be taken to refer to an incapacity which is likely to last indefinitely as opposed to one which is likely to last only for a time'."

The gloss was expressed as follows: "To this we would add that compliance with the statutory requirement of permanency demands, in our opinion, that the decision-maker should be able to form, on the evidence, a settled expectation of the likelihood of such indefinite continuance of the incapacity. We think that it would be quite wrong to conclude that the applicant's

incapacity is permanent in this sense. There was evidence before us of deficiencies in her managment of her medication, of the possibility of the medication itself being improved, and of the possibility of maturation of personality. She is, as we have said, only 32, and it would be in accordance neither with the letter nor the spirit of the legislation to regard the applicant as qualifying for invalid pension on the basis of the permanency of her incapacity."

As stated earlier, the substantial question of law raised by the appeal is whether the AAT misapplied para 24(1)(a) of the Act. As stated in the amended notice of appeal, the question of law raised by the appeal is whether the AAT was wrong in law in: "Finding that 'permanent incapacity' must be taken to refer to an incapacity which is likely to last indefinitely as to be opposed to one which is likely to last only for a time and that the decision maker should be able to form on the evidence a settled expectation of the likelihood of such indefinite continuance of the incapacity."

The phrase "permanently incapacitated for work" appears in social welfare legislation which also makes provision for sickness benefits to be paid to a person "incapacitated for work" being "an incapacity of a temporary nature"; see s 108 of the Act. A distinction of a temporal nature is thus drawn, even though in this context, of necessity, "permanent" must be limited in time. In some workers' compensation legislation, another type of social welfare legislation, reference is made to "permanent" disablement. In the context of that type of legislation, the High Court has characterized the concept of "permanent" as being forever. Thus, in *Wicks v Union Steamship Co of New Zealand Ltd* (1933) 50 CLR 328, the court comprising Gavan Duffy CJ, Rich, Starke, Dixon, Evatt and McTiernan JJ at 338 said: "The sub-section then excepted from the limitation cases of permanent and total disablement. The Commission was, therefore, called upon to decide whether the worker had been permanently and totally disabled, an expression which, in our opinion, means physically incapacitated from ever earning by work any part of his livelihood."

To some extent the absolute nature of "forever" in relation to an incapacity for work is eased by the statement of principles enunciated in *Panke's* case, *supra,* that under the Act, "permanent incapacity must be taken to refer to an incapacity which is likely to last indefinitely as opposed to one which is likely to last only for a time". I agree with the opinion of Woodward J that under the Act the true test of whether incapacity for work is permanent as distinct from being of a temporary nature is whether, in the light of all the evidence and material before the Director-General, or his delegate, or the AAT, the incapacity for work is more likely than not to persist in the foreseeable future. I agree also with the application of the test as expressed by Woodward J.

The provisions of the Act, especially the provisions of Div 9 of Pt III, make it clear that although there must be finality concerning the fortnightly payments of invalid pension, there is no permanency in relation to their continuity. The Director-General has an obligation to maintain a constant review of the entitlement to and the payment of the invalid pension. He has power to cancel an invalid pension where the pensioner is no longer qualified to receive it. All the provisions of that division support the view that an absolute application of the test of "permanency" should not be adhered to when applying the provisions of the Act.

In applying the test of permanency, the Tribunal added a gloss to the statement appearing in *Panke's* case, *supra*. I agree with the opinion of Woodward J that the gloss imposes a stricter requirement on a claimant for an invalid pension than is required by para 24(1)(b) of the Act and that in this case the AAT may have misdirected itself as to the law. For the reasons expressed by Woodward J, I would set aside the decision of the AAT and remit the review to the Tribunal to be decided in accordance with the observations of the court either with or without the hearing of further evidence as the Tribunal may direct.

On the appeal, the applicant, by leave, raised the question of whether the Tribunal was wrong in law in "Directing itself as to which party bore the onus of proof and more particularly in impliedly placing the onus of proof on the Applicant".

This question was not raised before the AAT and the question of onus of proof was not referred to in its reasons. In my opinion, it is undesirable that in this case the court should express an opinion on that question, but since the matter was raised, some general comments should be made. It is sufficient to say that terminology used in relation to courts may tend to cause confusion and difficulties when applied to persons exercising statutory powers of a different kind. The Director-General is not a party to claims for pensions under Pt III of the Act. Under that Part, persons who come within specified criteria are "qualified to receive" an age pension, an invalid pension or a wife's pension respectively; see ss 21, 24 and 31 respectively. A person makes a claim for a pension and that claim is determined by the Director-General or his delegate. The Director-General, or his delegate, determines a claim on all the relevant material in his possession. Parties do not appear before him. There are no adversary procedures. In one sense it is true to say that a claimant has an onus of proof, but the use of that expression obscures the true nature of the duty imposed on the Director-General, or his delegate, to determine the matter. A pension is paid only so long as the pensioner is qualified to receive the pension. The rate of pension may vary depending upon what facts are known by the Director-General or his delegate. If a change in circumstances occurs, it is unreal to suggest that the Director-General, or his delegate, has an onus of proof, whether evidentiary or not, to be satisfied before varying a pension entitlement. The ultimate question is whether the person is qualified to receive the pension and, if so, at what rate. These questions must be decided after a consideraion of all the material before the Director-General, or his delegate, when the decisions are made. The question of whether a pensioner is "permanently incapacitated for work" has to be decided in accordance with the opinions expressed above.

Similar principles apply to proceedings before the AAT. The Tribunal is not bound by the rules of evidence. It has before it all the material that was before the person who made the decision under the Act and which is the subject of the review before the AAT. Additional material may be placed before the AAT. As a matter of convenience, the Director normally appears to assist the Tribunal, but the Director-General is not to be treated in the same way as a party to proceedings before a Court. In *Sordini v Wilcox* (1982) 42 ALR 245, a review under the Administrative Decisions (Judicial Review) Act 1977, the administrative body whose decision was being reviewed appeared before the court. At 255 Northrop J said: "Counsel for the respondents stated that each of the first three-named respondents, being the members of the Review

Committee, would abide by the order of the court. Counsel for the respondents, very properly, made substantive submissions on behalf of the Commission. Where there are no adversary parties appearing before an administrative body, as in this case, it is important that the court receive assistance of counsel appearing for the administrative body making the decision which is being challenged under the Judical Review Act."

It is equally important that in reviews by the AAT of decisions by administrative bodies such as the Director-General, or his delegate, in which there were no adversary parties, the AAT receive the assistance of persons acting on behalf of the administrative body. Likewise, in appeals of this court from the AAT on questions of law, it is important that the court receive the assistance of counsel appearing for the administrative body. This practice, however, which gives the outward appearance of an adversary system, should not be allowed to obscure the true position, and in particular to justify the introduction of concepts of onus of proof into the determination of claims under the legislation where no onus of proof in the legal sense arises. This view, quite correctly, has been acted upon by the AAT in the past. The AAT has not departed from that practice in the present case.

Jenkinson J. Appeal pursuant to s 44 of the Administrative Appeals Tribunal Act 1975 from a decision of the Administrative Appeals Tribunal.

The circumstances of the case are set out in the reasons for judgment of Woodward J, which I have had the advantage of reading.

Two errors of law were assigned by counsel for the applicant to the reasons in writing which the Tribunal gave, in compliance with the requirements of s 43(2) of the Administrative Appeals Tribunal Act 1975, for its decision. It was said that the Tribunal mistakenly conceived an incapacity to be permanent, for the purposes of Div 3 of Pt III of the Social Security Act 1947, only if the incapacity were unlikely ever to cease, whereas the proper construction of the expression "permanently incapacitated for work" required, according to the submission of counsel for the applicant, that permanence be conceded if the incapacity were likely to persist for a period of indefinite, but substantial, duration, and might not ever cease. The final clause of the last sentence may be thought otiose, since indefiniteness of duration comprehends the whole of life.

It was upon the word "indefinitely" that the applicant's submission was grounded. In *Re Panke and Director-General of Social Services* (1981) 4 ALD 179 at 192 two members of the Administrative Appeals Tribunal, with "the substance" of whose reasons for decision the president, Davies J, expressed his agreement in his own reasons for decision, observed: "What then is the meaning of the expression 'permanently incapacitated for work' in s 24 of the Act? 'Permanent incapacity' in this section is used in contradistinction to 'temporary incapacity' in s 108 of the Act dealing with the qualifications for sickness benefit. Consistently with the ordinary meaning of the words 'permanent' and 'temporary', we think that permanent incapacity must be taken to refer to an incapacity which is likely to last indefinitely as opposed to one which is likely to last only for a time."

The word "indefinitely" in that passage was to be understood, according to the submission, as meaning "for an undetermined period of time", and had been employed, not in recognition of the indeterminableness of a current life's

span, but in order to comprehend as permanent not only the remainder of life but also a period the duration of which had not been estimated.

Both the two members of the Tribunal from whose reasons I have quoted, Mr A N Hall, Senior Member and Mr M Glick, and the President of the Tribunal cite the statement of the High Court (Gavan Duffy CJ, Rich, Starke, Dixon, Evatt and McTiernan JJ) in *Wicks v Union Steamship Co of New Zealand Ltd* (1933) 50 CLR 328 at 338 that the expression "total and permanent disablement" in s 9(3) of the Workers' Compensation Act 1926 (NSW) means "physically incapacitated from ever earning by work any part of his livelihood". But neither the Tribunal nor the High Court was concerned to advert to the distinction between a period measured by the life of the person whose incapacity or disablement was in question and a period of undetermined but substantial duration. Nor was any such a concern likely to have been present to the minds of the members of the Court of Appeal who in *Calico Printers' Association Ltd v Higham* [1912] 1 KB 93 at 97, 100-101 spoke of a permanent incapacity, to which cl 17 of the First Schedule to the Workmen's Compensation Act 1906 referred, as one unlikely to change during the remainder of life. In all three of those cases neither the evidentiary material nor the legal issues in contention raised the distinction. Notwithstanding the observations of the High Court and the Court of Appeal, I think this court free to assign to the word "permanent", in Div 3 of Pt III of the Social Security Act 1947, the meaning which has been expounded in the reasons for judgment of Woodward J. I respectfully concur in that exposition. It is consonant with what may be found in a dictionary and, as I think, with ordinary usage.

It was submitted that the passage from the Tribunal's reasons for its decision which is set out in the judgment of Woodward J suggested a misconception by the Tribunal of what "permanently" means in Div 3 of Pt III. I do not think that the passage does — or that the reasons as a whole do — give ground for any apprehension of such a misconception, and accordingly I am unable to allow the appeal on that ground.

The other error of law imputed to the Tribunal was that it had misconceived the onus of proof applicable to the determination whether the decision it had under review should be affirmed.

It was not, nor could it have been suggested that the Tribunal had failed to understand that its function was to determine for itself, upon the material before it, whether the applicant's invalid pension should be cancelled, without attaching any significance to the fact that the decision of which the applicant had sought review was for cancellation of that pension.

The passage from the Tribunal's reasons for its decision which is quoted by Woodward J includes a statement that "a settled expectation of the likelihood of such indefinite continuance of the incapacity" is required to be formed by the "decision-maker" concerned to decide, for the purposes of Pt III of the Social Security Act 1947, whether a person is permanently incapacitated for work. The statement implies that in the absence of such a settled expectation the decision will be that there is not a permanent incapacity. The expression "settled expectation" I understand, in its context, to be descriptive of the state of mind of the "decision-maker". The expression seems to me to specify, as an attribute of the decision-maker's belief, a degree of confidence in the correctness of the belief which may be suggested by the word "settled". In my opinion no such a degree of confidence is required. The "actual persuasion"

of the occurrence of past act or event, which Dixon J stated to be required if proof, in a civil curial proceeding, of the act or event were to be achieved, does not involve necessarily any greater confidence than a bare preponderance of probability may engender: see R Eggleston, *Evidence, Proof and Probability*, Ch 9. No different standard is applicable to a finding as to a future act or event, in my opinion; nor does an administrative "decision-maker" apply any different standard unless special legislative direction be given.

The passage implies the existence of what in relation to a curial proceeding would be described as an onus of proof on the applicant. There may be difficulty, as Woodward J has pointed out, in adapting the curial conception to the processes of administrative determination of individual rights. Some of the purposes which the conception serves in a curial proceeding are achieved by other means in administrative proceedings. A court waits upon the parties to litigation to tender their proofs. When the parties differ as to which shall go first into evidence, their difference is resolved by determining upon which lies the burden of proof. (See W M Best, *An Exposition of the Practice Relative to the Right to Begin.*) But the administrative decision-maker will commonly inform himself of the facts by his own inquiries, as well as receiving such proofs as the individual citizen and those who may be authorized to oppose the citizen's interest choose to place before him. And he will not ordinarily be free, as a court is ordinarily free, to determine a matter against the party on whom lies the onus of proof, and who fails to offer any proof in discharge of the onus, without further inquiry. When the party to litigation on whom the onus of proof of an issue lies has concluded his evidence, the court may be called upon by the other party to determine the question of law whether that evidence can support a verdict or finding for him on whom the onus lies. Except by special legislative direction no administrative decision-maker could be so constrained. In many cases subject to administrative decision there is in any event no other party in controversy with him on whom the onus may be said to lie.

There is, however, in my opinion a dilemma in which either a court or an administrative authority determining rights or liabilities may find itself, for the resolution of which the same principles are applicable by each tribunal. Either tribunal may find itself unpersuaded either that a circumstance exists or that it does not exist. (The same may be said of a past or a future circumstance.) The court or the administrative authority will determine, by reference to the substantive law, whether it is the existence or the non-existence of the circumstance which is determinative of the question for decision. In this case the Administrative Appeals Tribunal would determine whether the Social Security Act 1947, upon its proper construction, required that the applicant's pension be cancelled if she were found not to be permanently incapacitated for work, or required that the pension be cancelled unless she were found to be permanently incapacitated for work. In the former case the Tribunal's lack of persuasion that permanent incapacity did not exist would preclude cancellation. In the latter case the Tribunal's lack of persuasion that permanent incapacity did exist would result in cancellation. An application of the same principles by a court in resolution of the same dilemma is to be found in *Maher-Smith v Gaw* [1969] VR 371. In a court the principles are expressed in terms of the onus or burden of proof. When those principles are applied in an administrative tribunal, there may be risk of misconception if the curial modes of expression are employed.

In this case the passage from the reasons for the Tribunal's decision which Woodward J has quoted implies that it was a requirement of the Social Security Act 1947 that the applicant's pension be cancelled unless she were found to be permanently incapacitated for work, whereas my conclusion is that it was a requirement of that Act that the pension be cancelled if she were found not to be permanently incapacitated for work. If my conclusion be correct, error of law is demonstrated in the Tribunal's reasons. The error could not have vitiated the Tribunal's decision unless the Tribunal was unpersuaded, on a balance of probability, that there was not a permanent incapacity. All that can be discerned from the Tribunal's reasons is that it was unpersuaded, to the degree suggested by the expression "a settled expectation", that there was a permanent incapacity. I agree therefore that the appeal should be allowed, that the decision should be set aside, and that the case should be remitted to the Tribunal for determination according to law.

My conclusion as to what the Social Security Act 1947 required in this case is based on the following considerations. The Act contemplates that an invalid pension shall be payable in consequence of a decision, after a claim has been made, by the Director-General that it be granted: ss 39, 37, 28(1), 7, 13 and Div 3 of Pt III. The Act contemplates that the decision for grant of the pension thus made shall be sufficient authority for payment of fortnightly instalments of the pension from the date which the Director-General determines (pursuant to s 39) until a time to be fixed by a further decision of the Director-General: ss 41, 42, 14 and Div 9 of Pt III. While it may be that s 14 authorizes the annulment of a decision made to grant a pension, the evidentiary material in this case establishes, in my opinion, that it was a power conferred by s 46 which had been exercised in relation to the applicant's pension, and that it was the decision taken in exercise of that power which the Tribunal was engaged in reviewing.

The grant of each of the powers conferred by s 46 — to "cancel or suspend the pension, or reduce or increase the rate of the pension" — is conditioned upon the formation by the Director-General of the opinion that the power should be exercised, and for a reason specified in one or other of paras (a), (b) and (c) of s 46(1). The conditional form of the grant of power suggests, as does the legislative recognition that the original grant authorizes continuance of payment until a decision terminating that authority has been made, that one of the circumstances specified in paras (a), (b) and (c) must appear to the Director-General (or to his delegate or, on review, to the Administrative Appeals Tribunal) to exist before the power is exercisable. In this case the only circumstance of that kind which the evidentiary material suggests is lack of one of the qualifications for an invalid pension specified in Div 3 of Pt III: lack of that permanent incapacity for work which s 24(1)(a) specifies. It is therefore a condition of the grant of power to cancel the applicant's pension that her lack of that qualification should be found, in my opinion.

Having regard to the length of time which has elapsed since the Tribunal made its decision and to the provisions of ss 43(6), 44(4) and 44(5) of the Administrative Appeals Tribunal Act 1975, it is in my opinion desirable that the Tribunal be left free to determine for itself whether it will receive further evidence. But I think this court's orders should be that the appeal be allowed, the Tribunal's decision be set aside, the application for review be heard and

determined according to law, and the respondent pay the applicant's costs of the appeal.

Solicitors for the appellant: *Galbally & O'Bryan.*

Solicitor for the respondent: *Commonwealth Crown Solicitor.*

PETER HANKS
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