

entitlements. The Tribunal decided that it was within its jurisdiction to consider all of those entitlements, including that for a lump sum payment.

On the argument that, in relation to the claim for treatment, a separate application should have been made to the Tribunal, the Tribunal noted that it is unlikely that the legislature intended to require a person to lodge a separate application for review in respect of each and every rejected claim for treatment expenses.

On the question whether, in relation to the claim for a lump sum payment, it is appropriate for the Tribunal to consider entitlements before Comcare has had the opportunity of considering the claim, the Tribunal observed

Having decided that the tribunal has jurisdiction to hear the applicant's claims, it should be borne in mind that the question of the tribunal's jurisdiction is one thing, and its discretion to make directions in relation to its procedures is another. While the tribunal may have power to entertain additional claims to the claim considered by the original decision maker, it may not be desirable for it to include them in the proceedings on foot. It may be neither fair nor procedurally efficient for the tribunal to consider a new claim before Comcare has had the opportunity of considering it.

In relation to claims for lump sum amounts for permanent impairment in particular, it is often appropriate for the respondent to have the opportunity of assessing the level of an applicant's impairment for the purposes of assessing an entitlement, if any, to a lump sum. It is undesirable for matters to be raised for the first time before a tribunal without the respondent having the opportunity to consider them. This is, though, no more than a practical matter which can be dealt with by the tribunal making appropriate directions as to how the matter is to proceed,

pursuant to s 30 of the *Administrative Appeals Tribunal Act 1975*.

Comcare is seeking judicial review of the Tribunals' decision in the Federal Court and the matter is set down for hearing in August 1998.

Schramm and the Repatriation Commission (Nos. S92/54 and S92/66; AAT No.12847)

Deputy President Burns

Application for reinstatement of two applications for review dismissed with consent by the tribunal – applicant claimed to be not of sound mind when he signed the notice of dismissal – Tribunal's jurisdiction to reinstate matter under subsection 42A(10) of the Administrative Appeals Tribunal Act 1975 – whether applications dismissed in "error" within the meaning of subsection 42A(10)

In 1992, the applicant had sought review of decisions made by the respondent rejecting his claim that his heart disease was war related and that his disability pension should be increased and rejecting a related claim for a loss of earnings allowance. In 1993, by way of signed notice (which was erroneously dated), the applicant had purportedly consented to the dismissal of both applications without the Tribunal proceeding to a review. The Tribunal then issued a direction that both applications be dismissed and, in early 1996, the Tribunal's files were destroyed.

In June 1996, the applicant lodged a new claim in relation to his heart disease which was accepted as defence-caused by the respondent. The applicant sought to have his dismissed applications reinstated as it would then be open to the Tribunal to find that his eligibility for the special rate disability

pension began prior to the date in 1993 to which it was back-dated.

The applicant submitted that he was not of sound mind when he signed the notice of dismissal. He did not recall his solicitor explaining to him the effects of his signing the consent to dismissal form and the only memory he had of the event was his belief that he was merely withdrawing his applications indefinitely until such time as he could gather together the necessary medical evidence.

The Tribunal accepted that the applicant lacked sufficient understanding of the ramifications of his actions for it to be said that he consented to the dismissal of his applications and further noted that, even to persons of sound mind, the terminologies in the documentation used were capable of interpretation consistent with the belief that the matter was being indefinitely suspended.

In considering whether it had jurisdiction to entertain the applications for reinstatement, the Tribunal considered section 42A of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) and, in particular, the powers of reinstatement provided to it in the *Administrative Appeals Tribunal Amendment Act 1993*. While the dismissals occurred before the amendment, the parties and the Tribunal accepted that section 42A as amended was the relevant law to apply since it is legislation of a procedural rather than a substantive nature.

Subsection 42A(10) of the AAT Act provides:

If it appears to the Tribunal that an application has been dismissed in error, the Tribunal may, on the application of a party to the proceeding or on its own initiative, reinstate the application and

give such directions as appear to it to be appropriate in the circumstances.

The Explanatory Memorandum to the *Administrative Appeals Tribunal Amendment Bill 1992* on the changes to section 42A provided

56. New subsection 42A(10) provides for the Tribunal, on its own initiative, to reinstate an application which has been dismissed through administrative error on the part of the Tribunal.

The applicant argued that, notwithstanding paragraph 56, subsection 42A(10) should be given an interpretation which would confer on the Tribunal jurisdiction to reinstate applications dismissed by way of *any* error, including errors on the part of the Tribunal and errors on the part of a party to the proceedings. The applicant argued that AAT cases had established that, prior to the legislative changes, the Tribunal had power to set aside dismissal orders made under subsection 42A(1) in circumstances where real consent was absent. The applicant argued that the legislative changes had not altered the Tribunal's powers in this regard and that the words of subsection 42A(10) gave the Tribunal express powers to correct and review dismissals and to reinstate applications erroneously dismissed which otherwise would have to be sought to be rectified in the Federal Court. The applicant further argued that subsection 42A(10) should not be limited to error on the part of the Tribunal and he referred to a decision of Deputy President McDonald in *Re Thomson and Comcare* (Unreported; AAT 10552; 24 November 1995) where he decided that the word "error" in subsection 42A(10) was not a technical word and should not be interpreted so as to be limited only to errors of the Tribunal.

Alternatively, the applicant's argument was that the Tribunal had in fact made

an error since it had proceeded to dismiss the applications on the basis of a consent which was erroneously dated. The incorrect date should have put the Tribunal on notice as to the applicant's confused state of mind, and should have caused it to confirm the applicant's true intentions before dismissing the applications.

The respondent argued that, as a general rule, the Tribunal had no power to reinstate an application once dismissed by it and that a valid exercise of the Tribunal's powers under subsection 42A(1) had the effect of exhausting the Tribunal's jurisdiction with respect to that particular application so that the only way a matter could be dealt with further was by a fresh application. Should a consent agreement be vitiated by lack of consent, it was within the ambit of a superior court to correct, and not that of the Tribunal which made the original order. The 1993 amendments merely gave effect to exceptions to these general rules, allowing the Tribunal to correct dismissal orders consequent upon an error of its own. The respondent also relied upon the wording of paragraph 56 of the Explanatory Memorandum and to several authorities to this effect which the respondent argued should be preferred to *Re Thomson and Comcare*.

The Tribunal noted that central to the issue between the parties was the meaning of the word 'error'. Deputy President Burns said:

The 'error' referred to in s.42A(10) is the error of the Tribunal bearing in mind the words 'dismissed in error'. The focus of the sub-section is upon the reinstatement of applications which have been dismissed in error, ie. in a belief in something untrue... the basis for the Tribunal's error may well lie in an error or belief on behalf of one or more of the parties...

The above meaning of 'error' will also include administrative error by the Tribunal and in this respect, the Tribunal would indicate that had Parliament intended to limit s.42A(10) to only those applications dismissed through administrative error on the part of the Tribunal (as the respondent submits), it could have quite simply said so but it has not. The wording of paragraph 56 [of the Explanatory Memorandum] is not to be substituted for the wording of the subsection as passed by Parliament.

The Tribunal then went on to decide that the applications in question had been dismissed in error as the dismissals were solely based on a belief that each side had consented to such a course. Accordingly the Tribunal had jurisdiction to entertain the applications for reinstatement and the parties were given an opportunity to make submissions on the question whether subsection 42A(10) imports a discretion to reinstate and, if it does, what circumstances should be taken into account in the exercise of that discretion.

**The Company and the
Commissioner of Taxation (No.
NT98/41, NT98/43, NT98/47 -48 and
NT98/42; AAT No.12865)**

Senior Member Block
*Circumstances justifying remittal of
decisions to decision maker for
reconsideration – whether claim that
decision maker's reasons were
inadequate is sufficient*

These were a group of cases in four of which a certain private company and, in the remaining case, another applicant had sought review of tax assessments. At a directions hearing before the Tribunal the applicants had each applied for an order under section 42D(1) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act), which provides: