

MILITARY REHABILITATION AND COMPENSATION COMMISSION v MAY (S243/2015)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 93

Date of judgment: 30 June 2015

Special leave granted: 13 November 2015

Mr Benjamin May enlisted in the Royal Australian Air Force (“the RAAF”) in November 1998. At that time he was fit and healthy. Between November 1998 and March 2000 Mr May received various vaccinations in the course of his employment with the RAAF. After receiving each vaccination, Mr May experienced dizziness, nausea and diarrhoea. He was repeatedly diagnosed with viral or bacterial infections and on some occasions he required hospital treatment. A clear cause of Mr May’s ailments however was never identified. In July 2004 Mr May was discharged from the RAAF, at the rank of Officer Cadet.

In November 2002 Mr May lodged a claim for rehabilitation and compensation, on the basis that the vaccinations he received in the course of his RAAF employment had caused him “low immunity, fatigue, illnesses, dizziness”. In March 2003 the Applicant (“MRCC”) rejected that claim, noting the lack of a medical diagnosis that could connect Mr May’s symptoms with his RAAF service. In April 2010 that decision was affirmed upon a reconsideration of it by the MRCC.

Mr May then applied to the Administrative Appeals Tribunal (“the Tribunal”) for review of the MRCC’s reconsideration decision. On 14 December 2011 the Tribunal affirmed that decision, concluding that Mr May did not suffer a disease and he had not suffered an injury “amounting to a sudden or identifiable physiological change in the normal functioning of the body or its organs that can be attributed to the vaccinations he received while serving in the RAAF.” This was after finding no objective evidence that connected Mr May’s vaccinations with the ailments he suffered during his RAAF service. The Tribunal also found that Mr May had become incapacitated by a condition that could loosely be described as “vertigo” and that there was no objective evidence that he had suffered from that condition in the period following his vaccinations. Mr May was therefore not entitled to receive compensation under s 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (“the Act”).

An appeal to the Federal Court from the Tribunal’s decision was dismissed by Justice Buchanan on 30 April 2014. His Honour held that the Tribunal had not mistakenly believed that a definitive diagnosis was required, nor had the Tribunal erred by finding that Mr May’s ailments did not constitute an injury.

The Full Court of the Federal Court (Allsop CJ, Kenny, Besanko, Robertson & Mortimer JJ) unanimously allowed Mr May’s appeal and remitted the matter to the Tribunal for it to re-determine. Their Honours held that the Tribunal had erred by confining the meaning of “injury” by reference to “a sudden or identifiable physiological change”, whereas the meaning of the word “injury” as

defined in s 4(1) of the Act was broader and derived partly from historical and legal context. A diagnosis of a recognised medical condition was unnecessary for the finding of an “injury” within the meaning of the Act. The Full Court held that once the Tribunal had found that Mr May suffered from vertigo it ought not have required objective evidence in seeking a causal connection between Mr May’s ailments and the vaccinations he had been given. Mr May had suffered an injury “in the course of” his employment with the RAAF, which is all that he needed to establish in order to receive compensation under the Act.

The grounds of appeal include:

- The Full Court erred in finding that the Tribunal erred in its construction of the term “injury (other than a disease)” as that term appeared in paragraph (b) of the definition of “injury” in s 4(1) of the Act (as in force at the time when the Respondent claimed to have sustained an “injury”).
- The Full Court erred in finding that, on its proper construction, the term “injury (other than a disease)” did not require a sudden or identifiable physiological or pathological change.