SUPREME COURT OF QUEENSLAND

CITATION:	*Gomez v Board of Trustees of the State Public Superannuation Scheme* [2017] QSC 98
PARTIES:	**EDWIN GOMEZ** (plaintiff) **v** **BOARD OF TRUSTEES OF THE STATE PUBLIC SUPERANNUATION SCHEME** (defendant)
FILE NO/S:	No 1535 of 2015
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	29 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	10 and 11 April 2017
JUDGE:	Boddice J
ORDER:	**The defendant properly consider the application for the payment of total and permanent disablement benefits.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – PROCEEDINGS BETWEEN TRUSTEE AND BENEFICIARIES OR THIRD PARTIES – where the plaintiff was a member of the superannuation scheme administered by the respondent – where the appellant suffered total permanent disablement ("TPD") – where the plaintiff's claim for a TPD benefit under the superannuation scheme was rejected on the basis the information available was not sufficient to establish the requirements for a total and permanent disablement benefit – where a review of that decision was unsuccessful as the defendant Board determined that the plaintiff did not satisfy the definition of total and permanent disablement – where a request for further review was determined on the basis that a review of the decision and additional material did not indicate a reasonable possibility of a different result to the Board's earlier decision – whether the relevant decision made by the defendant was open on the evidence – whether the relevant

decision was made upon a real and genuine consideration of the material before the defendant

Superannuation (State Public Sector) Act 1990 (Qld)
Superannuation (State Public Sector) Deed 1990 (Qld)

Alcoa of Australia Retirement Plan Pty Ltd v Frost (2012) 36 VR 618; [2012] VSCA 238, applied
Eddington v Board of Trustees [2016] QCA 247, applied
Finch v Telstra Super Pty Ltd (2010) 242 CLR 254; [2010] HCA 36, cited
Gilberg v Maritime Super Pty Ltd (2009) NSWCA 325, cited
Hannover Life Re of Australasia Ltd v Colella (2014) VSCA 205, cited
Jones v United Super Pty Ltd (2016) NSWSC 1551, cited
Repatriation Commission v Hill (2005) 142 FCR 88; [2005] FCAFC 7, applied
TAL Life Ltd v Shuetrim (2016) NSWCA 68, cited
Wheeler v FSS Trustee Corporation as Trustee for the First State Superannuation Scheme (2016) NSWSC 534, cited

COUNSEL: P Bingham, with him R Nichols, for the plaintiff
R Morton for the defendant

SOLICITORS: Maurice Blackburn for the plaintiff
Mills Oakley for the defendant

[1] The plaintiff, a 44 year old nurse, claims the payment of a total and permanent disablement benefit pursuant to the provisions of the *Superannuation (State Public Sector) Act* 1990 ("the Act") and the *Superannuation (State Public Sector) Deed* 1990 ("the Deed"). The defendant has denied the plaintiff is entitled to the payment.

[2] At issue is whether it was reasonably open to the defendant, in the exercise of its duties as trustees, to find that notwithstanding the plaintiff having sustained an injury in 2011 as a consequence of which he has not been able to return to his previous employment as an intensive care nurse, the plaintiff was capable of working in another occupation for which he is reasonably qualified by his education, training or experience. A further issue is whether the defendant, through its delegate, failed to properly reconsider the plaintiff's request for a total and permanent disablement benefit.

Background

[3] The plaintiff was born in the Philippines on 12 August 1972. He obtained his nursing qualifications in the Philippines. He worked, pursuant to those qualifications, as a nurse and as a tutor prior to emigrating to Australia in 2003.

[4] Since living in Australia, the plaintiff predominantly worked as an intensive care nurse. He has not undertaken any work in Australia as a tutor. He was employed with Queensland Health from 2007 until being made voluntarily redundant in 2013. That employment, at the Princess Alexandra Hospital, was as an intensive care nurse.

Injury

[5] In September 2011, the plaintiff was employed as an intensive care nurse at the Princess Alexandra Hospital. Whilst undertaking that employment he sustained an injury to his right shoulder, resulted in increasing pain and limitation of movement. He subsequently developed anxiety and depressed mood.

[6] The plaintiff lodged a claim for compensation with WorkCover Queensland and was paid weekly compensation benefits. He undertook an alternative light duties programme for a period of time. However, the plaintiff's return to work on light duties was unsuccessful. He further injured his shoulder in March 2012. The plaintiff ceased reliance on WorkCover in May 2012. At that time he made application for income protection benefits from the defendant.

[7] Attempts at finding alternate employment at the hospital which the plaintiff could perform were unsuccessful. He last performed duties at the hospital in April 2013. The plaintiff's employment with the Princess Alexandra Hospital ceased on 12 August 2013 when the plaintiff accepted a voluntary redundancy pursuant to an offer made by his employer.

[8] The offer of a voluntary redundancy was made in circumstances where the employer had advised the plaintiff that as a consequence of a restructure of employment arrangements there was no suitable position available having regard to the plaintiff's ongoing restrictions in his employment capabilities.

Claim for benefits

[9] In May 2012, the plaintiff lodged a claim for income protection benefits pursuant to the terms of the Superannuation Scheme administered by the defendant. In August 2012, he lodged a claim for payment of a total and permanent disablement benefit with the defendant pursuant to the same Scheme.

[10] The plaintiff's claim for payment of income protection benefits was initially allowed but subsequently declined by the defendant. The defendant also declined the plaintiff's claim for payment of the applicable total and permanent disablement benefit. The decision to decline to pay income protection benefits was overturned on review in March 2014.

[11] The plaintiff's first claim for payment of a total and permanent disablement benefit was lodged on 7 August 2012. That claim was rejected by letter dated 9 January 2013 by a delegate of the defendant's Board on the basis the information available was not sufficient to establish the requirements for a total and permanent disablement benefit.

[12] By letter dated 10 February 2014, the plaintiff sought a review of that fund decision. The plaintiff provided submissions and new material for consideration by the Board. On 26

June 2014, the defendant Board determined that the plaintiff did not satisfy the definition of total and permanent disablement and affirmed its delegate's earlier decision.

[13] On 15 April 2016, the plaintiff made a further request for review of the decision to decline his claim for total and permanent disablement benefits. Again, that request was accompanied by submissions and additional new material.

[14] On 10 June 2016, the plaintiff was advised that the senior Board delegate of the defendant had determined that a review of that additional material did not indicate a reasonable possibility of a different result to the Board's earlier decision and therefore affirmed the defendant's refusal to pay total and permanent disablement benefits to the plaintiff.

[15] The issue said to disentitle the plaintiff to the payment of total and permanent disablement benefits was that there were occupations the plaintiff could undertake for which the plaintiff was reasonably qualified by his education, training or experience.

Total and permanent disablement

[16] The defendant has the duty of administering the scheme in accordance with the provisions of the Deed and the Act. The Board's powers include the payment of benefits out of the funds to persons entitled thereto. Once the Board has received satisfactory proof that an insured member has suffered total and permanent disablement while an insured member the Board will, subject to the insurance terms, pay the amount of his insurance cover.

[17] Under the Deed, total and permanent disablement exists if a member has suffered "disablement of a degree which, in the opinion of the Board after obtaining advice of not fewer than two medical practitioners, is such as to render the member unlikely ever to be able to work again in a job for which the member is reasonably qualified by education, training and experience". Disablement means "any mental or bodily injury, illness, disease or infirmity".

Applicable principles

[18] It is for the Trustee of a super fund to determine a member's entitlement to payment of a total and permanent disablement benefit. That determination must be made in accordance with the terms of the relevant Trust Deed. A decision is reviewable by the Courts.

[19] It is open to a Court to set aside that decision if satisfied that the decision:

1. was not made in good faith; or

2. was not made upon a real and genuine consideration of the material before the Trustee; or

3. was not made in accordance with the purposes for which the power to make a decision was conferred.[1]

[20] Such a conclusion may be inferred by a Court if satisfied the Trustee has come to a conclusion no reasonable person would have come to on the evidence before it or that a real and genuine consideration of the issue required properly informed consideration by the making of relevant inquiries and by giving attention to natural justice requirements.

[21] The scope of that review was enunciated in *Finch v Telstra Super Pty Ltd*[2]:

> "[66] … the decision of a trustee may be reviewable for want of 'properly informed consideration'. If the consideration is not properly informed, it is not genuine. The duty of trustees properly to inform themselves is more intense in superannuation trusts in the form of the Deed …. It is extremely important to the beneficiaries of superannuation trusts that where they are entitled to benefits, those benefits be paid. Here, for example, the applicant was claiming a Total and Permanent Invalidity benefit to support himself for the rest of his life. His claim depended on the formation of an opinion by the Trustee about the likelihood that he would ever engage in 'gainful Work': that was not a mere discretionary decision. In the Deed there was a power to take into account 'information, evidence and advice the Trustee may consider relevant', and that power was coupled with a duty to do so. It would be bizarre if knowingly to exclude relevant information from consideration were not a breach of duty. And failure to seek relevant information in order to resolve conflicting bodies of material, as here, is also a breach of duty. The Scheme is a strict trust. A beneficiary is entitled as of right to a benefit provided the beneficiary satisfies any necessary condition of the benefit. Whether or not it will be decided hereafter that, consistently with s 14 of the *Complaints Act*, the duty of a trustee in forming an opinion of the present type is a duty to form a fair and reasonable opinion, or even a duty to form a correct opinion, there is because of the importance of the opinion and its place in the Scheme a high duty on the Trustee to make inquiries for 'information, evidence and advice' which the Trustee may consider relevant. …" (citations omitted)

[22] In determining whether the definition of total and permanent disablement pursuant to the Deed is met the Trustee must focus not on some hypothetical person but on the insured member. Consideration must be given to whether a person with that person's background, suffering from that person's condition would be able to work again in a job

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1 *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QSC 245 at [55]; On appeal [2016] QCA 247 at [64].

2 (2010) 242 CLR 254 at [66].

for which that person is reasonably qualified by education, training and experience.[3] The relevant consideration is the capacity to perform remunerative work of that kind, not the capacity to perform a work task. As was observed in *Hannover Life Re of Australasia Ltd v Colella*[4]:

> "The capacity to do work is dependent, in part, on a person's background, training and skills. A person is not able to perform work unless that person has the necessary qualifications, skill and experience to perform the work.
>
> To be practical and meaningful, the concept of capacity to perform work must be in the context of an occupation or employment recognised in the community. There is no useful concept of work outside of remunerative activity within the framework of existing occupations or employment.
>
> A person may have the capacity to perform work even though the occupation or employment is not available in the town or region in which the person lives. The test is not concerned with the availability of employment or work to the person – rather it is concerned with the person's capacity to perform remunerative work for which the person is otherwise suited."

[23] In undertaking that assessment, the observations of Leeming JA (with whom Beasley P and Emmett JA agreed) in *TAL Life Ltd v Shuetrim*[5] are apposite:

> "… To make an assessment of TPD, it is not sufficient for the insurer to be satisfied that it is more likely than not that the person will never return to work. On the other hand, if there is merely a remote or speculative possibility that the person will at some time in the future return to relevant work, an insurer will not, acting reasonably and in compliance with its duties, be able to be satisfied that the person is not TPD. The critical distinction is between possibilities which are readily contemplatable even though they may not be more probable than not, and possibilities which are remote and speculative. A real chance that a person will return to relevant work, even if it is less than 50%, will preclude an insured person being unlikely ever to return to relevant work."

[24] In undertaking that assessment of possibilities, a Trustee is to give consideration of the "actual, or real possibility of employment, rather than a theoretical possibility".[6] Finally, in undertaking an assessment of whether another occupation is one to which the insured member is fitted by education, training or experience consideration is to be had to the

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3 *Repatriation Commission v Hill* (2005) 142 FCR 88 at [57].

4 (2014) VSCA 205 at [30].

5 (2016) NSWCA 68 at [89].

6 *Wheeler v FSS Trustee Corporation as Trustee for the First State Superannuation Scheme* (2016) NSWSC 534 at [76].

person's current education, training or experience not to possibilities after re-training. As Brereton J observed in *Jones v United Super Pty Ltd*[7]:

> "… The identification of some skills acquired or developed in one occupation, which may be applied in another, does not necessarily mean that the worker is fitted by experience for the second occupation. Having some of the requisite individual skills does not equate to being fitted for the employment as a whole: capacity to perform remunerative work is different from capacity to perform a work task. It does not follow that because a person is physically capable of performing one or more work tasks that there is an ability to engage in remunerative work."

Documentation

First decision

[25] At the time of the first decision there was before the Board's delegate the following information:

- The plaintiff had suffered an injury to his right shoulder in September 2011 as a consequence of which he had suffered ongoing pain and restriction of movement necessitating a substantial period of time off work and an unsuccessful graduated return to work on light alternate duties. Those light duties had ceased when two specialist orthopaedic surgeons certified the plaintiff as being fit to undertake suitable duties with restrictions of no lifting greater than 1 kilogram and no pushing.

- Since the injury the plaintiff had undergone a range of conservative treatments including physiotherapy and steroid injections. A further attempt at a return to work on light suitable duties in February 2012 had also been unsuccessful. At that time an assessment by Dr English, orthopaedic surgeon, resulted in an opinion that the plaintiff was fit for non-lifting, non-manual duties with a lift limit of 1 to 2 kilograms and an assessment that the plaintiff was unfit to work in his ordinary job at his ordinary hours as a registered nurse.

- Notwithstanding those assessments, each orthopaedic surgeon had opined that surgery was an appropriate treatment option and that long term the plaintiff had a reasonable prospect of returning to full duties as a registered nurse. There was a difference of opinion as to whether that potential need for surgery was due to an underlying pre-existing degenerative condition which had been asymptomatic prior to the injury or as a consequence of a work related aggravation of that asymptomatic condition.

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7 (2016) NSWSC 1551 at [77].

- The plaintiff was unwilling to undergo surgery due to a genuine concern as to the risks associated with anaesthetia. WorkCover Queensland had also determined that it would not fund that surgery.

- The plaintiff commenced a graduated return to work programme in March 2012 within the intensive care unit undertaking light duties. Whilst undertaking those duties he jarred his right shoulder causing further pain. The plaintiff subsequently withdrew his WorkCover claim on 30 May 2012 as he did not believe he could participate in its proposed return to work programme. The plaintiff instead applied for income protection benefits from the defendant.

- An assessment undertaken on behalf of WorkCover in April 2012 had resulted in an opinion that the plaintiff's ongoing prognosis was impossible to predict and that the plaintiff remained with a limited capacity to return to work for office duties only with a lifting weight limit of 2 kilograms using his right arm and no work at or above shoulder height.

- Notwithstanding conservative treatment and attempts to return to work on light duties only, the plaintiff's condition remained severely painful necessitating the taking of medication and the development of psychological stress and anxiety.

- The defendant's examining occupational physician, Dr Douglas, had noted reports of persisting pain in the right shoulder with difficulty undertaking daily tasks and increased pain with physiotherapy. The need for constant medication resulted in drowsiness. Dr Douglas opined that the plaintiff's injury had resulted in a permanent aggravation of a degenerative change in the right shoulder but that the plaintiff was fit for a return to part-time duties as a registered nurse. The underlying degenerative changes meant the plaintiff would always experience variable levels of discomfort in his right shoulder. However, Dr Douglas was of the opinion that continuing physical activity, including nursing type activities, would help in the plaintiff's ongoing rehabilitation. Dr Douglas recommended the plaintiff be weaned from his narcotic analgesic medication and be encouraged to increase his physical activities to return to his nursing duties.

- Consequent to Dr Douglas' report, efforts were made to establish a graduated return to work plan, however, the plaintiff had advised his employer that he was not willing to immediately return to work based on Dr Douglas' opinion.

Second decision

[26] In addition to the material available for consideration at the time of the first decision and a submission by the plaintiff that the first decision had placed undue reliance upon Dr Douglas' opinion, which it was submitted failed to analyse the plaintiff's ongoing physical incapacities and variable pain levels, the plaintiff provided new material for consideration by the Board. That material established:

- whilst living in the Philippines the plaintiff's work experience had included some months as a clinical instructor or college instructor. Since moving to Australia, the plaintiff had worked in hospital settings in intensive care units.

- Dr Gillett, orthopaedic surgeon, who examined the plaintiff on 29 May 2012, noted constant pain, disturbed sleep and problems with mood and interaction with people. In Dr Gillett's opinion, the plaintiff's injury continued to prevent him from working at that time. Whilst his injury was not stable, without further treatment, particularly surgery, it was likely the plaintiff's condition had reached maximum medical improvement.

- Dr de Leacy, psychiatrist, who examined the plaintiff on 11 October 2012 said the plaintiff reported ongoing constant pain keeping him awake at night with pain and restriction of movement associated with most daily activities. The plaintiff reported becoming depressed about his ongoing difficulties. He also reported regular headaches, fatigue, and poor concentration and short term memory difficulties. Dr de Leacy noted on examination that the plaintiff had poor concentration, defective short term memory and that his distress was affecting his cognitive functioning. In his opinion, the plaintiff was suffering an adjustment disorder with anxiety and depressed mood of a moderate intensity. The plaintiff's ongoing symptoms prevented his return to full duties as an intensive care nurse but he could perform light nursing duties. His pain would be distracting and cause concentration lapses. His ongoing poor sleep meant he would need a late start for work. It was likely that mood disturbance, anxiety and an ongoing effect on his ability to concentrate and focus would continue in the future.

- Dr Hadwen, who examined the plaintiff on 5 November 2012 at the request of WorkCover, opined that as the plaintiff had declined surgical treatment his injury must be considered to have reached maximum medical improvement. An additional complication was a dependence upon narcotic based medication and the plaintiff's ongoing concerns that a lack of sleep interfered with his fitness to return to work in any capacity.

- Dr Chao, the plaintiff's general practitioner, in a report dated 19 December 2012, opined that the plaintiff was unable to do manual handling, elevate his arm above his shoulders or lift weights greater than 2 kilograms. The plaintiff reported ongoing pain affecting his sleep and daily activities. Both injections and physiotherapy had not resulted in improvement and the plaintiff declined surgical intervention due to a fear of anaesthetics.

- Dr Fitzgerald, occupational physician, who examined the plaintiff on 22 January 2013 at the request of his employer, noted ongoing constant dull pain, poor sleep lack of motivation, irritability and lowish mood. The plaintiff reported using medication on a daily basis. Dr Fitzgerald opined the plaintiff's condition had become chronic and that without a change in the next six months, was unlikely to change in the future without surgical intervention. In Dr Fitzgerald's opinion, the plaintiff was not currently able to resume the full range of duties of his substantive

position due to both the physical incapacities and the effects of his ongoing medications.

- Karen Stewart, a rehabilitation adviser who undertook a review of the documentation, opined that based on the plaintiff's employment history, including past experience as a teacher/instructor in the Philippines, the plaintiff had potential vocational options of general practice nurse, telephone triage nurse and nursing educator. Further information would be required to ascertain whether the plaintiff's functional capacity would allow him to undertake the duties of a general practice nurse. The overall labour market for the occupations of telephone triage nurse and nursing educator was not strong but such roles did fall within the plaintiff's education, training and experience. The role were entirely sedentary and met his limitations on physical demands.

- In a subsequent report, Ms Stewart opined further potential vocational options, were pathology collector/venepuncture, ward clerk and medical receptionist. As the work as a pathology collector required minimum primary qualifications, further information would be required to determine the plaintiff's functional capacity to undertake that role. The role of medical receptionist required administrative duties. Ms Stewart noted the plaintiff had not worked specifically in an administrative role.

- On 13 February 2013, the plaintiff's employer determined not to return the plaintiff to his substantive position of ICU nurse following the opinion of Dr Fitzgerald.

- Dr Christian, occupational physician, who assessed the plaintiff on 13 March 2013, opined there had been a slow, steady improvement in the plaintiff's symptoms over time but that any forceful activity continues to lead to a worsening of his pain necessitating avoidance with that level of activity. When the pain worsened, it would awaken the plaintiff resulting in a poor sleep throughout the night. Dr Christian opined that the plaintiff was not able to undertake medium or heavy physical activity, was not able to undertake repetitive or prolonged even light level activity at or above the shoulder and was not able to undertake sudden shoulder movements. The plaintiff could undertake sedentary or light level activity undertaken below shoulder level. Such activities would not be expected to lead to an increased level of pain or a worsening of the underlying condition. In Dr Christian's opinion, the plaintiff could not work as an ICU nurse or as a general practice nurse but was physically fit for fulltime work as either a telephone triage nurse, a nursing educator, pathology collector/venepuncture or a ward clerk/ medical receptionist. All of those roles were light work roles. Use of a light blood collection trolley would involve only light physical activity, undertaken with the arms outstretched below shoulder level. The plaintiff may also be suited for work as a health promotion officer. That role also involved light physical work.

- Dr Salinas, the plaintiff's current general practitioner, opined on 3 June 2013 that the plaintiff was suffering chronic pain on an ongoing basis. The plaintiff was also suffering from an adjustment disorder with moderate severe anxiety features and mild moderate depression. As a consequence, the plaintiff remained unfit for work

as a registered nurse and as a general practice nurse. With re-education and additional training, the plaintiff may be fit to work as a nurse supervisor, nurse educator, health and safety officer or in a completely different field.

- On 4 July 2013, the plaintiff had been advised by his employer that his permanent substantive position had been abolished and that the employer was unable to identify any alternate employment role. The plaintiff was offered a voluntary redundancy, which he accepted with his employment ceasing on 11 August 2013.

- On 11 July 2013, Dr Salinas provided a certificate certifying that the plaintiff was unlikely ever to be able to work in a job for which he was reasonably qualified by education, training or experience due to his shoulder injury and adjustment disorder with mixed anxiety and depression.

- Rebecca Hague, occupational therapist, who examined the plaintiff on 23 August 2013, noted ongoing right shoulder pain with restrictions of movement, disturbed sleep and continual reliance upon medication. Her assessment revealed reduced movement in the right shoulder and muscle wastage with reduced strength. In Ms Hague's opinion the plaintiff was precluded from heavy or repetitive lifting, from static or repetitive forward or overhead reaching and limited in his capacity for forceful or repetitive use of his right upper limb which precluded him from heavy pushing or pulling. The plaintiff's ongoing restrictions precluded him from a return to work as a registered nurse and as a general practice nurse. Whilst his physical restrictions may not restrict him from working as a nurse educator, the plaintiff's previous experience was now more than 10 years ago and for less than 12 months. As the plaintiff had no Australian qualifications as a nurse educator and no prior experience in Australia, he was not reasonably qualified by education, training or experience to work as a nurse educator in Australia as he would not be competitive on the open market. Ms Hague reached a similar conclusion in relation to work as a telephone triage nurse, noting that he has no prior training or experience for this work and that an essential requirement for such a role is excellent telephone communication skills. Ms Hague concluded:

  > "Mr Gomez is a 41 year old man who has spent the majority of his working life as a registered nurse. He is no longer fit for the full duties of a registered nurse. He is not reasonably qualified (in Australia) for work as a nursing educator. He has no prior experience or training (in Australia) for work as a nursing educator or registered nurse in a medical centre. He has no prior experience or training for work as a telephone triage nurse. He has no training, education or experience in lighter roles. Related to his ongoing occupational restrictions he is no longer fit for the occupations detailed above. At the date of my assessment and in my opinion this man is unfit for any occupation for which he is reasonably qualified for by education, training or experience."

Third decision

[27] Subsequent to the second decision the plaintiff requested a review and provided further information. In addition to the material available at the time from the first and second decisions, the plaintiff provided reports from Dr English and Dr Shaikh.

[28] Dr English opined that with appropriate treatment the plaintiff would remain fit for work as a nurse supervisor, pre-admission nurse, telephone nurse, practice nurse, nurse educator, pathology collector, medical receptionist or general practice nurse.

[29] Dr Shaikh, who had examined the plaintiff on 23 March 2016, noted the plaintiff reported ongoing constant pain of varying severity depending upon the activities undertaken by him. This pain disturbed his sleep leading to daytime fatigue which affected his concentration and memory. He required ongoing medication. Dr Shaikh opined that the plaintiff's sleep disturbances, impaired cognition and reduction in recreational pursuits were primarily due to physical complaints, not a psychiatric disorder.

[30] The plaintiff also provided a supplementary report from Ms Hague. Ms Hague had conducted a telephone consultation with the plaintiff. In her opinion, the plaintiff's accent would be a barrier to employment as a telephone triage nurse as would his lack of experience and additional qualifications. Further, as the plaintiff did not hold the requisite certificates for the occupation of pathology collector/venepuncture, the plaintiff was not reasonably qualified or experienced for work in that occupation. Similarly, as the plaintiff had no prior experience or formal qualifications as a ward clerk or a medical receptionist and no knowledge of specialised software programmes, he was not reasonably suited for this type of work by virtue of his education, training and experience. Ms Hague opined the position of health promotion officer was a profession with a recognised undergraduate qualification in Australia requiring an applicant to possess the understanding of public health sector policies and requirements. The plaintiff did not possess either the qualifications or the skills to allow him to work in this field.

[31] Finally, the plaintiff provided a statement dated 15 April 2016 in which he indicated that over the previous three years he had attempted to look for alternate work and had submitted approximately 200 job applications without success. The plaintiff had only basic computer skills and spoke English with an accent and could not be described as highly fluent.

Decisions

First decision

[32] By letter dated 9 January 2013, the Board's delegate advised the plaintiff that his claim for total and permanent disablement benefits was refused because the information available did not establish that the plaintiff was suffering from a condition which rendered him totally and permanently disabled and the plaintiff was deemed fit to resume his normal duties.

Second decision

[33] On 26 June 2014, the Board determined that the plaintiff was not totally and permanently disabled within the terms of the Deed. The Board advised that, having regard to the evidence, the plaintiff was reasonably qualified by his education, training or experience and fit to work as a telephone triage nurse, nursing educator, pathology collector, health promotion officer and as a general practice nurse performing specified duties. The Board noted that shoulder surgery would provide a cure but did not take the plaintiff's refusal to undertake surgery into account as he was reasonably qualified by his education, training or experience and physically able to perform other nursing related roles. Accordingly, the Board was not satisfied the plaintiff suffered from a disability of such a nature as to render him unlikely ever to be able to work again in a job for which he is reasonably qualified by education, training or experience.

Third decision

[34] On 10 June 2016, the Board advised the plaintiff that its Senior Board Delegate had determined, on review of the additional material, that it did not indicate a reasonable possibility of a different result to the Board's second decision. Accordingly, the refusal to grant the plaintiff's total and permanent disablement claim was affirmed.

Plaintiff's submissions

[35] The plaintiff submits the first and third decisions were nullities as there was no power for the defendant to delegate the decision-making process and, in any event, there was no effective delegation to the person who purported to make those decisions on behalf of the defendant.

[36] The plaintiff further submits that the first decision was not a decision made in good faith with real and genuine consideration of the claim and that a reasonable person applying the correct test on the available material would not have reached that decision. The defendant was required to obtain the advice of at least two medical practitioners but made the decision in reliance upon the advice of one practitioner, Dr Douglas, which decision was contrary to the consensus of medical opinion available to the defendant at the time of making the first decision.

[37] The plaintiff submits the second decision was based on an incorrect conclusion that the plaintiff was able to work again in occupations for which he was reasonably qualified by education, training or experience. Whilst the plaintiff may have had a physical, functional capacity to undertake a sedentary occupation, the plaintiff had not previously been employed in a sedentary occupational role. Further, the opinion relied upon by the Board to reach that conclusion was based on a documentary review of the material by its rehabilitation adviser, not an assessment of the plaintiff. The defendant had the opinions of Ms Hague as to the lack of prior educational or occupational experience in the suggested alternate occupations. In those circumstances, it was the obligation of the defendant to take steps to resolve the conflicting opinions by seeking further information as to the plaintiff's actual prospects of working in such a job. There was insufficient evidence to support the decision reached by the defendant, particularly as the plaintiff's previous employer did not identify those alternate roles as a reasonable transfer option.

[38] Finally, the plaintiff submits the third decision was not a decision that was reasonably open on the material provided to the defendant. The defendant had a duty to address that material, in any genuine re-consideration of its earlier decision, including obtaining further medical and other evidence.

Defendant's submissions

[39] The defendant submits the relevant decision is the second decision. That decision was a decision open to the Board, in accordance with its obligations and duties. In addition to Dr Douglas' opinion, the defendant had the opinions of Dr English, Dr Radovanovic and Dr Scott that the plaintiff had a reasonable chance of returning to duties following appropriate treatment. There were the opinions of Dr Christian and Dr Salinas as to his suitability for sedentary type positions having regard to his prior education, training and experience. Those conclusions were supported by the opinion of Ms Stewart. The opinions of Ms Hague did not detract from the conclusion that there were occupations the plaintiff was reasonably qualified to undertake by education, training and experience, notwithstanding his physical disabilities.

[40] The defendant further submits the second decision was not a decision that it could be said no reasonable person could have come to having regard to all of the material. The defendant made a reasoned choice between competing bodies of medical opinion. There is no allegation of a failure to act in good faith. There is no basis to conclude the decision was other than a real and genuine consideration of the material, made in accordance with the purposes for which the power to make the decision was conferred.

[41] Finally, the defendant submits the third decision was a decision properly made in accordance with the authorised delegation of the defendant's power. The additional material did not indicate a reasonable possibility of a different result. The new information related to limitations on the availability of the work, not a conclusion that the plaintiff was not someone reasonably qualified for such positions by his education, training or experience.

Discussion

[42] Whilst the plaintiff contends that the first decision is a relevant decision for consideration in this proceeding, the first decision became of no practical effect once the defendant made the second decision. As the relevant decision for consideration in determining the plaintiff's claim is the second decision, there is no utility in determining whether the first decision was made pursuant to an effective delegation from the defendant Board.

[43] In considering whether the second decision was a decision open to the defendant, exercising its powers in accordance with its obligations and duties, regard must be had to the fact that the Court's power is not a general merits based review. If, on a consideration of the evidence as a whole, the second decision was a decision the defendant could properly make in good faith as a real and genuine consideration of the exercise of its power, it is not open to a successful challenge.

[44] Having considered the material available to the Board, I am satisfied the second decision was a decision reasonably open to the Board, exercising its powers in good faith and having given a real and genuine consideration to the claim in accordance to its duties and obligations under the Deed.

[45] The material placed before the Board established that whilst the plaintiff had an injury which caused him ongoing pain, discomfort and limitation of movement, the plaintiff's ongoing physical disabilities did not prevent him from undertaking sedentary type duties. Whilst the plaintiff complained of further limitations, in terms of concentration and memory loss as a consequence of his reliance upon narcotic medication and the ongoing effects of constant pain on his sleeping patterns, the material reasonably supported a conclusion that those issues could be adequately and properly addressed to ensure the plaintiff could physically undertake sedentary type occupations.

[46] There was identified in the material a number of occupations which fitted that criteria. The issue for determination was not whether those occupations were freely available. The issue was whether those occupations were occupations for which the plaintiff was reasonably qualified by education, training or experience.

[47] Limitations such as the plaintiff not having previously undertaken such duties did not render those occupations which the plaintiff could not undertake, having regard to his education, training and experience. For example, whilst the plaintiff may not have undertaken previously the duties of a triage nurse, he had extensive experience as an intensive care nurse. That experience would qualify him for undertaking an assessment of a patient in order to assess which patient ought to be attended to first. Similarly, the plaintiff's extensive experience as an intensive care nurse rendered him qualified to administer needles and take samples from a patient.

[48] The plaintiff has not established that the second decision was a decision made not in good faith. The plaintiff has also not established that the decision was made without a real and genuine consideration of the issues for determination by the defendant, in accordance with its obligations and duties under the Deed and the Act. The second decision also was not a decision which was so unreasonable that no reasonable Trustee could reach it on the material placed before the defendant.

[49] The plaintiff's challenge to the second decision amounts to no more than an assertion that a different decision was open on the evidence. That is not a sufficient basis to set aside the decision of the defendant. The defendant made a reasoned choice between competing bodies of medical opinion, in accordance with its obligations and duties to decide whether the plaintiff satisfies the terms of the Deed. That choice was reasonably open to it. Such a decision is not properly to be interfered with by a Court.[8]

[50] The remaining issues for determination are whether the third decision was a decision made by an approved delegate and, further, was a decision open on the material. As to

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[8] *Eddington v Board of Trustees* [2016] QCA 247 at [70].

the former, the affidavit material relied upon by the defendant establishes the decision was made pursuant to a delegation and by an approved delegate.

[51] In determining the latter issue it is important to consider the obligation of a Trustee in respect of a request for a re-consideration. That obligation was enunciated in *Gilberg v Maritime Super Pty Ltd*[9]:

> "[25] In the case of an application to reconsider, it is relevant for the Trustee to take into account the trouble and expense to the Trust involved in obtaining medical reports under para C and to the circumstance that the previous determination was a final determination of the previous application.
>
> [26] If the Trustee did not consider that the material provided in support of a new application indicated a reasonable possibility of a different result by reason of circumstances occurring since the previous application or by reason of evidence not reasonably available at the time of the previous application, it would, in my opinion, be appropriate for the Trustee to decline to obtain further reports under para C for the purposes of the new application and to refuse the application.
>
> [27] However, if the Trustee considered that the material provided in support of the new application did indicate a reasonable possibility of a different result, by reason of circumstances occurring since the previous application or by reason of evidence not reasonably available at the time of the previous application, and that, having regard to the interests of the applicant and the interests of other members, that possibility justified the expense of appointing medical practitioners to make further reports under para C, then it would be appropriate for the Trustee to take that course.
>
> [28] In my opinion, the Trustee has a duty to address applications to reconsider on the basis I have indicated."

[52] The further material provided to the defendant addressed not merely the availability of other occupations for which the plaintiff was qualified by relevant education, training or experience. That material addressed the likelihood of the plaintiff having such transferrable skills, having regard to the need for particular educational requirements and the ability to undertake certain types of communication. They were matters which had not been specifically considered by Ms Stewart or any of the medical practitioners who had earlier provided opinions to the defendant.

[53] Those matters were relevant to a consideration of whether the plaintiff, in truth, had the capacity to perform remunerative work in those designated occupations as opposed to a capacity to perform work tasks within those designated occupations. As was observed in

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9 (2009) NSWCA 325 at [25]-[28].

Jones v United Super Pty Ltd[10] having some of the requisite skills does not equate to having a capacity to perform remunerative work.

[54] The defendant, consistent with its obligations and duties under the Deed and Act, had to consider whether, having regard to the plaintiff's particular circumstances, the identified alternate occupations were occupations the plaintiff had the capacity to engage in having regard to his education, training or experience. That consideration had to be more than a theoretical exercise removed from reality. The additional material gave rise to that very consideration. It put forward sufficient material to show there was a case to be investigated further.[11] That case justified the seeking of further opinions from Ms Stewart and the relevant medical practitioners.

[55] Had the Board's delegate given consideration to that aspect of the additional material, there was a reasonable possibility of a different result being reached by the defendant to that of the second decision. The delegate's failure to consider the material in that way breached the defendant's obligation to reconsider its second decision.

[56] That conclusion supports a finding that the defendant breached its duty by failing to properly reconsider the application made to it by the plaintiff for the payment of total and permanent disablement benefits. Whilst there remains in that event, a discretion to decline to make an order that the Trustee properly consider the application, the material placed before the defendant was of such a nature that it cannot be concluded there is no reasonable possibility that the defendant, acting reasonably, will accede to the plaintiff's application in the event of a reconsideration. It is not appropriate to exercise the discretion to decline the order in those circumstances.

Conclusion

[57] The plaintiff is entitled to an order that the defendant properly consider the application for the payment of total and permanent disablement benefits.

[58] I shall hear the parties as to the form of orders and costs.

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[10] (2016) NSWSC 1551 at [77].

[11] *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618 at 633 [60].