[2014] AATA 851

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number | 2013/5557 |
| Re | Roque Hammal |
|  | APPLICANT |
| And | Repatriation Commission |
|  | RESPONDENT |

# Decision

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| Tribunal | **Ms N Isenberg, Senior Member** |
| Date | **14 November 2014** |
| Place | **Sydney** |

The decision under review is affirmed.

.......................**[sgd]**.................................................

**Ms N Isenberg, Senior Member**

# Catchwords

VETERANS ENTITLEMENTS – Whether Applicant's pension should be paid at partnered rate – Whether there are special reasons – Financial difficulties – Health issues – No special reasons – Decision under review affirmed

# Legislation

Social Security Act 1991 (Cth), s 24(1)

Veterans Entitlement Act 1986 (Cth), ss 5E(2), 5R(3), 38D, 38H, 56D, 57A, 58K

# Cases

Boscolo v Secretary, Department of Social Security [1999] FCA 106; (1999) 90 FCR 531

Kazmierczak v Department of Families, Housing, Community Services & Indigenous Affairs [2010] FCA 1084

Re Holt and Secretary, Department of Education, Employment and Workplace Relations [2010] AATA 143

Malajew v Secretary to the Department of Social Security (1988) 9 AAR 31

Whippey v Repatriation Commission [1999] AATA 1030

# REASONS FOR DECISION

**Ms N Isenberg, Senior Member**

**14 November 2014**

# Decision under review

1. The Applicant, Roque (‘China’) Hammal, is an ex-serviceman who seeks review of a decision of the Respondent, the Repatriation Commission, to reduce his service pension rate as a result of his marriage. A delegate of the Respondent determined on 26 October 2012, that the Applicant’s rate of pension should be reduced with effect from 16 October 2012 to the partnered rate. The Applicant applied for review of that decision, which was affirmed by a further delegate of the Respondent on 2 August 2013.
2. The Applicant now applies to this Tribunal for review of that decision.

# Background

1. The Applicant has been paid service pension (and other veteran’s entitlements) at the single rate for some years. On 31 July 2012 the Applicant informed the Respondent that he would be getting married on 1 October 2012. On 8 October 2012 he informed the Respondent that he had married as foreshadowed.
2. The Respondent reviewed the Applicant’s rate of service pension from the date of his marriage. As a member of a couple, the Applicant was moved from the single rate of service pension to the partnered rate.
3. Up until recently, Mr and Mrs Hammal resided in Hong Kong. The Respondent considered that the Applicant's wife was ineligible to receive any payment from the Respondent as she was not an Australian citizen or Australian resident. As a consequence, the Applicant was considered to only be eligible to receive service pension at half the partnered rate, which is less than the single rate. The result was that the Applicant’s service pension was reduced from the date of his marriage.

# Issue before this Tribunal

1. There are two issues before the Tribunal for determination:
* Is Mr Hammal’s service pension properly payable at the partnered rate because his wife is not an Australian citizen or resident?
* And, if so, are there special reasons why Mr Hammal should not to be treated as a member of a couple for the purposes of the *Veterans Entitlement Act 1986 (Cth)*(‘VEA’), in accordance with the discretion set out in s 5R(3) of the VEA?

# Consideration

1. There was no dispute that Mr Hammal was, from 1 October 2012, and continues to be, a member of a couple: s 5E(2) of the VEA.

## Is Mr Hammal’s service pension properly payable at the partnered rate because his wife is not an Australian citizen or resident?

1. Payment of a pension to the partner of a veteran is not automatic – the partner must make his or her own application for payment of a partner pension: s 38D VEA. That means that Mrs Hammal did not automatically become entitled to a partner pension on her marriage to the Applicant. No claim was made by Mrs Hammal; if such a claim had been made, it would properly have been refused because Mrs Hammal was not an Australian citizen or a permanent resident, as required by s 38H of the VEA.
2. Mr Hammal’s entitlement to service pension was, of course, unaffected by his marriage. However, his status had changed to that of a ‘member of a couple’: per s 5E(2) of the VEA. Section 56D of the VEA requires the Respondent to reduce the rate of pension paid to a person if it is satisfied that the rate at which the person is paid a service pension is more than that to which the person is entitled.
3. I consider it was entirely appropriate that the Respondent adjusted the Applicant’s pension payment to reflect that he was a member of a couple.

## Is there a special reason why Mr Hammal should not to be treated as a member of a couple for the purposes of the Act, in accordance with the discretion set out in s 5R(3) of the VEA?

1. Section 5R(3) of the VEA provides that the Respondent (and hence the Tribunal on review) may determine that for a special reason, a person who is a member of a couple, is not to be treated as a member of a couple for the purposes of the VEA.
2. Mr Hammal contended that a special reason exists in order to warrant a determination under s 5R(3). He referred to financial difficulties, the expense of needing to travel continually to Australia to preserve continuity of payment of his service pension, and the unfair calculation of his service pension that took into account his wife’s income and assets, while failing to allow for her entitlement as his spouse.
3. On 2 July 2013 Mrs Hammal was granted a spouse visa to enter Australia. She will be eligible for permanent residence in March 2015.
4. I accept that had Mrs Hammal been an Australian citizen or permanent resident, and therefore able to claim partner pension, then their combined pension may have produced a net increase.

## Financial hardship

1. The Applicant is currently in receipt of a total of $1,937.64 per fortnight from the Respondent for his disability pension (paid at the Special Rate) and his service and related pensions. Of that amount about $1,200.00 relates to his Special Rate. The Applicant conceded that he was aware that his Special Rate was unaffected by his move to Hong Kong.
2. On 27 October 2011 the Applicant received a lump sum payout from the Military Rehabilitation and Compensation Commission. This precipitated a review of the rate at which his pension was paid. He was asked to provide information about his income and assets and in January 2012, the Applicant informed the Department of Veterans Affairs that he had approximately $110,000 in assets. It was unclear what has happened to that money but he said he had had to pay for the wedding and accommodation for some guests. He had a credit card debt but this has now been paid off. He also explained that his wife’s cultural customs dictate that they are to provide financially for her mother.
3. Following his marriage the Applicant was requested to provide to the Respondent information about his wife’s income. By email dated 15 October 2012 he forwarded his wife’s employment contract and information about her monthly salary.
4. For the purposes of the hearing, the Applicant provided very detailed calculations of his income and expenses since his marriage which he had re-constructed from memory.
5. As to their assets, he said he and his wife paid about $180,000 for a 50 year lease of a 500 square feet apartment in Hong Kong, where they lived until recently.. Since they have been in Australia his wife’s sister is paying the mortgage of about $630 per month, but they will have to pay that money back. Presumably it can be tenanted in their absence which could offset the debt.
6. As to his income, he said that, other than his various veteran’s pensions, he has no income. He said even while in Hong Kong he continued to undertake pro bono veterans’ advocacy, using the internet and some phone contacts. He also provides assistance to Australian veterans in Hong Kong, and is often contacted by the Australian Embassy to assist veterans. That work, however, is unpaid, notwithstanding that there are costs associated with it, such as phone and internet expenses and stationery.
7. As to his current financial position he said that he and his wife live from fortnight to fortnight on his veteran’s pension.
8. His current health issues (discussed below) have been somewhat burdensome financially, requiring him to pay about $2,500.00 for a CT scan. However, because the Applicant was born in Hong Kong, he has been able to gain some ongoing access to the health system at a reduced cost. Also, as the treatment he has undertaken has been somewhat experimental, it was therefore provided at a significantly reduced cost. Presumably in Australia he will have access to public and veterans’ health benefits.
9. The Applicant also had expenses associated with his Hong Kong visa, which required him to leave the country every three months, noting that even a day trip to China or Macau resulted in considerable expense. However, it is unclear whether this expense continued after he married a Hong Kong resident.
10. The Respondent submitted that any perceived financial hardship must be more severe than in the usual sort of case considered under the Act, and referred me to *Malajew v Secretary to the Department of Social Security* (1988) 9 AAR 31*.*
11. I do not consider there to have been evidence that would suggest the Applicant is in strained financial circumstances. He and his wife own an apartment in Hong Kong, although it is mortgaged. He owns a car in Australia. I understand him to be debt free. He has a regular source of income by way of his disability and service pensions. Living in Australia will no longer require travel to maintain his Hong Kong visa.

## The expense of needing to travel continually to Australia to preserve his entitlement to service pension

1. The Applicant said he has had to travel to Australia several times a year in order to maintain his service pension entitlements. He said that he had been told by the Respondent’s counter staff when he enquired before he went to Hong Kong in 2010 that he needed to return to Australia every three to four months to retain his service pension, because it would otherwise be ‘cut off’ after 26 weeks. He conceded he had received no written advice to that effect. In accordance with the instructions he was given, he notified the Respondent every time he left Australia.
2. Because of his need to continually visit Australia, he maintained a room in a friend’s property on the Central Coast for which he paid $50 per week when he was not in Australia and $100 when he was actually staying there, for one to two months at a time. He was travelling on his own because his wife could only get one week’s leave from her job a year. He said there are expenses associated with living here temporarily – such as eating out and other food – which would not be incurred if he were living ‘at home’ with his wife. He pays $160 per month for storage and $104 per annum for a post office box, as well as expenses associated with maintaining a car in Australia.
3. The Applicant said he had only learned on the day of the hearing that his service pension would be unaffected if he were to leave Australia, even permanently. He said he also learned that it is only some ancillary benefits (such as pension supplement and rent assistance) that are not portable for extended periods: s 58K of the VEA.
4. Mr O’Reilly, who appeared for the Respondent, said that he had been a delegate of the Respondent in 2010 and that service pension was, as it continues to be, portable. As there has been no change to s 58K of the VEA since that time, I accept this to be the case.
5. I have serious reservations about the Applicant’s claim that he thought he needed to travel to Australia with some regularity in order to preserve his service pension. Firstly, the Applicant is a very experienced advocate, having for many years advised veterans of their pension entitlements. In those circumstances I find it unlikely that he was unaware of the important provision that made his service pension portable indefinitely. Further, the Applicant made detailed enquiries associated with his move to Hong Kong and proposed marriage. None of the material available to me suggests he was in any way misled about his service pension portability.
6. As discussed above, some ancillary benefits are not portable. If the Applicant chose to return to Australia to preserve the ongoing nature of those payments, then that is entirely a matter for him. If he received the benefit of those payments, he cannot complain that he incurred expenses in ensuring the continuity of payment.

## Unfair calculation of the Applicant’s entitlement

1. The Applicant contended that it was unfair that his wife’s income and assets had been taken into account in assessing his rate of payment, as if she were receiving the partnered pension.
2. He conceded that he had first enquired about the impact of marriage upon his pension in 2010. He said he was referred to the relevant section of the Act and told that his wife would be able to apply. There was no discussion about whether he would be likely to lose part of his pension if he should marry a non-permanent resident.
3. The Applicant had made enquiries with the Respondent, it appears, from as early as May 2010, when he was first contemplating marrying in Hong Kong¸ about the effect on his service pension if he were to become a ‘member of a couple’. He was informed, via emails in May 2010, that his service pension may be affected by his marriage and that normally income and assets of the couple are assessed for service pension purposes. Further, he was specifically informed in the email that his full rate of pension supplement, an ancillary benefit, would not be payable after 13 weeks. I do not accept that the applicant was taken by surprise by the turn of events.

## Applicant’s health

1. The Applicant said he has recently been diagnosed with asbestosis and he had two months hospitalisation in Hong Kong. The Applicant’s poor prognosis has precipitated his wife leaving work and coming to Australia to be with him. He is presently making a claim with the Dust Diseases Tribunal.
2. The Applicant said that the couple’s plan is to stay in Australia, sell the property in Hong Kong and to visit his wife’s family once a year.

# Conclusion

1. In determining whether there is a special reason to exercise the discretion in s 5R(3) of the VEA, I have considered a number of the cases to which the Respondent referred me relating to a similar provision in the *Social Security Act 1991* (Cth).
2. In *Boscolo v Secretary, Department of Social Security* [[1999] FCA 106](http://www.austlii.edu.au/au/cases/cth/FCA/1999/106.html); [(1999) 90 FCR 531](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281999%29%2090%20FCR%20531) (‘*Boscolo’*) at [18], French J (as he then was) held that the core of the requirement for “special reasons” under s 24(1) (of the Social Security Act) is that there be something unusual and different to take the matter, which is the subject of the discretion, out of the ordinary course: that does not require that the case to be extremely unusual, uncommon or exceptional. That approach was followed in *Kazmierczak v Department of Families, Housing, Community Services & Indigenous Affairs* [2010] FCA 1084 (‘*Kazmierczak’*).
3. I also note that the discretion is not to be enlivened lightly: *Boscolo* at [18] and *Kazmierczak* at [37].
4. In *Re Holt and Secretary, Department of Education, Employment and Workplace Relations* [[2010] AATA 143](http://www.austlii.edu.au/au/cases/cth/AATA/2010/143.html) (‘*Holt*’), SM Creyke, considered the capacity of the applicant and his wife to pool resources for their mutual benefit. In *Kazmierczak* Barker J accepted that the case law canvassed by SM Creyke in *Holt* confirmed that there is a particular focus (under the Social Security Act) on the practical ability of the resources being pooled. There is no reason in my view that the same focus should not apply in respect of the VEA. In the current matter, there was no evidence that the income and assets of both Mr and Mrs Hammal are not available for pooling. This matter is not like *Whippey v Repatriation Commission* [1999] AATA 1030, where the Tribunal exercised its discretion in favour of the applicant. There the applicant’s wife had no assets and was not permitted to work. In the present matter Mr and Mrs Hammal own property together; Mrs Hammal has worked and her Australian visa contains no prohibition against working here.
5. I am not satisfied that the Applicant is experiencing financial difficulty. He and his wife own an apartment in Hong Kong; he owns a car in Australia and he receives his fortnightly service pension and his disability pension. He does not need to travel from Hong Kong to Australia, unless he seeks to preserve his ongoing ancillary pensions, which are very minor compared to the Special Rate and service pensions. Now that he and his wife have decided to make Australia their home, the Applicant will not need to travel in and out of Hong Kong to preserve his (Hong Kong) visa.
6. I am not satisfied that the Applicant’s recently diagnosed health problems of themselves, or with his other circumstances, amount to a special reason to treat Mr Hammal as not being a member of a couple. After all, all veterans who receive Special Rate of pension are not in good health.
7. I do not consider that the Applicant has established a special reason why he should not be treated as a member of a couple within the meaning of s 5R(3) of the VEA.

# Decision

1. The decision under review is affirmed.

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| I certify that the preceding 44 (forty -four) paragraphs are a true copy of the reasons for the decision herein of Ms N Isenberg, Senior Member |

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Associate

Dated 14 November 2014

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| Date of hearing | **18 September 2014** |
| Applicant | **In person** |
| Advocate for the Respondent | **Mr T O'Reilly** |