IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2016-485-514
[2017] NZHC 3180

BETWEEN		PATRICK JEFFREY EDWARDS Applicant
AND		ATTORNEY-GENERAL Respondent

Hearing: 24&28 February 2017

Counsel: J M Trotman for Applicant
R Roff and S Leslie for Respondent

Judgment: 18 December 2017

JUDGMENT OF WILLIAMS J

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Introduction

[1] The applicant, Patrick Edwards, is 90 years old and blind. He served as a regular in the New Zealand Army from April 1959 until May 1962. He saw active service during that time in the Malayan Emergency. His eyesight had been failing from around the time of his service and by 1989 he was totally blind. Mr Edwards applied for a war disablement pension (WDP) for failing eyesight on 19 January 1966. The application was declined because his condition could not be linked to his service in the Army.

[2] Following multiple further applications, reviews and reconsiderations over the intervening years, a National Review Officer (NRO) from the Office of Veterans' Affairs reconsidered the matter in May 2006. The NRO accepted for the first time that Mr Edwards' loss of vision was "aggravated" by his service in Malaya – the test then applicable under the now-repealed War Pensions Act 1954. In short, the reviewer found it was possible or probable that Mr Edwards' failing eyesight was aggravated by a cobra strike to his eyes while on patrol in Malaya. Mr Edwards' entitlement was backdated to 2004, the date of his most recent application.

[3] There followed further applications and reviews with respect to the starting date for such entitlement. In due course, the Secretary of War Pensions agreed to backdate Mr Edwards' entitlement to 15 June 1999. This was the date upon which the Minister of Defence changed the status of service in Malaya from routine service to service in an emergency.

[4] The underlying substantive issue in this application for judicial review is whether the entitlement should have been backdated to the date of Mr Edwards' first application for a WDP in January 1966. In all, Mr Edwards challenges five separate decisions relating to that backdating. Three were made under the War Pensions Act 1954 (WPA) and two under its replacement, the Veterans' Support Act 2014 (VSA). The WPA decisions were made by the Secretary (twice refusing to backdate) and the Appeal Board (upholding those refusals). The two decisions under the VSA were made by the General Manager and Deputy General Manager of Veterans' Affairs New Zealand (VANZ). In these, the officials refused to consider backdating because

there was no jurisdiction available in the VSA, nor in any residual transitional power remaining under the old WPA.

[5] For the most part, the challenges raise orthodox public law grounds of procedural unfairness and illegality.

[6] My assessment of that issue has been complicated by the following factors:

(a) the time delay since Mr Edwards' service in Malaya;

(b) the change of status of service in Malaya in June 1999; and

(c) comprehensive reform of the law in relation to support for veterans in 2014.

[7] Because the factual, legislative and procedural background in this application is more complex than usual, I will set out the background in six parts. I will begin by discussing Mr Edwards' service in the Armed Forces and his first claim in 1966. Then I will set out the relevant provisions of the War Pensions Act 1954 before providing a brief chronology of Mr Edwards' multiple applications for coverage. It is necessary to traverse this background in some detail in order to provide necessary context for the backdating issues that arise in this case. I will then turn to the backdating policy and Mr Edwards' backdating applications. Finally, I will address the repeal of the WPA and its replacement with the VSA, setting out the relevant provisions and the jurisdictional decisions made pursuant to them.

[8] I will finally set out my analysis and conclusions. I will start with the backdating decisions under the WPA, then turn to the jurisdictional decisions under the VSA. I will lastly address the availability of relief.

Service in Malaya and first claim

[9] Mr Edwards served in Malaya between 1959 and 1961 when he returned to New Zealand. He was discharged from regular service in 1962 and his five-year reserve obligation expired in 1967.

[10] According to Mr Edwards' medical records from when he was in Malaya, he visited the base medical clinic twice in relation to his eyes. On 23 May 1961, he was reported as having pain in his right eye.[1] The pain was treated with boric acid and something called Al Bucid. On 9 September 1961, Mr Edwards was recorded as having a sting to his left eye which was treated with Phenergan.

[11] In January 1966, four years after discharge from regular service, Mr Edwards applied for a WDP for what had become his developing blindness. His application described the relevant disability as "syphilitic retinitis – latent neuro syphilis" said to have been contracted in Taiping, Malaya. Two brief reports were attached to the application. His GP, Dr Hitchings, provided the first. He connected Mr Edwards' advice of two attacks of gonorrhoea contracted while in Malaya to Mr Edwards' failing eyesight. The report provided "investigations carried out suggests a syphilitic retinitis and latent neuro syphilis which was probably contracted at this time." Those investigations included a lab report from Rotorua Hospital, blood reports from Waikato Hospital that tested for the presence of syphilis antibodies and a cerebro spinal fluid report. The tests for the presence of syphilis antibodies were carried out twice and produced negative results both times. These results suggest that Mr Edwards did not have syphilis.

[12] Also appended was a brief report from Dr Nielson, an eye specialist. She described the state of Mr Edwards' eyes, noting his right vision had been failing for six years. She concluded:

> The retinal appearances are similar to that found in retinitis pigmentosa, but there is no family history of the complaint [this disease appears to be primarily hereditary]. This may be some rarer virus or infection acquired in Malaya. I shall be interested in the blood result … I may have to admit him to Rotorua Hospital for investigations.

[13] The application was declined in February 1966 as "not due to service". There is no further reference to the blood result to which Dr Nielson looked forward and no record of an admission to Rotorua Hospital for further investigation. The possibility

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[1] On his medical record it is possible the reference to (R) (meaning right eye) was corrected to (L) (meaning left eye) but it is impossible to be sure from the quality of the reproduction.

of a "rarer virus or infection" from Malaya does not seem to have been further explored, or at least if it was, there is no evidence of the outcome.

War Pensions Act 1954

[14] It is necessary now to provide a brief overview of the disablement pension entitlement and machinery provisions of the now-repealed WPA, as they were the applicable provisions when Mr Edwards' entitlements (or lack thereof) were established. Unless I indicate otherwise I will refer to the Act as it stood between 1988 and its repeal in 2014.

Entitlement categories

[15] Section 19(1) provided that where a member of the Armed Forces is disabled or dies, a pension will be payable to that person and/or their dependants in one of three situations:

(a) where the death or disablement actually occurred at the time the member was on service overseas in connection with a war or emergency (subs (a));

(b) where the death or disablement is attributable to service in New Zealand or overseas (subs (b)); or

(c) where the condition resulting in death or disablement is aggravated by service in New Zealand or overseas (subs (c)).

[16] As noted, service in Malaya was deemed by the Minister of Defence to be service in connection with an emergency for the purposes of s 19 on 14 June 1999.[2] As Mr Edwards' disability did not arise in Malaya, but developed gradually after his time in service, he could not take advantage of the conclusive entitlement category in s 19(1)(a). Instead he was required to establish that his disablement was either attributable to, or aggravated by, service (in his case in Malaya) per s 19(1)(b) or (c).

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2 This declaration was made pursuant to s 80A WPA.

[17] Service is not defined. But in *Nixon v War Pensions Appeal Board* this Court considered it should be understood as a wide, but not completely elastic concept. It included duty under orders but also extended (at least) to optional off duty activities which the military encouraged.[3]

Entitlement rules and presumptions

[18] Sections 17 and 18 provided the rules against which the evidence of attribution or aggravation was required to be assessed by the Secretary for War Pensions (or his or her delegates), or the Appeal Board in any appeal. Like s 19, these provisions reflected the spirit of a legislature grateful for the sacrifices service men and women were required to and did make especially when placed in harm's way, as they say.

[19] The first presumption was that contained in s 17(1). It provided that a grading of fit for service at the time of entry (attestation) would be conclusive evidence of the absolute physical and mental fitness of the claimant at the time. Subsection (3) contained important presumptions applicable to this case. It relevantly provided as follows:

> In any case in which the foregoing presumption in favour of the claimant … is not sufficient to establish his claim, the claimant shall be entitled to produce to the Secretary or an Appeal Board, as the case may be, any evidence (whether strictly legal evidence or not) to show that the condition that resulted in the disablement or death of the member was possibly or probably attributable to or aggravated by his service with the forces in connection with any war or emergency, and if any reasonable evidence to that effect is produced there shall thereby be established a presumption that the condition was in fact attributable to or aggravated by the service of the member, and that presumption may be rebutted only by evidence that satisfies the Secretary or Appeal Board that the condition was not so attributable or aggravated but was due entirely to other causes.

[20] The effect of this subsection was that if the presumption of fitness upon attestation was not enough to establish the attribution or aggravation required by s 19(1)(b) or (c) then claimants who had served in a war or emergency had another option. They would not necessarily need to produce evidence capable of *proving* attribution or aggravation. Instead if they could produce "reasonable" evidence

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3 *Nixon v War Pensions Appeal Board* HC Wellington CP 360/91, 5 March 1993 at 20-21.

(meaning relevant, credible and reliable evidence)[4] to show it was *possible or probable*, this would be enough to create a presumption in favour of attribution or aggravation. In practical terms, that meant establishing a possibility was sufficient to found the presumption. Once the presumption was in place, it could only be rebutted by evidence establishing that the disablement was instead due *entirely* to non-service related causes. In other words, the Secretary had to be satisfied that there was no possibility at all that service contributed to the disablement.

[21] The reason for this very low threshold in the case of war or emergency must have been that those who had been required to face a hostile enemy should be treated with particular benevolence. This meant the status of the Malayan engagement remained relevant to the availability of these presumptions even though s 19(1)(a) did not apply.

[22] I should note one further matter of background at this point, though it was not the focus of submissions to me. From the time of the WPA's enactment in 1954 until amending legislation in 1976, the s 17(3) presumption applied to all "service with the forces". In 1976, the provision was narrowed to apply only to service in a war or emergency.[5] This meant that in 1966 when Mr Edwards first made his application, the presumption was available (if he met the evidential threshold) whatever the status of the Malayan operation. That status did not become relevant until 1976. This legislative history should be kept in mind. It will become important later.

[23] Section 18 then established further rules to be applied. Subsection (1) established the general rule that any decision must be "in accordance with substantial justice and the merits of the case, and shall not be bound by any technicalities or legal forms or rules of evidence." Subsection (2) established "particular rules" to be applied in consequence of the substantial justice rule. Their effect was in part also to affirm and illustrate the practical effect of the s 17 presumptions. Subsection (2) provided:

> (a) In no case shall there be on the claimant any onus of proving that the disablement or death on which the claim is based was in fact attributable to the service of the member or that the condition that

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4 *Te Ua v Secretary for War Pensions* [2014] NZHC 1050 at [115].
5 War Pensions Amendment Act 1976, s 2.

resulted in the disablement or death of the member was aggravated by his service:

(b) The claimant shall be given the full benefit of the presumptions in his favour provided for in s 17 of this Act:

(c) The Secretary or an Appeal Board, as the case may be, shall be entitled to draw and shall draw from all the circumstances of the case, from the evidence furnished, and from medical opinions submitted to the Secretary or Appeal Board, all reasonable inferences in favour of the claimant, and the claimant shall, in every case, be given the benefit of any doubt as to the existence of any fact, matter, cause, or circumstance that would be favourable to him.

[24] To summarise, it is important to understand that in the case of war or emergency service the possible aggravating effect threshold (in s 17(3)) was at the heart of the assessment the relevant decider had to make. But s 18 went further. Both at the threshold and subsequent rebuttal of presumption stages, any properly available pro-claimant inferences had to be applied, and any doubt at all resolved, in favour of the claimant. In case this left room for any doubt as to the true intent of Parliament, the direction was that the veteran must receive the "full benefit" of the s 17 presumptions.

[25] In addition, the s 18 standards also applied to routine service (that is service in which the s 17(3) presumption did not apply). That meant even in routine service WDP applications, the claimant was entitled to the benefit of all reasonably available inferences and all doubt. It also meant the overall standard of substantial justice and merits applied to such cases.

[26] As McGechan J noted in *Nixon*, the terms of ss 17 and 18 were "extraordinarily benevolent".[6]

Procedures

[27] Sections 14 to 16 covered the relevant procedure for making and deciding claims. Applications had to be made in writing.[7] And the Secretary could require a relevant medical report to be provided in support of the claim.[8] In practice, all

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6 *Nixon*, above n 3, at 26.
7 WPA, s 14(1).
8 Section 14(2).

entitlement decisions under the Act were made in the first instance by District Claims Panels comprising an official from the Department, and a representative nominated by the New Zealand RSA.[9] These panels were authorised to make such decisions by delegation from the Secretary.[10] Claims Panels could require the claimant to attend a hearing and give evidence (but were not bound to require this) and the claimant had a right to make written submissions in support of the claim.[11]

[28] Decisions of District Claims Panels could be reviewed by National Review Officers (NROs) who were employees of the Department.[12] An application for review had to be made within six months of the Claims Panel decision.[13] The NRO could also require the attendance of the claimant, but in any event, was bound to receive any written submissions.[14] There was then a right of appeal to the War Pensions Appeal Board within six months of a decision of either the Secretary or an NRO.[15] The Appeal Board could, in its discretion, make its decision retrospective "if and to such extent as that Board thinks fit".[16]

[29] The Appeal Board's decision was "final and conclusive"[17] subject to a right of "reconsideration". Reconsideration (effectively, reopening) was available if an NRO was satisfied that by reason of new evidence becoming available or "for any other reason whatsoever" it was desirable in the interests of justice that the claim should be reconsidered.[18] There was an equivalent provision, in the same terms, for claimants whose appeal right to the Appeal Board had lapsed.[19] In either situation, the NRO would decide whether to accept the reopening claim, and then, if he or she accepted it, would send it back to the Claims Panel for further consideration.[20] In making its

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9 Section 15(2).
10 Section 15A.
11 Section 15B(1).
12 Sections 15C and 15D.
13 Section 15D(1).
14 Section 15D(5).
15 Section 16(1) although a right of review to a NRO had to be exercised first if one existed under s 15D – see s 16(5) .
16 Section 16(3).
17 Section 16(4).
18 Section 16(4), pursuant to delegation from the Secretary under s 15A(1).
19 Section 14(5), again pursuant to delegation under s 15A(1).
20 Section 15E.

decision, the Claims Panel was required to treat the claim "in all respects as if it were an original claim."[21]

[30] Given these open-ended procedures, it may be said that the WPA was not just substantively, but also procedurally, benevolent.

Summary of subsequent applications for entitlement

[31] With this decision-making structure in mind, I return now to the factual narrative. Following declinature in 1966 of Mr Edwards' first application, further applications for the same disability were also declined in 1982, 1983 and 1990. An application in November 1994 for "retinitis pigmentosa producing complete blindness" was also declined. By this stage the War Pensions Office no longer presumed syphilis as a root cause for Mr Edwards' blindness and instead consistently concluded that retinitis pigmentosa was the cause.

[32] In January 1995, a further application was made. This identified a non-disease-based (whether sexually transmitted or hereditary) contributing cause. It was for "(R) eye corneal opacity superiorly (snake venom toxicity splash damage)" together with "aggravation of (L) (R) retinitis pigmentosa". This was the first time the issue of snake venom had been raised as an aggravating factor of an underlying condition. Mr Edwards in a statement attached to the 1995 application recorded as follows:

> On 23/5/61 I reported to the R.A.P. with a problem with my (R) eye. They found it necessary to wash it out with boric acid.
>
> I had prior to this just returned from a patrol and reported this problem. During this patrol, I had a close-in confrontation with a Cobra eg suddenly stopped dead on my tracks and it was about six feet off in strike position with the hood up. They spit venom onto the face of animals/humans to protect themselves, aiming at the eyes. I suspect that this is what happened and my (R) eye got slightly splashed as it was after this that I was having trouble. I did not at the time realise, nor did the R.A.P. treating me, that this might have happened. It never really cleared up. Since my discharge, it gradually got worse with a growing sight problem. I am also stating that I consider that this problem being co-existent with my retinitis condition has pre-empted my susceptibility for this condition in both eyes. I am stating it is also aggravating it. I wish to bring to your attention that my sight may have suffered extraordinary stress caused by a motor accident. (See entry 11/12/59) and a toxic reaction from a

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21 Section 15E(2).

> sting or bite in the (L) eye. (See entry 9/9/61). These may have pre-empted my susceptibility to my present retina problems also.

[33] On 20 April 1995, the Claims Panel found the disability was not attributable to service.

[34] On 26 September of that year, Mr Edwards requested that an NRO review his claim. On 28 September, the NRO upheld the declinature but on the basis that the Panel lacked jurisdiction to hear the matter in the first place because no NRO had decided to reopen the file since the initial decision in 1966. Mr Edwards appealed that decision to the Appeal Board but it seems that an NRO independently decided to consider reopening the case anyway. Having reviewed the file, the NRO then declined to reopen the case, noting that Mr Edwards suffered two gonorrhoea attacks while serving, and "venereal diseases are not considered as due to war service".[22]

[35] Then on 14 June 1999, the status of service in Malaya was changed by declaration of the Minister of Defence pursuant to s 80A of the WPA. As a result of that change, the Appeal Board decided on its own initiative (in the context of an appeal relating to a head injury suffered by Mr Edwards in Malaya) to direct the Claims Panel to reconsider Mr Edwards' claim presumably because the s 17(3) presumption then applied. But on 1 May 2001, the claim was further declined as the Claims Panel still considered the condition was "neither attributable to, nor aggravated by, service."

[36] Mr Edwards sought a further review on 23 June 2001, and in a six-page decision the evidence was reviewed by an NRO and the claim again rejected on the basis that the evidence established the cause of blindness as retinitis pigmentosa.

[37] In 2003, a further review was sought. The response letter from the Secretary proceeded on the basis that reconsideration was sought. The letter continued:

> Accordingly, would you please produce new evidence not previously considered by the Claims Panel, and that contradicts previous medical opinion.

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[22] This reasoning appears doubly wrong; syphilis and gonorrhea are not the same thing, and blood tests had discounted syphilis in 1966 anyway (see [11] above).

[38] On 24 May 2004, Mr Edwards sought a further reconsideration by the NRO. Mr Edwards wrote:

> I feel that my original claim as to the cause of my blindness has not been appropriately considered. As I stated in my earlier efforts to get this accepted on the grounds that my eyes became irreparably damaged due to being spat in the face and eyes by a spitting Cobra, whilst on a patrol in Malaya. I hereby enclosed further evidence in support of my claim:
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> (1) sworn statement and whakapapa, that there is no inherited blindness in my family, eg retinitis pigmentosa; and
>
> (2) also enclosed with this, a video on spitting Cobras and the level of eye damage their venom can cause.

[39] On 1 September 2004, the reconsideration was declined on the basis that Mr Edwards' case had been comprehensively reviewed in 2001 and that review had also considered the question of cobra venom spray and rejected it as an aggravating factor.

[40] Then on 18 October 2004, the NRO again agreed to revisit Mr Edwards' file, this time following a letter from his GP, Dr Tustin, who recounted the cobra incident already referred to by Mr Edwards in his May application. Once again, the NRO treated this as a further application for reopening.

[41] As a result, a specialist report was obtained from Dr Haddad, a Tauranga-based eye specialist. The specialist rejected snake venom as a possible contributing cause in Mr Edwards' case. In his letter of 25 February 2005 to the War Pensions Central Processing Unit, he said:

> One of the questions raised by [Mr Edwards] and his daughter was whether the untreated cobra venom in both eyes contributed in any way to his subsequent deterioration and loss of vision. Clearly there is evidence in the literature to indicate that cobra venom can cause significant ocular problems. Having said that, one would expect cobra venom however to affect the anterior surfaces of the eye, ie the conjunctiva and cornea as these are the areas where the cobra venom comes into contact with the eye. As a consequence of that, one would expect that the cornea would become scarred and perhaps vascularized. There is no indication that this happened in that today his left cornea is clear and furthermore I would not expect an ophthalmologist to consider undertaking cataract surgery in the presence of a scarred vascularized cornea.

[42] Dr Haddad noted that the right eye had been removed and replaced with a prosthesis and that the state of the left eye "is very typical of severe advanced Retinitis Pigmentosa and I could not attribute it to any other condition."

[43] As to the typically hereditary nature of retinitis pigmentosa, Dr Haddad said:

> There is apparently no other member of the family who has or has had retinitis pigmentosa. Whilst retinitis pigmentosa is often a hereditary condition with other members of the family having it, isolated sporadic cases do occur and are well documented. If there are no other members of the family with retinitis pigmentosa either past or present, and if there is no evidence that any of the members of his family are carriers, then one would have to assume this to be an isolated sporadic case.

[44] On the basis of this advice from the specialist, the Claims Panel which reconsidered the case following the NRO's further reopening of it declined the claim. The basis was that no link had been established between Mr Edwards' condition and his service.

[45] Mr Edwards then applied again for review by an NRO. This application was received on 10 March 2006. It was in the context of that review, that Mr Edwards' daughter forwarded a letter dated 13 March 2006 to the NRO. This letter changed the game. It was from Dr Lawan Chanhom of the Queen Saovabha Memorial Institute of the Thai Red Cross Society in Bangkok. It appears from the letter that the hospital where Dr Chanhom was based kept a large collection of live cobras for the purpose of anti-venom production.

[46] Dr Chanhom suggested the culprit in the incident recounted by Mr Edwards could have been the equatorial spitting cobra (*naja sumantrana*) which is prone to spraying its victim when disturbed and can spray up to two metres. It aims for the eyes, the doctor indicated:

> Its venom in contact with human eyes causes an immediate and severe irritation of the conjunctiva and cornea. If untreated or improper treatment, may result in permanent blindness.

[47] Dr Chanhom then advised as follows:

> I reviewed once thoroughly the medical record of your Dad from 1959 to 1961 mainly concerned the treatment of his eyes. It's possible that he didn't receive

> the proper treatment when the cobra venom ejected into his eyes. The proper first aid and treatment for this case should be immediate and observe any signs that may progress as I mentioned in my staff case [she earlier in the letter outlined an experience of one of her staff members]. Otherwise the patient has developed severe local tissue damage, and well-known major complications are cytotoxic effect accompanied with local tissue swelling and necrosis in case of late treatment. A photo of your Dad in the jungle showed sign of eye swelling already.

[48] On the basis of this additional evidence, the NRO overturned the Claims Panel's decision and therefore four decades of declinatures. In summary, his reasons were:

- the Tauranga specialist, Dr Haddad, could only comment on the left eye as Mr Edwards' right eye had been removed;
- there was no history of retinitis pigmentosa in the family as deposed by family kaumātua, Mr Claude Edwards;
- the effect of the WPA was that the veteran is to receive the benefit of the doubt; and
- Mr Edwards' medical service file showed deterioration in visual acuity from the time of his compulsory military training medical in 1954 and no change to that during his service between 1959 and 1962, but he clearly suffered eye injuries during that time.

[49] The NRO found therefore that there was "the possibility of a relationship [between deteriorating eyesight and] service in Malaya." He accepted that Mr Edwards' total loss of vision was aggravated by service in accordance with the s 17(3) presumption and awarded him a permanent WDP at 100 per cent.

[50] I note for completeness that on 4 May 2000, Mr Edwards made an application for an additional pension under s 23 of the WPA (in respect of his disabilities other than blindness).[23] The Claims Panel initially declined the application, but this decision

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[23] Section 23 provided that if a veteran had a severe disablement (which included total blindness or "2 or more serious disabilities") and was receiving a 100 per cent WDP for that impairment, they were eligible for an additional pension at the Secretary's discretion. The amount awarded, up to

was overturned by an NRO in May 2001, who awarded the s 23 pension at 10 per cent. On 26 May 2006, following the NRO's decision that his blindness had been aggravated by service, Mr Edwards sought a further review, and as a result the s 23 pension was granted at the 60 per cent maximum, from the date of the May application.[24]

Backdating law and policy

[51] Section 84 provided the Secretary a discretion in setting the commencement date for any successful claim to a WDP. It provided:

> Except as may be otherwise provided in this Act, all pensions and allowances granted thereunder shall be payable as from a date to be fixed in that behalf by the Secretary.

[52] This is the source of the backdating discretion. According to the evidence of the current General Manager of VANZ, by the mid-2000s, the Office of Veterans' Affairs was facing an increasing case-load of backdating applications.[25] A decision was made to develop formal policies and this work was done between 2007 and 2009. This period coincided with Mr Edwards' initial backdating applications.

[53] As a result there were two versions of the backdating policy, and one much fuller explanation of it, put in evidence.[26] The Crown submits, and I agree, that for the purposes of this application, there is little difference between them, so I do not propose to set each draft out separately. All three started with the proposition that the general commencement date of a pension was the date of application (which included the date of a reconsideration application, because pursuant to s 15E that was to be treated "in all respects as if it were an original claim"). However, the policy recognised that applying the general commencement date in all cases could result in injustice. All three iterations confirmed that the backdating policy was designed to achieve the ends

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60 per cent of the WDP, was based on the impact of the veteran's disabilities on their quality of life.

24 In argument, counsel for Mr Edwards submitted that the backdating application should also have related to the s 23 additional pension. However, this was not pleaded and I am not prepared to attempt to resolve that issue without a proper pleading and proper opportunity afforded to the Secretary to respond.

25 The War Pensions Office was renamed the Office of Veterans' Affairs in 1999 when responsibility for war pensions shifted from MSD to the New Zealand Defence Force. At some later date, but prior to the VSA, it was renamed VANZ.

26 The explanation draft was drawn from an affidavit filed by the Secretary in unrelated proceedings before the Appeal Board.

of justice. Then they identified three examples where backdating might be appropriate. Two of the examples are not relevant, but one is. It related to when there had been a change in service status.

[54] This was called "category C". It required three things:

(a) a change in service status to war or emergency;

(b) an application that was accepted because of the newly available s 17(3) presumption; and

(c) medical evidence:

(i) that the claimant was suffering from the disability prior to the change in service status, and

(ii) sufficiently linking the disability to the service,

such that, if the claim for the disability had been considered at the time, it would have been accepted.

[55] If these criteria were met, backdating would be granted, but only to the date of the change in service status.

[56] In essence, category C required a convergence of attribution or aggravation evidence and war or emergency status: if there was medical evidence such that the claim would have established the s 17(3) presumption at the time of the status change, then backdating would occur to that date.

[57] The writers of the policy do not appear to have taken into account that prior to 1976, war or emergency status was irrelevant under s 17(3). That section initially related to *any* service. The policy therefore does not explicitly cover the situation where, had a claim been correctly considered in accordance with the applicable presumptions in the Act from the outset, it would have been granted.

[58] That brings me to the catch-all category D, included in the policy after the three examples. This affirmed the underlying purpose of the policy by recognising that there would be other circumstances in which justice required backdating. It is worth noting that in what I have called the "explanation draft" the following statement appears:

> It is under category D that the Secretary might consider backdating to the date of commencement of the disability.
>
> In summary, where there is credible contemporaneous evidence of the disability and its relationship to service backdating will be considered to the date of that contemporaneous evidence.
>
> …
>
> When a service person develops a medical condition some years after leaving the defence force, the question of the causation may not be clear. The medical condition may have developed slowly over a number of years. The service person may not have applied for a War Disablement Pension immediately following the commencement or diagnosis of the medical condition.
>
> The nature of these medical conditions creates difficulties with establishing the date on which the medical condition began.
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> …
>
> The difficulties of establishing the causation of the medical condition may mean that a medical condition would not be immediately accepted under the Act as attributable to or aggravated by a claimant's service, as it is difficult to provide sufficient evidence to apply the presumption of attributability or aggravation under section 17(3) of the Act.
>
> Section 17(3) of the Act will only operate if the claimant satisfies the service and evidential requirements. The date on which these elements are satisfied, and the consequent decision to accept the medical condition as attributable to or aggravated by service, may not be the date on which the medical condition developed.
>
> In cases of this type of disability backdating may not be considered appropriate because of the difficulties in establishing the commencement date of the condition. The evidence of attributability or aggravation and the date from which the service person began to suffer an impact from the condition.

[59] The policy was thus alive to the fact that the justice of the situation required a very careful assessment of the evidence, both of causation and date of disablement. These will be themes I come back to in my analysis section.

Summary of backdating applications

[60] The commencement date for Mr Edwards' vision-related WDP was set at 31 May 2004, the date on which his reopening application was received. But because he was (due to other qualifying disabilities already receiving his pension at the maximum rate on that date), it produced no change in income. Then in May and August 2006, Mr Edwards with the assistance of the New Zealand RSA requested that the Secretary reconsider her backdating decision. The Secretary refused to do so.[27]

[61] Following an Ombudsman's review of the file, the Secretary then decided to reconsider her backdating decision. In a letter to Mr Edwards dated 12 June 2008, the Secretary noted:

> The backdating of the date of commencement of War Disablement Pension (sic) is not a specific entitlement under the War Pensions Act 1954. Such backdating is only possible by an exercise of the Secretary for War Pension's (sic) discretion to fix the general commencement date of a pension under s 84 of the War Pensions Act 1954. War pension policy prescribes that this discretion can be exercised to redress any injustice and to ensure that all veterans who are awarded a War Disablement Pension are treated fairly and equitably.

[62] The Secretary then gave examples of circumstances where a requirement to redress injustice applied. They included "where there has been a previous application and a subsequent change in service status." She therefore concluded:

> The decision of the War Pensions Board on 19 November 1982 indicates that the reason that the Board could not accept your claim for Failing Eyesight was because, although the Board recognised the possibility of a link between your eyesight problems and the sexually transmitted disease which you contracted in Malaya, the presumption of attributability did not apply to you because Malaya was considered to be routine service at this time. The change of status of service in Malaya on 15 June 1999 means that I am able to give you the benefit of the presumption of attributability from this time.

[63] Mr Edwards challenges this decision as the first reviewable decision. He says the backdating should have been to the date of his first application 1966.

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[27] By her letters dated 20 June and 13 November 2006; although the commencement date was adjusted from October 2004 to May 2004 as it seems the NRO had made a mistake as to the date on which the application for reopening was received.

[64] Mr Edwards then requested that the Secretary revisit her backdating decision and on 21 January 2009 the Secretary advised she would not. Mr Edwards now challenges that decision as the second reviewable decision. The Secretary decided to treat the request as an appeal against her earlier backdating decision in June 2008 for the purposes of meeting the six month appeal deadline.

[65] The Appeal Board issued its decision on 19 November 2009. The Appeal Board concluded as follows:

> The Board is not persuaded by the arguments advanced by the appellant that the interests of justice required the commencement of his pension to be backdated to a date earlier than that determined by the Secretary under the backdating policy. In the Board's view, the arguments submitted by the appellant essentially reaffirmed that the requirements of the policy had been met, a fact that has already been accepted by the Secretary in her decision to backdate the commencement date of the pension to 15 June 1999. In the Board's view there must be something more to establish that it would be in the interests of justice to depart from the "usual" procedure provided in the policy to further backdate the commencement date of the pension. The Board is not inclined to as (sic) accept as a general proposition it will be in the interests of justice that a (sic) medical knowledge relating to a disability acquired sometime later will of itself justify backdating the commencement date.

[66] Mr Edwards challenges this decision as the third reviewable decision. He took no further steps in the matter of backdating until after the repeal of the WPA.

The Veterans' Support Act

The Act

[67] At this point, it is necessary to introduce the new Act. It received the Royal assent on 7 August 2014 but came into force progressively by the terms of s 2. All provisions relevant to the issues in this case were declared to come into force four months later on 7 December 2014.[28]

[68] It is unnecessary to discuss the substance of the reform in any depth because it is not relevant to the issues raised but it is worth noting that the new Act is intended to align more closely with the ACC scheme and to have more emphasis on rehabilitation.

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[28] Section 2(1).

The provisions relating to applicable presumptions were comprehensively overhauled in Subpart 3 of Part 1 of the Act. However, the spirit of the 1954 presumption regime remains although the structure and application of that spirit is rendered with the greater clarity characteristic of modern drafting practice.

[69] Under the VSA, the WDP is replaced with the disablement pension which is available to eligible veterans with qualifying service before 1 April 1974. Veterans currently receiving the WDP can choose whether to shift to the new regime, although if they do not, they will not be eligible to have new conditions accepted. Any application for new medical conditions filed from 7 December 2014 is determined using the new decision-making process and, if successful, will result in a transfer from the WDP to the disablement pension. On transfer, a veteran's current pension will not be reduced, and any other entitlements they received under the WPA are grandparented.

[70] The first provision in the VSA relevant to Mr Edwards' case is s 48. It relates to applications for disablement pensions. Section 48(2) sets the mandatory start date for any such pension. It provides:

> If an application is accepted by VANZ, the veteran's entitlement to the disablement pension is to be treated as beginning on the day on which VANZ received the application.

[71] There is therefore no discretion to backdate the commencement of a pension to any date other than the date of application.

[72] The next relevant provision is s 205. It provides VANZ with the power to reconsider any decision. Subsection (1) provides:

> If VANZ considers it made a decision in error, it may reconsider the decision at any time, whatever the reason for the error.

[73] This is the replacement for the NRO reconsideration/reopening powers in the 1954 Act. By the terms of subs (3) VANZ is also empowered to reconsider any review

or appeal decision in light of specified changed circumstances including a change in the service status of an operation in which the veteran served.[29]

[74] In *Keelan v General Manager of Veterans' Affairs New Zealand*, Simon France J discussed the relationship between the reconsideration provisions in the WPA and s 205.[30] He said:

> [41] The reconsideration provision under the Veterans Support Act 2014 is different from the War Pensions Act. There is material that suggests it was intended to be more limited in its scope. The new threshold test is whether VANZ considers an error has been made. If it does, there is a discretion to revisit it. The provision needs no explanation. Whether the power is reasonably exercised in a particular case will need to await review of such a case, should that happen.

[75] That said, the Judge appeared to accept that a decision made under the WPA reconsideration provisions could be revisited under s 205 if, in accordance with the requirements of the latter, an error in that reconsideration could be identified.[31]

[76] Finally, cls 4 and 5 of the transitional provisions in Part 2 of Schedule 1 of the Act are also relevant. Clause 4 keeps unconcluded WPA reviews and appeals alive. It provides:

> Any review or appeal under the War Pensions Act 1954 instituted but not concluded at the commencement of this Act may be continued and concluded as if this Act had not been passed.

[77] Clause 5, meanwhile, protects unexercised review or appeal rights. It provides that:

> Any right of review or appeal under the War Pensions Act 1954 that existed but which had not been exercised at the commencement of this Act may be exercised and the review or appeal continued and concluded as if this Act had not been passed.

VSA decisions and challenges

[78] On 17 December 2014 (just over five years after the Appeal Board's November 2009 decision), Mr Midlane sought to re-enliven the backdating issue on behalf of Mr

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29 Section 205(3)(c).
30 *Keelan v General Manager of Veterans' Affairs New Zealand* [2016] NZHC 1869.
31 At [39].

Edwards. He wrote to the Secretary for War Pensions seeking a reconsideration of that decision.

[79] On 5 January, the Deputy General Manager of VANZ wrote advising that the WPA had in fact been repealed and the VSA had replaced it as from 7 December. He advised further that there was no backdating provision in the new Act. He said he no longer had jurisdiction to reconsider a previously declined WDP claim. He did however record that Mr Edwards had a right to seek judicial review of the Appeal Board decision.

[80] The Deputy General Manager's declinature of jurisdiction is challenged by Mr Edwards as the fourth reviewable decision.

[81] Following further correspondence between Mr Midlane and the Deputy General Manager of VANZ, the General Manager of VANZ, Jacki Couchman took over the file.[32] She wrote to Mr Midlane on 10 November 2015 advising that there is no provision under the VSA for reconsidering a decision made under the WPA, and there existed no discretion to consider backdating.

[82] Mr Edwards challenges this decision of Ms Couchman as the fifth reviewable decision.

My assessment of the backdating decisions

[83] To recap briefly, the first to third "reviewable decisions" (to use the phrase adopted by counsel for Mr Edwards) all relate to backdating and were made under the WPA. The first was the Secretary's 12 June 2008 decision to backdate Mr Edwards' pension to 15 June 1999. The Secretary formed the view that the change of service status in Malaya meant she was only able to give Mr Edwards the "benefit of the presumption of attributability", provided for in s 17(3) from that date. This, she noted, was an exception to the usual procedure which would, in Mr Edwards' case, have been to set the commencement date at the date of his most recent application for reconsideration in 2004.

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[32] The position of Secretary of War Pensions no longer exists under the VSA.

[84] In her "second reviewable decision" on 21 January 2009, the Secretary wrote to Mr Edwards confirming that she viewed her 12 June 2008 decision as correct.

[85] On 19 November, in the third reviewable decision, the Appeal Board confirmed that the Secretary had applied the backdating policy correctly. The Appeal Board said it was not in the interests of justice to backdate the pension to the date of the original disablement if the medical knowledge establishing attribution or aggravation did not come to light until many years later. This was a reference to the later arrival on the scene of the snake venom hypothesis.

[86] Mr Edwards argued the commencement date should have been the date of his first application in 1966. He submitted that since the policy provided the general commencement date was the date of application, it was entirely consistent with the policy to adopt that date as the commencement date.

[87] In addition, Mr Edwards argued the Secretary followed incorrect procedure in the manner in which she dealt with his backdating application. He submitted the Secretary should not have made the decision at all. Instead the claim should have gone to the Claims Panel in the usual way pursuant to the standard procedure in s 15E(2).

[88] For its part, the Crown argued that the Secretary properly, even generously, applied the backdating policy. The Crown argued that the policy specifically provided for backdating to the date of status change as an exception to the general commencement date (which in this case would have been 2004). The Appeal Board thus rightly affirmed this, the Crown argued. Further, the Crown argued there was no reason to backdate beyond 1999 because although there was evidence suggesting Mr Edwards suffered from impaired vision in 1966, that evidence did not establish a relationship between Mr Edwards' disability and his service. There was, in short, no credible evidence demonstrating attribution or aggravation at the time. The snake venom hypothesis, the Crown argued, did not arise until 1994.

[89] Finally, the Crown argued that the manner in which the application was dealt with was not procedurally flawed. Section 15E(2) did not apply to require the matter to go to a Claims Panel. This was because the backdating discretion belonged to the

Secretary alone under s 84. Furthermore, even if the Secretary's decision had been procedurally flawed (and it had not), the process at the Appeal Board stage had effectively corrected any flaw. It was in substance a rehearing with its own appropriate procedural safeguards under s 16 to ensure that Mr Edwards' case was properly heard. Indeed, Mr Edwards provided full submissions from counsel and full supporting documentation.

[90] I agree that there was no flaw in either the Secretary's or the Appeal Board's processes. The Secretary's backdating discretion is personal to her and therefore did not fall to be dealt with pursuant to the more elaborate procedure provided for in s 15E(2).[33]

[91] Further, as the Crown argued, the Appeal Board was properly seized of the matter pursuant to s 16(1)(b) giving it jurisdiction to hear an appeal in relation to "the assessment of a pension granted to any member of the forces in so far as the assessment is based on medical grounds." Plainly the backdating decision was based primarily on whether there was credible evidence of injury in service as at 1999 and was thus grounded in the medical evidence as required by that provision. In any event, Mr Edwards can hardly complain about being given the benefit of a full appeal hearing with its attendant procedural infrastructure, even if he can and does complain about the result. The procedural flaw argument must fail.

[92] All of that said, s 84 did not operate independently of the powerful ss 17 and 18 provisions. It did not give the Secretary a free hand to set the commencement date in any application as she saw fit – whether case by case or by broadly applicable policy. Each specific decision and any general backdating policy she adopted had to be consistent with the entitlements created by the ss 17-19 framework. I did not understand the Secretary to be suggesting otherwise and indeed even a cursory view of the relevant policy shows the Secretary was aware of the need for such consistency.

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[33] The Appeal Board had its own retrospectivity discretion under s 16(3), but for the purposes of this analysis, that is really beside the point. Nowhere in the statute is that power given to an NRO or a claims panel.

[93] In any event, to recap, Mr Edwards' entitlements under these provisions were relevantly as follows:

(a) if his blindness was aggravated by service, he had a right to a WDP (s 19(1)(c));

(b) because his service was in an emergency (post-1999), any evidence that established the possibility of such aggravation created a rebuttable presumption in favour of that conclusion (s 17(3));

(c) in any event, in 1966 that presumption applied to any service irrespective of its status;

(d) he was entitled to the *full* benefit of this presumption (s 18(2)(b));

(e) to dislodge the presumption, the Secretary and/or the Appeal Board had first to be satisfied on the evidence that there was no reasonable possibility at all that Mr Edwards' blindness was aggravated by service (s 17(3));

(f) whether or not his service was in an emergency, Mr Edwards' application had to be decided in accordance with the substantial justice and merits of his case. It could not be set aside by reason of a legal technicality, a want of form or any question of admissibility of the evidence he relied upon (s 18(1));

(g) in the assessment, Mr Edwards bore no onus of proof (s 18(2)(a)); and

(h) the Secretary and the Appeal Board had to give Mr Edwards the benefit of all reasonably available inferences and any doubt (s 18(2)(c)).

[94] These are the factors that combine to construct the "extraordinarily benevolent" lens,[34] through which the Secretary and Appeal Board were required to view Mr Edwards' case.

[95] The first question then is whether, on the evidence available at the time, Mr Edwards engaged the s 17(3) presumption in 1966. There was evidence that Mr Edwards suffered eye injuries that required treatment in May and September 1961. The evidence was in the Army's own medical records and was produced in the context of the application. It was thus reasonable evidence, as required by the statute:[35] that is, it was relevant (eye injury), credible (official army records), and reliable (medical examinations).[36] But was it enough to establish that the injuries could possibly have contributed in some material way to Mr Edwards' later failing eyesight, whether that be to the condition itself, the extent of it, or the rate of its onset? Plainly, such possibility had to be more than a fanciful or unrealistic one. Rather, it had to be a logical and realistic prospect.

[96] Although it should not be taken too far, a more familiar analogue to the reasoning that this section requires is the burden on criminal defendants wishing to advance an exculpatory defence. Self-defence is a good example. There, the evidence must carry a "credible or plausible narrative" capable of causing a jury to entertain the reasonable possibility that the defendant may have acted in self-defence.[37] If that threshold is reached, the defence must go to the jury. And the jury must then completely exclude it as a reasonable possibility before it can convict. Here, if a similar threshold is reached, it is the Secretary who is required (like the jury) to completely exclude attribution or aggravation as a reasonable possibility before she is entitled to decline the application.

[97] On its face it seems far from unrealistic or fanciful to conclude that eye injuries requiring treatment at the time of service might possibly have contributed to Mr Edwards' later failing eyesight in one or other of the ways I have suggested. The snake venom hypothesis advanced many years later (1995) and then supported by

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34 *Nixon*, above n 3, at 26.
35 Section 17(3).
36 *Te Ua,* above n 4.
37 *Tavete v R* [1988] 1 NZLR 428 (CA).

independent medical evidence in 2006 lent considerable weight to that possibility but it did not create it. Eye pain and eye sting were plainly relevant injuries in their own right given the disablement in question was failing eyesight. They were easily sufficient to cast the onus on the Secretary. I of course accept that the existence of that possibility was a question of fact for the Secretary. But the Courts have consistently treated this threshold as bright-line issue, rather than a matter of broad discretion. The possibility either exists on the evidence, or it does not. The presumption thus applied.

[98] Was it rebutted? Not in my view. The attribution in 1966 of Mr Edwards' failing eyesight to syphilitic retinitis was no more than a diagnostic hypothesis. And it was discounted in the blood test results at the time. Indeed in the 1966 application, the report of the eye specialist, Dr Nielson, specifically noted the possibility that the cause of Mr Edwards' progressive blindness could have been an infection or virus received in Malaya. Dr Nielson may not have been aware of the 1961 eye injuries. There is no evidence the possibility he identified was further explored at the time. The Secretary could not have been satisfied in 1966 that Mr Edwards' failing eyesight was due entirely to non-service related causes on the basis of this evidence.

[99] Over time the hypothesis of syphilitic retinitis came to be replaced with one of retinitis pigmentosa, but again as Dr Nielson's report signified, that too was a working hypothesis. This was because of the lack of a family history of this primarily hereditary disease. By 2004, when Dr Haddad agreed with the retinitis pigmentosa diagnosis, he could only assess one eye because Mr Edwards' other eye had been removed. This made it unlikely he could be definitive as to cause. Dr Haddad did say that he saw no evidence of scarring or vascularisation that he believed would accompany a cobra strike, but he offered no basis for that belief. Dr Chanhom in Thailand did not appear to consider this issue to be significant. And Dr Haddad's diagnosis of retinitis pigmentosa was also a working hypothesis. He noted that, in the absence of a family history of this disease, "one would have to *assume* this to be an isolated sporadic case."[38] Once again, the applicable standard of removing any reasonable possibility of service related aggravation was not met.

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[38] My emphasis.

[100] I note that, consistently with s 17(3), category D of the policy allowed for backdating to the original contributory injury where there was reasonable contemporaneous evidence to show disablement was possibly or probably attributable to or aggravated by service in an emergency. As I have explained, the 1966 record contains reasonable contemporaneous evidence. Category D of the policy thus contemplates exactly the situation that occurred here. The Secretary wrongly considered that category D had no application. The Appeal Board accepted that flawed approach.

[101] The fundamental error both the Secretary and the Appeal Board made was to overlook that in 1966, the s 17(3) presumption applied to *any* service, and was therefore engaged (and as a result, to focus on category C rather than the broader interests of justice under category D).[39] Because s 17(3) applied from the outset, the date of the medical evidence relating to snake venom was irrelevant, as was the date of change of service status. The overall interests of justice required the Secretary and then the Board to consider whether the pension should have been granted for loss of vision in 1966. Plainly, it should have and accordingly, the interests of justice required backdating to 1966.

[102] Furthermore, if Mr Edwards had received his entitlement in 1966, it would not have been stopped in 1976 when the ambit of s 17(3) was reduced. Mr Edwards' pension was for permanent disability. It was not like WINZ or ACC entitlements that require ongoing proof of eligibility. It is a well-established principle that amending provisions take effect only from the time they come into force, and not retrospectively (unless they are expressly retrospective).[40] It would also be contrary to the generous scheme of the legislation for the amendment to have this effect.[41] So the change in s 17(3) could not have affected a decision made under the original enactment.

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39 Category C of the policy provides for the situation where the s 17(3) presumption was not available at the time of initial application but became available when the service status changed. It does not address situations where the s 17(3) presumption was engaged at the time of the initial application but where the application was declined due to the presumption not being properly applied.

40 Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 679. See also *Databank Systems Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 385 (PC) at 393-394.

41 As well as the provisions contained in ss 17-19 which support this conclusion, see s 26 which states that only a change in the extent of disablement can result in the reduction of a permanent pension.

[103] It follows, that in my view, Mr Edwards should have received a WDP from 1966 (subject to the extent of his entitlement due to partial blindness being assessed by the Secretary in accordance with s 22 of the Act). And the Secretary (and the Appeal Board) ought to have backdated his pension accordingly in 2008 and 2009, not as a matter of discretion, but as a matter of entitlement.

Jurisdictional decisions under the VSA

[104] The fourth and fifth "reviewable decisions" were made by the Deputy General Manager of VANZ on 5 January 2015 and the General Manager on 10 November 2015 respectively. These officials took the view that with the repeal of the WPA, there was no longer any backdating jurisdiction. Nor, they considered, did VANZ have any power to reconsider the WPA Appeal Board decision.

[105] The effect of s 48(2) VSA is to establish a mandatory starting date under the new Act – the day on which VANZ received the application – and there is no ability to adjust that. The two officials were plainly right that the VSA contains no backdating power.

[106] Mr Edwards argued that s 205 nonetheless applied to allow VANZ to correct any error at all including an error made under the old Act. There is, as I have noted, some support for that proposition in *Keelan*, although for the reasons set out in that case, Simon France J reaches no final view of the matter.[42] For myself, I do not consider s 205 is available in this case. The problem is that, according to the section, the error has to be an error of VANZ. The Appeal Board's decision (the most recent and controlling decision up to that point) was plainly not a decision of VANZ.

[107] Finally, there are cls 4 and 5 of Part 1 of the Schedule 1 of the VSA. Clause 4 provides that an unconcluded "review or appeal" under the WPA may continue in all respects as if the WPA remained in force. Clause 5 protects any right of review or appeal under the WPA if it had not been exercised before the commencement of the VSA.

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42 *Keelan*, above n 30, at [41].

[108] I turn to cl 5 first. Mr Edwards argued that a reconsideration must have been intended to be included within the terms "review or appeal" in cl 5.

[109] I agree with the Crown that the WPA had three revisiting tracks: review, appeal and reconsideration. It is clear that the legislature did not intend to extend the very open ended reconsideration option but wished to preserve the review and appeal paths. The effect of keeping the reconsideration option open would have been to greatly lengthen the life of the WPA after its repeal because it would have been available as a second or third step even after reviews or appeals had been taken. Parliament no doubt considered extending the life of the WPA to that degree should not be encouraged. In any event, and more broadly, there was in fact no express reconsideration power in relation to backdating decisions under the WPA anyway.[43] There could therefore be no basis for an expectation that the repeal of the WPA could somehow have preserved one.

[110] As to cl 4, the question is whether the 2009 appeal had been concluded by the time of the repeal of the WPA. It is possible that cl 4 is wide enough to encompass judicial review of any appeal provided relevant error is found and, in the Court's view, some remedy should be granted. There is a degree of support for this proposition in the fact that the Deputy General Manager in his letter of 5 January 2015, advised Mr Edwards that he had a right to seek judicial review of the Appeal Board's decision. In the end however, the question is one which belongs to the remedy stage of my assessment. If there was a relevant error in the Appeal Board's decision and neither delay in bringing the proceeding nor repeal of the WPA are disqualifying factors; then, in my view, a remedy would follow with or without cl 4. This though is a high threshold.

[111] In the end therefore, I find myself in agreement with VANZ that they had no jurisdiction to further consider Mr Edwards' case once the WPA was repealed. His remedy, if he had one, was in judicial review only.

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[43] See ss 15A(1) and 15E.

Relief

[112] The Crown argues that, even if an error is found (and I have found one) relief should be denied. The Crown points to delay in bringing the proceedings – nearly seven years after the Appeal Board's decision. Mr Edwards had been advised in April 2014, some months before the repeal of the WPA, that judicial review of the Appeal Board's decision was the only option available to him.

[113] Further, the Crown submitted there is no utility in making a declaration in relation to a repealed Act, and no ability to send the appeal back because the Appeal Board itself has now been disestablished. Finally, the Crown submitted it would be quite inappropriate for the Court to usurp the function of the Appeal Board by arrogating that discretion to itself.

[114] Although the Crown's submissions represent public law orthodoxy, for the following rather exceptional reasons, I find myself unable to agree.

[115] As to delay, this is a relevant, but rarely decisive factor on its own.[44] I of course accept that a delay of six and a half years is very significant indeed. Perhaps unprecedentedly so. That factor however has to be placed in its proper context.

[116] Mr Edwards first made his application in 1966 and has been trying since that date to obtain what he considered to be his entitlement. A six and a half year delay in the context of repeated applications, reviews, reconsiderations and appeals spanning a 50 year period is, to my mind, somewhat less problematic. Even on the backdating issue, Mr Edwards had been challenging the Secretary and then VANZ for three years before falling temporarily silent. And by then he was 83 years old and blind. In the context of a statute whose mandate is benevolent and that directs that Mr Edwards should retain the "full benefit" of its presumptions, such delay in such circumstances should not be seen as fatal.

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44 *Hauraki Catchment Board v Andrews* [1987] 1 NZLR 445 (CA) at 448 and 458; Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [5.36]. Relief was granted in the context of a six year delay in *Vickerman Fisheries Ltd v Attorney-General* HC Wellington CP1007/91, 26 August 1994; and in the context of a nine year delay in *Kapiti High Voltage Coalition Inc v Kapiti Coast District Council* [2012] NZHC 2058.

[117] In addition, I am unable to discern any relevant prejudice to the Secretary or to VANZ as a result of this delay. On the contrary, it is consistent with VANZ' statutory purpose to ensure that claimants receive their proper entitlements.

[118] As to the issue of substituting this Court's decision for that of the Appeal Board, I wholly accept that this is only ever rarely done. However, it is not without precedent. In *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* Woodhouse and Cook JJ granted a declaration that, subject to the upgrading of premises in accordance with plans that had been submitted, the appellant was entitled to a game packing house licence.[45] The Court was satisfied that "there was no evidence on which the respondent could reasonably or properly determine that he was not satisfied of the matters prescribed by the regulations; and that the evidence established these matters satisfactorily."[46] A reasonable Minister could not, the Court said, in applying the correct tests, have reached any other decision. The Court also noted that the "most obvious course at first sight" would be to send the decision back to the Minister for reconsideration. However, the Court said, three years had passed "since the application should have been disposed of on the right considerations", and the appellant, having already been prejudiced, "should not have to suffer more avoidable delay."[47]

[119] Other examples are *Dunne v Canwest TVWorks Ltd*, where Ronald Young J granted a mandatory interim injunction requiring the respondent to invite the two plaintiffs to participate in its leaders' debate to be held the evening of that decision;[48] *Haronga v Waitangi Tribunal* where the Supreme Court quashed the Waitangi Tribunal's refusal to grant an urgent remedies hearing, and remitted the matter to the Tribunal "with the direction that it must proceed urgently to hear the claim";[49] and *Watson v Department of Corrections* where Fogarty J was prepared to make an order to allow a prisoner to attend his mother's funeral.[50]

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45 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341.
46 At 353.
47 At 350.
48 *Dunne v Canwest TVworks Ltd* [2005] NZAR 577.
49 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [111].
50 *Watson v Department of Corrections* [2012] NZHC 3542.

[120] If the Appeal Board still existed I would have remitted it back with a direction to reconsider; however it no longer exists and like the Court of Appeal in *Quake Outcasts v Minister of Canterbury Earthquake Recovery*, I rather doubt I can resurrect that which Parliament has disestablished.[51] That gives me no option but to substitute my own decision.

[121] As I have indicated, although the s 84 decision was technically a discretionary one, that decision had to be made in the context of the other provisions of the Act, and with regard to the fact that Mr Edwards' application should have been granted in 1966. In short, as in *Fiordland Venison*, a reasonable decision maker, applying the very generous statutory provisions correctly, could not have declined the application in 1966, and for the same reason a reasonable decision maker in 2008 could only have lawfully and reasonably decided to backdate the entitlement to 1966. In *Dunne* and *Watson*, urgency was the impediment to remitting the matter while in this case the impediment is the disestablishment of the relevant decision makers. As in those cases, substituting my own decision is the only way to grant effective relief that reflects the substantial justice and merits of this case.

Disposition

[122] The application with respect to reviewable decisions four and five is dismissed.

[123] The application with respect to reviewable decisions one to three is granted.

[124] The decision of the Appeal Board (the third reviewable decision) is set aside. In its place, I make an order in the nature of mandamus that Mr Edwards' WDP must be backdated pursuant to s 84 WPA to 1966. I note that the extent of his backpayment will depend on both the degree of his partial blindness (prior to 1989) and the extent to which he was already receiving the WDP for his other disabilities.

[125] In the absence of a Secretary or Appeal Board, it will be necessary for me to make that assessment under s 22 and other relevant provisions of the Act. I direct the General Manager to file and serve a memorandum setting out an appropriate approach

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[51] *Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2017] NZCA 332, [2017] 3 NZLR 486 at [104].

to assessment. If this can be done by joint memorandum then that would be even better. The memorandum should be filed no later than 20 working days from the date of this judgment.

[126] I reserve leave for the parties to seek further directions if the foregoing orders inadequately represent the outcome in principle in this case.

[127] The plaintiff will be entitled to costs on a Category 2B basis. Memoranda of no more than three pages may be filed if agreement on quantum cannot be reached.

Williams J

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