

FEDERAL COURT OF AUSTRALIA

Clinton Earl McKenzie v Commonwealth Superannuation Corporation

[2023] FCA 396

SUMMARY

In accordance with the practice of the Federal Court in some cases of public interest, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at the Court's website together with this summary.

- 1 The applicant, Clinton Earl McKenzie, served with the Australian Defence Force (**ADF**) for over 20 years. During his time in service, Mr McKenzie was a member of, and made contributions to, the retirement benefits scheme established by the *Defence Force Retirement and Death Benefits Act 1973* (Cth) (the **DFR Act**). The DFR Act relevantly provides for the provision of retirement pay to members of the ADF (the **DFR scheme**). That scheme is administered by the respondent, the Commonwealth Superannuation Corporation.
- 2 Upon retiring from the ADF in January 1996, Mr McKenzie became entitled to retirement pay under the DFR scheme pursuant to s 23 of the DFR Act. On 6 December 1995 and within the three month period before retirement permitted by s 24(1AA) of the DFR Act, Mr McKenzie elected in writing “*to commute a portion of his or her retirement pay in accordance with*” s 24 of the DFR Act (the **election**).
- 3 The sole question for determination in the proceeding was whether, on a proper construction of ss 23 and 24 of the DFR Act, Mr McKenzie’s election permanently reduced the annual amount of retirement pay to which he was entitled (as the respondent contended), or whether his retirement pay was reduced only until he reached the age on which his expectation of life factor in sch 3 of the DFR Act was based (as Mr McKenzie submitted).
- 4 This question turned upon the proper construction of s 24(3)(b) of the DFR Act which, when Mr McKenzie retired, provided that, following a commutation election, a recipient member’s annual retirement pay was reduced “*on and after the day on which the election takes effect*”.
- 5 Mr McKenzie, who appeared without legal representation, made helpful, clear, and well-prepared submissions. In essence, Mr McKenzie submitted that the words “*on and after*” in

s 24 of the DFR Act should be construed as having an implied temporal constraint, so as to not apply once a member has lived beyond the applicable expectation of life factor in sch 3 of the DFR Act.

- 6 However, the Court rejected Mr McKenzie's construction of the DFR Act, finding that it would involve reading words of temporal limitation into s 24 which Parliament had not seen fit to enact. The Court held that, contrary to Mr McKenzie's submission, Parliament's intention that a member's annual retirement pay be permanently reduced following commutation is plain from the unqualified text of s 24(3)(b). The remedy for any unfairness in the scheme of the kind identified by Mr McKenzie lies in the hands of the Parliament. The originating application filed on 12 July 2021 was therefore dismissed with the parties afforded the opportunity to make submissions on the issue of costs.