VALLENTINE'S DAY

A Decision in Relation to the
PARLIAMENTARY RETIRING ALLOWANCES ACT 1948-1973

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ABSTRACT

Jo Vallentine was a member of Federal Parliament from 1984 until her retirement in January 1992. Her parliamentary career was in many ways unique. She was the first person ever elected to a parliament anywhere on a platform of Nuclear Disarmament. She resigned from Federal Parliament after approximately eight years service - not sufficient service to warrant the granting of a parliamentary pension which required 12 years service. She was the first politician to take a decision of the Parliamentary Retiring Allowances Trust to the Administrative Appeals Tribunal to have the Tribunal consider whether she qualified for a parliamentary pension under provisions which allow for the grant of a pension where retirement is “on account of ill health”. The proceedings before the Tribunal highlighted some deficiencies in the Trust’s operations. The writer was counsel for Ms Vallentine at the appeal before the Administrative Appeals Tribunal.
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ROBERT GUTHRIE*

Introduction

In June 1994 the Administrative Appeals Tribunal ("the Tribunal") considered for the first time the provisions of the Parliamentary Retiring Allowances Act 1948-1973 ("the Act"). The appeal came to the Tribunal following the decision of the Parliamentary Retiring Allowances Trust ("the Trust"). The decision of the Trust was to reject an application by former Senator Jo Vallentine for payment of a Parliamentary pension on the grounds of ill-health.

The Trust is created by Section 5 of the Act and consists of five Trustees, namely the Treasurer, two Senators and two Members of the House of Representatives. The affairs of the Trust are conducted at meetings of the Trustees (see Section 8). A quorum at a meeting of Trustees is three Trustees. The Trust has power to consider applications under the Act and in particular an application by a member of either house of Parliament for a pension pursuant to Sections 17 and 18A of the Act.

The thrust of the Act is to provide benefits to members of either house of Parliament upon their retirement. In general terms the Act provides that a pension is payable to a member of either house of Parliament where that member has served not less than twelve years or has been re-elected on four occasions. In addition, a pension is payable to a member of Parliament whose resignation was made bona fide on account of ill health. (See Section 17(3)).

In Vallentine v Parliamentary Retiring Allowances Trust (unreported decision of the Administrative Appeals Tribunal Application W93/336, 11 November 1994) the Tribunal considered whether pursuant to Section 17(3) of the Act Ms Vallentine should be deemed to have retired voluntarily by reason of the fact that her resignation was made bona fide on account of ill health.

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Section 17(3) provides:
17(3) ........... a member who resigns his place before the expiration of
his term of office shall be deemed to have retired voluntarily if he
fails to satisfy the Trust that his resignation is made bona fide:

(a) on account of ill health.

If Vallentine was able to satisfy the Trust that her resignation was made bona
fide on account of ill health in pursuant to Section 18A of the Act her period of
service would be deemed to be eight years, thus entitling her under Section 18 of
the Act to a retiring allowance.

Background to the Decision

Ms Vallentine was elected to the Australian Senate following a general election
in December 1984. In 1984 Ms Vallentine was elected as a member of the
Nuclear Disarmament Party. At the time of her resignation in January 1992 she
was a member of the Greens (W.A.). Throughout her parliamentary career she
was without the support of a major political party.

Ms Vallentine commenced service in the Senate in July 1985. When she entered
the Senate she had been examined by a Commonwealth Medical Officer and
submitted a medical certificate to the Trust for the purposes of Section 18(A) of
the Act. That section requires that in order for a person to be entitled to a
parliamentary pension it is necessary for a medical certificate to be submitted
which certifies that the Member of Parliament is unlikely to become, within a
period of eight years, incapable by reason of ill health of performing the duties of
a Member of Parliament.

On 16th September 1991 Ms Vallentine announced (by media release), her
resignation from the Senate. The resignation was to take effect from 31st
January 1992. She gave three reasons for her resignation:

1) her desire for more time with her family;
2) the fact that her health was deteriorating;
3) her belief that seven years of parliamentary service was enough, and that
   it was time for a new voice to be heard representing green issues.
Ms Vallentine did not make an application to the Trust for a parliamentary allowance at the time of her resignation but on 19th September 1991 a letter was sent to her from the Parliamentary and Awards Superannuation Section of the Department of Finance which enclosed a copy of the Parliamentary Contributory Superannuation Scheme handbook. This handbook set out the conditions applying to the entitlement to benefits under that scheme. Shortly thereafter Vallentine was referred to Dr Cutler, a Commonwealth Medical Officer, who reviewed Ms Vallentine and provided a report to the Trust. The report concludes:

"Senator Vallentine is currently not fit to perform the duties of her position as Senator. It is most likely that removal from this source of stress will result in an improvement in her medical condition. However, it should be pointed out that she was at no stage referred to a specialist neurologist who may have given more definite opinion in regard to the causes of the migraine headaches, and who may have recommended a trial of prophylactic anti-migraine medication.

In my opinion, Senator Vallentine will in the future be fit for a variety of occupations, but these should be of a non-stressful nature."

Evidence given at the hearing indicated that Ms Vallentine had suffered from headaches as early as 1967. The evidence at the hearing however was that only towards the end of her parliamentary career were the headaches of such severity as to affect her work capacity. As a consequence of the report from Dr Cutler the Trust referred Ms Vallentine to a specialist neurologist, Mr K. Graingier, who on 22nd January 1992 recorded in his report that:

"Stress caused by parliamentary conflicts appear to act as a precipitant for at least some of the headaches .......... The diagnosis is of common migraine, with the increasing frequency and severity being related to the pressures of her work situation ........ While a period of sick leave would probably be beneficial to her migraine, my usual practice would be to treat the patient while they continued in their work situation to obtain a more realistic view on their response to treatment."
Notwithstanding the evidence of two medical practitioners that Ms Vallentine was at the time of her resignation suffering from severe migraine headaches, the Trust decided on 2nd April 1992 that Ms Vallentine’s resignation was voluntary and not made bona fide on the grounds of ill health.

**The Procedures of the Trust**

The Act does not set out any procedure under which the Trust is to operate. Apart from requiring that the Trust conduct its affairs at meetings, there is no legislative direction as to how the meetings are to be conducted. In the event that an application is made to the Trust for a parliamentary pension, there is no legislative procedure set down for the consideration of those applications. In Ms Vallentine’s case, the Trust considered her application at its 60th meeting on 2nd April 1992. The minutes of the 60th meeting which are contained in the Section 37 papers filed with the Tribunal at the hearing record the following:

"The Trust considered the opinion of the specialist neurologist (Mr Grainger) and a statement from the Perth GP (Dr Cutler) in addition to the medical evidence provided previously. The Trust noted that the records of the Canberra GP were not available.

The Trust also considered legal advice dated 11th November from the Attorney General’s Department on the operation of the invalidity arrangements of the PCSS."

After considering this material and the statement provided by the former Senator, the Trust decided that her retirement on 31st January 1992 was voluntary and not on the grounds of bona fide ill health.

Ms Vallentine was advised of the decision of the Trust in writing 3rd April 1992.

**Documentary Evidence**

From the Section 37 documents it is possible to consider some of the material which was placed before the Trust for consideration. A document which appears to have been prepared by staff of the Department of Finance is entitled, "Application of Section 18A - Retirement on Invalidity Grounds - Senator Vallentine." The title of the document from the outset appears to make the assumption that somehow the provisions of the Act are related to invalidity. In
paragraph 6 of the document the author notes:

"Unlike legislative provisions in other superannuation schemes, which now generally require total and permanent incapacity before permitting invalid retirement, the Act provides very little guidance for assessing invalidity retirement. While not attempting to limit the factors that the trust would take into account in the exercise of it's discretion, the Trust may wish to form an opinion about whether the ill health is serious enough to justify a decision to resign."

At this early stage it is clear that documents provided to the Trust may have led the Trust into error. In the first place, continual reference to invalidity appears to be inappropriate given that the Act makes no mention of invalidity. The suggestion that the Trust should consider that the "ill health is serious enough" again is a gratuitous suggestion not supported by any of the provisions of the Act. The document refers to legal advice given by the Attorney General's Department. That advice was contained in the Section 37 documents but at the hearing the Attorney General's advice was withdrawn from the Section 37 documents on the grounds that the advice was privileged. Nevertheless, the Department of Finance document refers to the Attorney General's advice noting that the advice was:

"There is no requirement for the ill health to be permanent but this is a fact that the Trust should consider in making it's decision."

The Department of Finance document then referred to the medical evidence in detail, noting the report of Mr Grainger. In addition to the Department of Finance document a summary of previous cases was provided to the Trust. In all the Trust had before it the medical reports referred to above, legal advice from the Attorney General's Department and a submission prepared by the Department of Finance. There was also a letter provided to the Trust by Ms Vallentine outlining the severity of her migraine headaches and providing to the Trust a copy of the 1991 calendar indicating the days upon which migraine headaches were suffered by Ms Vallentine. It is interesting to note that at this point none of the information provided to the Trust negates the notion that at the time of her resignation Ms Vallentine was suffering from migraine headaches and that the medical opinion was that this prevented her from performing her parliamentary duties. Nevertheless the Trust concluded that
Ms Vallentine had not resigned bona fide on account of ill health.

Significantly Ms Vallentine did not attend the meeting of the Trust to explain her circumstances, nor was she invited to attend. In October 1993 Ms Vallentine wrote to the acting director of Parliamentary and Awards Superannuation section requesting that the decision of the Trust made 2nd April 1992 be reconsidered. At it's 63rd meeting on Monday, 22nd November 1993, the Trust reconsidered the application by Ms Vallentine for a parliamentary pension. Again the Trust was supplied with documents prepared by the Department of Finance. On this occasion the Trust was supplied with additional medical evidence from Ms Vallentine's general practitioner and specialist together with a further report from the director of the Australian Government Health Service. The submission from the Department of Finance again noted that there was little guidance under the Act for assessing "invalidity retirement". At paragraph 19 it was noted:

"legislative provisions in other superannuation schemes which typically require total and permanent incapacity where the person is unlikely ever to be able to work again in a job for which the person is reasonably qualified by education, training or experience before permitting invalidity retirement."

This statement would appear to be an expansion on it's earlier statement to the Trust at the time of the Trust's first consideration.

Significantly the document prepared by the Department of Finance for the Trust's 63rd meeting contained additional information. At paragraph 23 the document notes:

"Ms Vallentine's press statement about her resignation included reference to deteriorating health as the second of three reasons for her resignation. In the context of her third reason, when two officers of the Department of Finance briefed the then Senator-elect Chamarette on the operation of the parliamentary superannuation scheme on 11 December 1991, she volunteered the Greens in Western Australia had decided that Ms Vallentine's Senate position was to be rotated and that it was her turn. The comment was made in the context of Senator Chamarette being unlikely to qualify for a pension because of the policy."
In addition, the Department's document noted:

"Ms Vallentine did not seek leave of absence from her parliamentary duties during which the effect of medication on her condition could have been tested before resorting to resignation; migraine attacks would only very rarely be accepted for the purposes of superannuation invalidity retirement benefits in the wider community."

A number of points emerge from the Department of Finance document prepared for the Trust's 63rd meeting. In relation to the issue of rotation of Green members of parliament, the Section 37 documents contain a file memo which records the following:

"On 11 December 1991 Anne Burhop and I (Peter Downs, Acting Director, Parliamentary Awards Superannuation Section) went over to Senator Vallentine's office at Parliament House to meet her successor (Christobel Chamarette) following her retirement from the Senate on 31st January 1992.

Ms Chamarette told us that the Greens in Western Australia had decided to rotate the Senate position and that it was now her turn. As a consequence of this policy she indicated that she was unlikely to qualify for a parliamentary pension."

This memo was the subject of some comment by the Tribunal at hearing. The Tribunal at page 13 of it's reasons made the following comment:

"The file note was signed by both Mr Downs and Ms Burhop. The note was never shown to Senator Chamarette. Presumably this evidence was intended to provide an alternative reason for the applicant's resignation other than the question of ill health. The Tribunal arranged to have Senator Chamarette called and when questioned about the Green's policy to rotate their Senate position she categorically denied the existence of such a policy, was adamant that no pressure whatsoever was placed on Ms Vallentine to resign
by the Greens. She also said the file note was never drawn to her attention and she was never asked to affirm the words contained therein were her words."

Careful reading of the file note indicates that it refers to an opinion apparently proffered by Ms Chamarette in relation to Ms Chamarette's position rather than that of Ms Vallentine. The file note simply does not support the statement made by the Department of Finance in the document prepared by it for the purposes of the Trust's 63rd meeting. Notably at the hearing, counsel for the Trust was reluctant to call Senator Chamarette. The Tribunal in fact insisted that Senator Chamarette be called to give evidence and her evidence was given by telephone conference. The Trust is not bound by the rules of evidence and may inform itself on any matter in such a manner as it thinks appropriate. (See Section 33(1)).¹ At the hearing the applicants counsel examined Senator Chamarette and the Trust's counsel was given the opportunity to cross examine. Notwithstanding the apparent advantage afforded to the respondent, counsel for the respondent suggested that Senator Chamarette's evidence not be given or at least some time be allowed for an adjournment so that the respondent could seek further information. At the hearing a copy of the Greens (W.A.) Constitution was tendered to the Tribunal. Nowhere in the Constitution does it appear that the Greens have a policy of rotation of its members of parliament.

The repetition by the Department of Finance of the suggestion that the requirement of ill health in the Act be equated with invalidity is repeated in the statement of material questions of fact and reasons for decision supplied to the Tribunal pursuant to Section 37.

The Administrative Appeals Tribunal Decision

The Tribunal made the following findings of fact:

1.   Since 1967 Ms Vallentine had suffered from migraine headaches. The headaches became more frequent and more severe from 1986 so that by 1991 the headaches were occurring twice or more per month, lasting two to three days on most occasions.

   ¹ See Oldfield v Secretary, Department of Primary Industry (1988) 78 ALR 718 at 722
2. There is a strong family history of migraine headaches.

3. The Tribunal found that Ms Vallentine had a genuine reluctance to rely on drugs as a preventative measure and that she genuinely and reasonably believed that the side effects of any drugs (mainly drowsiness and lethargy) would interfere with her work as a Senator to an unacceptable degree.

4. Significantly, the Tribunal found that Ms Vallentine's migraines were the main reason for her resignation and that her continuing work whilst suffering from migraines was one cause of her family problems.

The Tribunal had to consider a number of issues of law. In the first place it was necessary to consider the meaning of the word "ill health". Applicant's submitted that the words be given their ordinary dictionary meaning and ultimately the Tribunal accepted definitions obtained from the Macquarie Dictionary (Second Edition) which defined ill health as "an unsound or disordered condition of health", and the Oxford English Dictionary which defined ill health as "an unsound, common disorder of health; that state of health which is characterised by the presence of some disease or by the imperfect functioning of the physical processes."

The Tribunal noted that at hearing the respondent's challenge to the application was made on five grounds. These were:

1. There were reasons other than ill health which motivated Ms Vallentine to resign, for example the Greens' rotation policy and personal family reasons.

2. Ms Vallentine did not seek the opinion of a specialist neurologist.

3. Ms Vallentine could have relieved the migraines by taking sick leave or prophylactic drugs.

4. She did not give the drug Sumatriptin a sufficient trial.

5. She was not incapacitated by her migraines.
"On Account of Ill-Health"

The issue of whether Ms Vallentine had retired by reason of the Greens "rotation policy" and/or family reasons had to some extent been dealt with by previous findings of fact. The Tribunal had already found as a fact that there was no Greens' rotation policy or at least there was no policy which had been brought to bear upon Ms Vallentine so as to force her to resign. In relation to the other reasons given for resignation, the Tribunal were of the opinion that it was not necessary that ill health be the only reason for resignation. The Tribunal's statement of principle makes no mention of the numerous authorities referred to in argument to establish this point. One of the difficulties for Ms Vallentine was to overcome the press release announcing her resignation. That press release gave three reasons for resignation, one of which was ill health. A number of cases were referred to in argument to establish that there may be mixed motives for resignation but so long as one of the motives is ill health then this would be sufficient to activate provisions of the Act. The New South Wales Court of Appeal decision of *Hook v Rolfe* (1986) 7 NSWLR 40 dealt with the interpretation of the *New South Wales Worker's Compensation Act 1926*. In that case the court had to consider whether a worker was entitled to compensation payments when he was injured in the course of a journey embarked upon for a number of purposes. Glass J A at 44 noted:

"Cause, reason and purpose are alike irrelevant unless it shown that they were 'inoperative' or influential. An event is not a cause of another unless it contributes to its occurrence; and cause, reason or purpose must all (in circumstances such as these) be in existence before the conduct they are said to inspire has been determined."

The Tribunal was also referred to the High Court decisions mentioned in *Hook v Rolfe*.

The Tribunal was also urged to consider the Act as a remedial statute, having regard to the reasons for its enactment. The second reading speech given at the time of the Act's passage through parliament noted that the establishment of the scheme was to cater for the exigencies of parliamentary life. In 1973 when the

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2 See Parliamentary Retiring Allowances Bill second reading speech, 1st December 1948 page 37 and 38.
Act was amended to include Section 18A Mr Crean in his second reading speech noted:

"Another important change relates to retirement from parliament because of ill health before the completion of eight years service. At present a member receives in such circumstances a refund of his contributions plus a Commonwealth supplement, the normal benefit payable to a member who has not qualified for a retiring allowance. The Bill provides for a member who retires because of ill health before completing eight years of service to receive retiring allowance at the eight years level provided that on becoming a member he furnished a medical certificate to the effect that he was not likely to be rendered incapable of performing his duties within a period of eight years."

If the statute was regarded as remedial then a number of cases were relevant to the interpretation of the Act. The Tribunal was referred to the High Court's decision in Wilson v Wilson's Tile Works Pty Ltd (1960) 104 CLR 328 and to the more recent decision of Bird v Commonwealth (1988) 62 ALJR 336 where at 339 in their joint judgement Justices Deane and Gaudron noted that legislation (in particular compensation legislation) which is remedial in its character should be interpreted beneficially. Referring to Wilson v Wilson's Tile Works Pty Ltd Justices Deane and Gaudron noted that if a person or a case falls within a general spirit of such remedial legislation and there are two possible interpretations the courts ought not to construe the Act so as to exclude that person or case.

It was submitted to the Tribunal on behalf of the applicant that the Act was remedial in nature and to some extent analogous to compensation legislation.

A decision of the South Australian Supreme Court which was not referred in argument but which confirms this approach is Broken Hill Pty Company Ltd v Brown (1986) 40 SASR 410. In that case the Supreme Court was considering the Worker’s Compensation Act 1971 (SA) in particular Section 69 which requires consideration of the words "on account of age of ill health". White J noted:

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3 Parliamentary and Judicial Retiring Allowances Bill second reading speech, 23rd May 1973 page 2500.
"A cause that is more than (a) trivial or minimal cause hardly corresponds with "on account of". It may be than neither test exactly defines the test which parliament had in mind. It may be that majority statement of the test is a little too high while Judge O'Lachlan's is somewhat too low. In any event, I prefer a test closer to that of a majority, although their test may be slightly overstated.

White J was referring to the majority of the Industrial Court of Appeal. The majority in the court below took the approach that the words "on account of" referred to the part which either age or ill health had to play in the decision of the worker to retire or be retired. Ill health had to be a major cause or a dominant cause of the retirement.

The Tribunal found that the "most significant reason" for Ms Vallentine's resignation was her ill health. The use of the words "most significant" is probably consistent with the reasoning in Brown's case above where reference is made to dominant and major cause. The Tribunal had earlier made a finding that the "main reason" for Ms Vallentine's resignation was her migraines. The Tribunal therefore seems to have accepted the proposition that ill health may be one of a number of reasons for resignation but that it needs to be the significant reason for resignation.

**Reasonable Medical Care**

As to the other arguments put by the respondent, these related to various aspects of Ms Vallentine's medical care. In argument it was submitted for Ms Vallentine that in substance the respondent was suggesting that she had failed to accept reasonable advice and had refused to undergo reasonable treatment. Reference was made to the High Court decision in *Fazlic v Milingimbi Community Inc* (1982) 38 ALR 423. The High Court in that case canvasses the issue of unreasonable refusal to undergo medical treatment in relation to a compensation case. At 428 the court noted:

"The material question ............ is not whether the medical advice given to the workman against an operation is more soundly based than advice in favour of it, but whether the workman who refuses to be operated upon is acting reasonably in view of the advice he received."
The Tribunal found that Ms Vallentine had been referred to a neurologist, that her attitude to medication and drugs was reasonable and that generally the Tribunal accepted her evidence that she had made a reasonable attempt to alleviate her migraine headaches. So, the second, third and fourth arguments of the respondent collapsed. It was also noted by the Tribunal that it was not an option for Ms Vallentine to take sick leave given that she had no major Party support and that if she was to be absent from Parliament this would effectively leave her constituents unrepresented. There was nobody to fill her vacancy and her vote would be lost because she was unable to “pair” with any other parliamentarian because she was not a member of one of the major political parties.

The Tribunal found that there was ample evidence to show that Ms Vallentine was incapacitated by reason of her migraine headaches. In fact the medical evidence on this point was uncontradicted.

Ms Vallentine's Credibility

As to whether there was any other motivating factor for Ms Vallentine's retirement, the Tribunal noted at page 19 of its reasons:

"Finally, the Tribunal must consider whether the real and overriding reason for the applicant's early resignation may have been a desire to exaggerate the affect of the migraine in order to fraudulently gain an early entitlement to pension. The Tribunal finds that this is not the case and nothing in the applicant's character, previous history or her actions in this instance give any support to this possibility."

The Tribunal's comments in this regard are in contrast to the comments made by the then Senator Walsh in March 1992. Using the second reading speech debate in relation to The Forrest Conservation and Development Bill 1991, Senator Walsh called upon Senator Chamarette to explain the resignation of Ms Vallentine and her application for parliamentary allowance. He said:

"How does Senator Chamarette believe that governments can afford to fund that sort of fiscal scam being attempted by her predecessor? If they followed her views, and the views of Green
extremists in general, governments would be simultaneously closing down the industries that paid the taxes, to fund far more worthy areas of government expenditure than the fiscal scam which the former Senator Vallentine is perpetuating."^4

Clearly the Tribunal did not agree with Senator Walsh.

In considering the criteria upon which ill health should be considered the Tribunal noted that it was inappropriate to refer to the allowance as relating to invalidity. The Tribunal noted that doctors who had supplied opinions to the Trust had referred to invalidity retirement and in so doing had applied the wrong criteria. The Tribunal found that the criteria under the Act was that the applicant should show ill health and that resignation is bona fide on account of ill health.

The Tribunal accepted submissions made on behalf of Ms Vallentine that ill health did not require the condition to be permanent nor was it necessary for the applicant to show an incapacity for work. These may be factors which could be taken into account by the Tribunal but they were not pre-conditions for the satisfaction of Section 17 and Section 18A.

The decision of the Tribunal was that the Trust's decision to decline payment of the parliamentary allowance under the Act was to be set aside and the Tribunal found that Ms Vallentine's resignation was made bona fide on account of ill health.

**Some additional issues**

A number of issues arise out of the Tribunal's decision.

In the first place, the decision of the Tribunal establishes that the threshold for qualifying for parliamentary pension under the Act is not invalidity or some other criteria generally accepted under other legislative provisions such as worker's compensation legislation and superannuation legislation. The threshold criteria for ill health would appear to be lower than that in the kind of legislation referred to by the Department of Finance in its submissions to the

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Trust. It was not necessary to establish that the condition which causes the ill health is permanent nor that the condition creates an incapacity.

The documents prepared by the Department of Finance contributed to the Trust misdirecting itself. The Trust was misdirected in relation to the criteria for ill health and further, the Trust was misdirected in relation to the file note referring to the policy of the Greens' rotation. At the hearing the Tribunal found that this file note had no substance. A proper investigation of the file note, its contents and confirmation of its contents by Senator Chamarette and Ms Vallentine would have confirmed that no such policy existed.

Secondly, the conduct and operation of the Trust appears to be inconsistent with the proper determination of matters of this kind. The Trust is clearly not bound by the rules of evidence but in deciding whether or not a parliamentary pension is payable, the Trust must act in accordance with natural justice. Ms Vallentine was not given the opportunity to appear before the Trust and submissions made by the Department of Finance to the Trust contained material which led the Trust into error. The minutes of the Trust and copies of the documents considered by the Trust were only made available to Ms Vallentine when she made her appeal to the Tribunal.

The composition of the Trust is also a matter of some concern, particularly if the applicant is from a minority political party.

**The Issue of Bias**

Forbes\(^5\) notes that proof of apparent bias is sufficient to avoid the decision of a court or statutory tribunal, or to disqualify it from proceeding further if it has yet to reach a decision. In *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519 the High Court noted that an adjudicator should not sit to hear a case if in all the circumstances the parties or the public might reasonably suspect that he was not unprejudiced or impartial.

The cases which arise most frequently in relation to bias are those where it is argued that because of some present or past relationship with, or strong personal animosity towards one or other of the parties, there is the perception that the

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\(^5\) J R S Forbes Disciplinary Tribunal's Law Book Company 1990 page 141 -see generally Chapter 15.
decision maker of adjudicator will not reach his or her decision in an unbiased way.

Bias is not presumed, it is necessary to show some reasonable suspicion or likelihood of bias. The was the test formulated by the High Court in *R v Conciliation and Arbitration Commission: Ex Parte Angliss* (1969) 122 CLR 546. In that case the court said:

"Those requirements of justice are not infringed by mere lack of nicety, but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the Tribunal or the minds of the public that the Tribunal or a member of members of it may not bring to the resolution of the questions arising before the Tribunal fair and unprejudiced minds."

It is submitted, that leaving aside Ms Vallentine’s case, a member of the public would have a reasonable apprehension of bias in relation to the assessment by the Trust of parliamentary retiring allowances, particularly in cases involving the issue of early retirement. As the members of the Trust are parliamentarians they clearly have an interest in the result of their determinations. Ironically Ms Vallentine’s case showed that under the criteria of ill health it was far easier for a parliamentarian to establish a right to a pension than for a member of the public to establish a right to a disability pension under the Social Security Act 1991.

Looking specifically at Ms Vallentine’s case, the fact that it was not possible for the Trust to be constituted by a member of the Greens (W.A.) might lead to a reasonable apprehension of bias. Even if the Trust could be so constituted, the apprehension of bias would not disappear for the reasons stated above.

In Ms Vallentine's case the manner in which the Trust informed itself (by using the file note in relation to Senator Chamarette) and the fact that it did not allow for the personal appearance of Ms Vallentine nor for her to view the documents upon which its decision was based might also lead to a reasonable apprehension of bias.

The Trust's procedures have not previously been open to such scrutiny. Vallentine's case is the first case which was brought to the Tribunal on appeal. Because of this the minutes of the Trust's meetings and other documents were
available for consideration.

It is submitted that given the nature of the Trust's considerations, particularly in relation to pensions payable for premature retirement from parliament, the Trust is an inappropriate forum for such determinations to be made. The determination of these matters requires the adjudicator to act judicially and on the evidence from Ms Vallentine's case the behaviour of the Trust did not fall into that category. On the other hand it might be argued that the Trust was never intended to operate judicially and the fact that there are appeal rights to the Tribunal redresses this problem. Given the more recent public scrutiny of parliamentary pensions it might be appropriate for the task of assessment of parliamentary pensions to be given to an entirely independent body.

Postscript

The decision in Ms Vallentine's case was not taken on appeal. It can be assumed that the Trust was satisfied with the reasons given by the Tribunal were correct. Clearly the Trust couched the bulk of its decision in terms of findings of fact and it is difficult to see how those findings could be disturbed.

The Act has as at June 1994 been amended so as to reflect a higher standard of proof for voluntary retirement. The amendments to the Act appear to have anticipated the decision of the Tribunal in Vallentines case because the new provisions require that a parliamentarian must show permanent incapacity before a pension will be granted. The Vallentine case is the first and only case to go to the Tribunal to hear an appeal in relation to the requirements of ill health under the Act. However the operations of the Trust and its composition still require examination.