Administrative Appeals Tribunal decisions

Age pension: 'annual rate of income'

HARRIS and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. V80/14)
Decided: 28 August 1981by R.K. Todd, W.B. Tickle and M.J. Cusack.

Amelia Irene Harris qualified for an age pension from 29 April 1976. From September 1977 to September 1979 she worked as a nursing aide and was paid, over those two years, $3,276. She received fortnightly payment of wages which varied between $35 and $231.

On 25 July 1979, Harris disclosed this income to the DSS, and her pension was reduced. On 18 October 1979, after Harris had ceased working, she was advised by the DSS that there had been an overpayment of pension, over the preceding two years, of $1200. The DSS told Harris that it would withhold $10 a fortnight from her pension until this overpayment was recovered. The authority to 'withhold' in these circumstances is found in s.140(2) of the *Social Services Act:*

> (2) Notwithstanding anything contained in this Act (other than sub-section (3) of this section), where, for any reason, an amount has been paid by way of pension, allowance, endowment or benefit which should not have been paid, and the person to whom that amount was paid is receiving, or entitled to receive, a pension, allowance or benefit under this Act (other than a funeral benefit under Part IVA), that amount may, if the Director-General in his discretion so determines, be deducted from that pension, allowance or benefit.

Harris appealed to an SSAT against this decision and then to the AAT.

Before the AAT, the DSS claimed that the overpayment of pension should be calculated as $1393. (At various earlier stages of the appeal, the DSS had assessed the overpayment as $1226 and $1177.) The calculation of Harris' proper level of pension and, hence, the overpayments between September 1977 and August 1979 depended on the meaning of s.28(2) of the Act:

> (2) The annual rate at which an age or invalid pension is determined shall, subject to sub-section (2AA), be reduced by one-half of the amount (if any) per annum by which the annual rate of the income of the claimant or pensioner exceeds –
> (a) in the case of an unmarried person – $1,040 per annum; or
> (b) in the case of a married person – $897 per annum.

What is the 'annual rate of income'?

The calculation of an 'annual rate of income' for a person with fluctuating income had clearly caused the DSS some problems (hence the four different figures assessed as the overpayment); indeed, the DSS representative told the AAT that 'seven possible bases of calculation had been suggested at one time or another': Reasons for Decision, para. 9. (Some of those bases were listed in *Lawson*; see *Social Security Reporter*, no. 1, p.3.

In the case of Harris, the DSS argued that a 'rolling fortnight' method should be used. That is, the income earned by a pensioner in a particular fortnight should be multiplied by 26 (to give the annual rate of income for that fortnight). This figure should then be compared with the permissible annual income figure ($1040: s.28(2)(a)) and half of the excess deducted from the maximum annual rate of pension to reach the appropriate annual rate of pension for this pension. This annual rate should then be divided by 26 to arrive at the 'correct' fortnightly pension payment. And this calculation would need to be repeated each fortnight.

This approach was rejected by all the members of the AAT, although one member, W.B. Tickle, adopted an approach which was similar but more flexible.

Todd and Cusack took the view that the Act required income (for the purposes of the income test in s.28(2)) to be treated on a yearly basis, as were the maximum rate of pension and the maximum permisible income (referred to by them as the 'benchmark'). And the year which should be adopted was the 'pension year': the year which commenced on the date of the first grant of pension and, thereafter, on each anniversary of that date. So a pensioner could only be said to have exceeded the permissible annual income ($1040 for an unmarried pensioner) if the total of that pensioner's income in a pension year exceeded $1040: the receipt of (say) $200 in one fortnight would not affect the level of pension payable to that pensioner, unless the pensioner had received other income in the 'pension year' and the total income received in that pension year exceeded $1040 (for an unmarried pensioner).

Similarly, even if an unmarried pensioner received, over a 12 month period, income well in excess of $1040, that income limit would not be exceeded if the income was divided between two 'pension years' and the amount received in each of those years was below $1040. (Harris, who had received $3,276 over a period of two years, was able to divide that income between three pension years. It is probable that in only one of those pension years did her income exceed $1040.

Clearly, this reading of s.28(2) requires the DSS to review the position of each pensioner at the end of each 'pension year': to calculate whether over the preceding year, the unmarried pensioner has received income in excess of $1040; and to make any necessary adjustment to the pension payable for the preceding year. Accordingly, the AAT's view of s.28(2) means that, in each 'pension year', a pension should be payable at a constant rate, even though income received may fluctuate throughout that year; and that constant rate is to be determined at the end of the 'pension year'.

Todd and Cusack said that the DSS might use its 'rolling fortnight' approach (or some other approach) which had some merit as an interim measure for calculating each fortnightly payment.

> But the Tribunal considers that all of those methods should be seen only as interim procedures relating to the continuing payment of fortnightly pensions. They may often involve eventual error, exposed once the opportunity arises to look with hindsight at the year that has passed. When that year has so passed, the time for reckoning and adjustment has arrived . . . [The] 'rolling fortnight' method of approach may be a very useful administrative scheme for the purpose of the payment of pensions on a fortnightly basis, but at the conclusion of the pension year, when the facts are known, an adjustment must be made to equate pension entitlement and pension received. The Department has a continuing and difficult administrative problem in the payment of pensions, but the problems of estimation that therein arise should not in our opinion be allowed to dictate the measurement of rights and obligations once estimation is overtaken by knowledge.
> (Reasons for Decision, para. 10.)

The two AAT members explained how the final adjustment would be made:

> In our opinion, what should or should not have been paid is to be determined against the criteria of the annual rate of pension matched against actual annual income and the benchmark amount of permitted income 'per annum'. If, on that basis, too little pension has been paid, then, whatever the justification administratively for the extent to which pension has been in fact paid over the course of the year, the legislation has not been compiled with and an adjustment in favour of the pensioner is demanded. No particular statutory warrant for this is necessary. If on the other hand pension has been paid that should not have been paid, s.140(2) applies to permit deduction of the 'overpayment' from pension being received.
> (Reasons for Decision, para. 11.)

The third member of the AAT, **W.B. Tickle**, took the view that the DSS's approach (of calculating an annual rate of income each fortnight by multiplying the income received in that fortnight by 26) was too inflexible; and that

> a broader view of the pensioner's income circumstances is demanded if the true annual rate of income is to be established for the purposes of s.28(2). It is a question of fact to be determined in the light of all the circumstances known or available at the appropriate time.
> (Reasons for Decision, para. 30.)

Tickle said that the DSS should, when calculating the appropriate level of pension, take account of a range of information, including the pensioner's current income and information supplied by the pensioner and the pensioner's employer about the probable level of income for the future. Any assessment based on this

information might need to be revised in the light of subsequent events: 'for example, the unexpected continuation of employment which was thought likely to be of limited duration': Reasons for Decision, para. 32.

This calculation should be made at the time when the pensioner notified the DSS (as required by s.45(1) of the *Social Services Act*) that her or his income over eight weeks had averaged more than $20 a week. It was from the date of that notification, or from the date when that notification was required by s.45(1), that the year (for the purposes of 'annual rate of income') was to be measured. In Harris' case, the evidence showed that the date when she should have notified the DSS under s.45(1) was 2 October 1977.

If the pensioner failed (as Harris had failed) to notify the DSS, then the DSS would need to make a retrospective assessment. In Harris' case, such a retrospective assessment would simply look at the income received in the two years beginning 2 October 1977 and 2 October 1978. The income received by Harris in each of those years was her 'annual rate of income'. According to this member of the AAT, such an approach showed an overpayment of $1194 and, as the DSS had indicated that it would not seek to recover more than $1177, Tickle would have affirmed the decision under review.

Special benefit: 'unable to earn . . .'

TE VELDE and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N81/2)

Decided: 21 August 1981 by A.N.Hall

Janice Te Velde was widowed on 18 January 1977 and from 18 January to 21 July 1977 she was paid a class 'C' widow's pension (she was under 50 years of age and had no children). Te Velde continued to live on the property and to work on its maintenance and improvement. Despite this commitment, she was granted unemployment benefit for the period from 1 September 1977 to 31 January 1979 when the benefit was terminated because she was 'not able to accept full time work'.

From February to August 1979, Te Velde continued to work the property (then severely affected by drought); she was supported by money lent by her parents and her sister; and she unsuccessfully looked for part time work in a nearby town.

In August 1979, Te Velde applied for special benefit which was granted from 6 August 1979 and ceased on 21 September 1979 when she failed to lodge a fortnightly application for continued payment. (She had just received a loan of $12 000 from the Rural Assistance Board, of which $2000 was designated as carry-on finance. In fact, she used this $2000 in paying off debts for stock feed and her financial situation after September 1979 was as desperate as it had been before.)

Te Velde then appealed against the January termination of unemployment benefit and the September termination of special benefit. On 5 June 1980 an SSAT recommended that the first appeal be dismissed and the second appeal upheld. On 3 September 1980 a delegate of the Director-General affirmed both earlier decisions terminating unemployment and special benefit. Te Velde then appealed to the AAT.

Unemployment Benefit

The AAT concluded that, during the relevant period (February-August 1979), the applicant was not 'unemployed': although her work on the property produced no income, it was directed to maintaining and improving the value of her investment and making the property a viable concern. She could not, therefore, be said to be 'unemployed' any more than the applicant in *Brabenec* – see *Social Security Reporter*, no. 2, p.14.

Special Benefit

The AAT considered whether Te Velde qualified for special benefit for the period February-August 1979 (as an alternative to the teminated unemployment benefit) and the period from 21 September 1979.

The financial background against which these questions were considered was as follows:

1. The applicant owned (or was legally entitled to deal with) the property, letters of administration of her husband's estate having been granted in June 1978.
2. The property was mortgaged to the Commonwealth Development Bank for $20 000 and repayments of that mortgage were 'probably in arrears'.
3. A severe and prolonged drought in the district had depressed the market for the Te Velde property.
4. The property was producing no income, although its maintenance demanded a great deal of the applicant's time.
5. In September 1979 the Rural Assistance Board made a loan of $12 000 to Te Velde, secured by a second mortgage on the property. $10 000 of this was spent on improvements to the property, and $2000 to repay debts.
6. The local council had approved the sub-division of a 54 acre lot on the property and this was placed on the market in November 1977. Three sales were negotiated, in 1978, 1980 and in 1981: the first two had not been finalized but it seemed that the third sale (at a price of $20 000) would be completed.
7. In October 1980, the NSW government gave Te Velde a seven year loan of $5000 at 4% interest by way of drought relief.

The payment of special benefit is controlled by s.124 of the *Social Services Act:*

> 124 (1) Subject to sub-section(2), the Director-General may, in his discretion, grant a special benefit under this Division to a person –
>
> (a) who is not in receipt of a pension under Part III or IV, a benefit under Part IVAAA, an allowance under Part VIIA of this Act or a service pension under the *Repatriation Act* 1920;
>
> (b) who is not a person to whom an unemployment benefit or a sickness benefit is payable; and
>
> (c) with respect to whom the Director-General is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).

(Sub-section (2) excludes from special benefit any person who has been denied unemployment benefit because of his (or his union's) participation in an industrial dispute.)

The AAT pointed out that s.124(1) established preconditions (set out in paras (a), (b) and (c)) which had to be met before the Director-General could exercise the discretion to pay special benefit:

> They are the gate, as it were, into the field where the Director-General's discretion lies. Having passed through the gate, a claimant is entitled to a proper exercise in accordance with law of the discretion conferred upon the Director-General [see *Padfield v Minister of Agriculture, Fisheries and Food* (1968) AC 997]. But that is not to say that everyone who passes the gate is entitled to special benefit, for that would negate the width of the discretion which Parliament clearly intended to confer [cf *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492]. The discretion, though broadly expressed, is neither arbitrary nor completely unlimited. Its proper limits are to be found by looking at the Act and by considering its scope and object in conferring the discretion upon the Director-General (see *Padfield*, (supra) at pp 1032-1034 per Lord Reid and at p 1060 per Lord Upjohn).
>
> (Reasons for Decision, para. 40.)

The Departmental Instructions

The AAT observed that the Departmental Manual of the DSS listed various categories of people who would be paid special benefit. While 'the manual has no legislative force' nor was it binding on the AAT, it could 'serve a valuable