

come and that DSS forms were 'misleading'.

The AAT said:

[T]he applicant's claim really amounts to a claim of ignorance of the law, which of course, according to well-established principles affords him no assistance in this matter. Nor do I think that the departmental forms are misleading when read in conjunction with the Act. The relevant parts of the forms, read literally, could in my view, have formed in the mind of the applicant, the impression that his army earnings were excluded from income for the purposes of the Act.

(Reasons for Decision, p.5)

The Tribunal declared itself satisfied that the overpayment had occurred 'solely by reason of the failure or omission of the applicant to inform the department . . .'

The Tribunal was 'unable to say that the [DSS] erred in the exercise of [its] discretion [under s.140(2)] in determining that deductions of \$10 per week be made': Reasons for Decision, p.6.

#### Formal decision

The AAT affirmed the decision under review.

[Comment: The Tribunal gave the appearance of being confused on the legal basis for the DSS's recovery. That basis must be s.140(2), not s.140(1). No doubt, in deciding whether to exercise the s.140(2) discretion, the Director-General and the AAT might consider whether an 'overpayment' could have been recovered under s.140(1). That was the approach taken by the Tribunal in *Buhagiar* (1981) 4 SSR 34, where the AAT argued that 'principles of consistency, fairness and administrative justice' should control the discretion in s.140(2). On that basis, the Tribunal in this case could properly have asked: 'would this overpayment be recoverable under s.140(1)?' To answer that question, the Tribunal would have tried to isolate the 'effective cause' of the overpayment: see, for

example, *Hangan* (1982) 7 SSR 71.

In *Hangan*, the AAT found that the DSS had misled Hangan about her legal obligation to inform the DSS of changes in her circumstances; and that this misleading of Hangan made it improper to seek recovery under s.140(1) of the Act. (See also *Hales* (1982) 8 SSR 73.)

Why, we might ask, did the Tribunal in this case gloss over the misleading nature of the form on which Schuss was asked to supply details of his income? Why did not that misleading form affect the (hypothetical) recovery under s.140(1)?

The Tribunal also seems to have given too little attention to the amount of the weekly deductions from Schuss' benefit. If, as he said, he was experiencing hardship, this issue should have been investigated (as it was, for example, in *Hales* (1982) 8 SSR 73). So far as the Reasons for Decision show, this issue was not investigated.]

## Double orphan's pension: 'whereabouts' of parent

### KICKETT and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/11)

Decided: 12 October 1982 by A. N. Hall.

In January 1981, Rhoda Kickett applied to the DSS for a double orphans' pension for each of her two grandchildren, of whom she had had the care, custody and control since 1974, and for whom she was receiving child endowment (now called family allowance). The DSS granted these pensions in February 1981. In March 1981, Kickett applied to the DSS for these pensions to be back-dated to 1975. The DSS decided, after investigating this claim, that the pensions should be cancelled and the claim for back-dating rejected.

Kickett sought review of these decisions from the AAT.

#### The qualifications for double orphans' pension

Section 105B(1) of the *Social Security Act* provides that a double orphan's pension is payable to a person for a child if that person is eligible for family allowance for the child, and the child is a 'double orphan'.

Under s.105A(1), a 'double orphan' includes a child, both of whose parents are dead. Section 105A(2) provides that if one of the parents of a child is dead, the 'other parent shall be deemed to be dead' (for double orphan's pension purposes) if—

- the whereabouts of the other parent are not known to the claimant;
- the other parent has been convicted of an offence and sentenced to [and is serving a sentence of at least 10 years imprisonment]; or
- the other parent is . . . a mental hospital patient . . . for an indefinite period.

The two children, aged ten and nine years at the time of the claim, were born to

Kickett's son and a woman, Hansen. The children's father had died in 1972 and their mother had lost interest in the children, finally leaving them with their paternal grandparents in 1975.

#### Were the mother's whereabouts known?

Turning to the qualifications for double orphan's pension, the Tribunal said the question was not whether Hansen had abandoned her children but whether the whereabouts of Hansen were known to Kickett. The Tribunal explained:

26. To know a person's whereabouts is, in my view, to know where a person is capable of being found . . . As the dictionary definitions of 'whereabouts' make clear, there is encompassed within the ordinary meaning of that word, the notion of 'the locality of a person or thing' (the *Macquarie Dictionary*), 'the place in or near which a thing is' (the *Oxford English Dictionary*), or 'the place or general locality where a person or thing is' (*Webster's International Dictionary*). There is a sense of approximation inherent in the word. Thus it is not necessary, in my view, to have precise knowledge of a person's normal place of abode in order to know that person's whereabouts. It is quite consistent with ordinary usage to say that one knows the whereabouts of a person in circumstances where the person has no fixed place of abode but his or her usual haunts and associations are known so that the person is capable of being found.

27. In the context of s.105A(2) of the Act, it appears to me that before Mrs Kickett could be heard to say that the whereabouts of Lynette Hansen were unknown to her, she had to be able truthfully to affirm that the sum total of her knowledge concerning the places of residence or the usual haunts and associations of Lynette were insufficient to enable her to be traced if she were to put her mind to it. Being indifferent to the whereabouts of a person is not, in my view,

the same as not knowing the whereabouts of that person. It is, I think, implicit in the concept of the whereabouts of a surviving parent being unknown, that the claimant will take reasonable steps to pursue information in his or her possession to endeavour to trace that parent's whereabouts. After all, it may require no more than to make a telephone call or to check the electoral role.

Kickett had told the AAT that she did not know where the children's mother lived and that the mother had not visited the children or tried to contact them for the past five years.

However, the Tribunal found that Kickett was, and had been, aware that she could contact Hansen through her parents and that Kickett had contacted Hansen in 1980 in order to obtain her consent to changing the children's surname.

On the basis of that finding, Kickett knew Hansen's whereabouts and was not, therefore eligible for double orphan's pension.

#### Discretion to 'back-date' pension

The AAT noted that, throughout much of the period for which back-dated pensions were claimed, Kickett had received a foster parent benefit under the *Welfare and Assistance Act 1961* (WA).

The Tribunal said that, if Kickett had been qualified for double orphan's pension, it would not have exercised the discretion to back-date the pension beyond the date of the claim in January 1981. (This discretion is conferred on the Director-General by s.102(1)(a) of the *Social Security Act*.) To exercise the discretion would have given Kickett 'a double benefit which, in my view, Parliament would not have intended': Reasons for Decision, para. 33.

#### Formal decision

The AAT affirmed the decisions under review.