

PANAGIOTIDIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/180)

Decided: 15 November 1982 by G. D. Clarkson.

The Tribunal *affirmed* a DSS refusal to grant invalid pension to a 46-year-old

former process worker and mother of four children after accepting medical opinion that she was consciously exaggerating her shoulder disability.

Federal Court decisions

DIRECTOR-GENERAL OF SOCIAL SERVICES v HANGAN

Federal Court of Australia

Decided: 17 December 1982 by Fox, Toohey and Fitzgerald JJ.

This was an appeal from the decision of the AAT in *Hangan* (1982) 7 SSR 71, where the Tribunal had decided that the Director-General could not recover from Hangan overpayments of child endowment.

The recovery was based on s.140(1) of the *Social Security Act*, which provides that if endowment has been paid 'in consequence of a failure or omission to comply with any provision of this Act', and that payment would not have been paid but for the ... failure or omission', the amount paid is 'recoverable ... as a debt due to the Commonwealth'.

It was common ground before the Tribunal that Hangan had failed to notify the DSS (as she was required by s.104A, of her children's absence from Australia, and that she should not have been paid endowment while her children were overseas (for some six years). However, the AAT found that the DSS had been given enough information to alert it to the absence of the children and that the 'effective cause' of the overpayment 'was the department's failure to review when learning of the applicant's circumstances'.

This approach was based on a series of AAT decisions (for example, *Matteo*, 5 SSR 50 and *Forbes*, 5 SSR 50) that an overpayment was only recoverable under s.140(1) if the 'failure or omission by a person to comply with the provision of the Act [was] the effective and not merely a contributory cause of the overpayment'.

This appeal was brought under s.44 of the *Administrative Appeals Tribunal Act* which allows a party before the AAT to appeal to the Federal Court, 'on a question of law', from a decision of the Tribunal.

In this appeal, the Director-General raised two questions of law.

1. Jurisdiction to review s.140(1) recovery

The Director-General first argued that the AAT had no jurisdiction in this matter, because recover of an overpayment under s.140(1) did not involve a 'decision' by the Director-General: 'recoverability springs from the circumstances set out in the sub-section; it is a self operating provision' (Toohey J, pp.9-10). And an essential pre-requisite of the AAT's review jurisdiction was a 'decision' of the Director-General (see Part XXIVA of the

Administrative Appeals Tribunal Act, now repealed and replaced by s.15A of the *Social Security Act*: (1981) 2 SSR 19).

The Court rejected this argument.

Toohey J listed the 'decision' which the Director-General had made in this matter, in the context of s.140(1):

It was a decision that endowment that had been paid was not payable, that it had been paid in consequence of a failure or omission to comply with s.104A, that it would not otherwise have been paid, that it was recoverable and that it should be recovered. Hence Mrs. Hangan was entitled to seek a review of the Director-General's decision by the Administrative Appeals Tribunal. (p.12).

2. Does recovery depend upon finding the 'effective cause' of overpayment?

The Director-General then argued that the AAT was mistaken in deciding that recovery under s.140(1) was only possible if Hangan's failure or omission had been the 'effective cause' not merely a contributing cause, of the overpayment.

The Federal Court accepted that argument. Toohey J referred to two decisions on the meaning of s.26(d) of the *Income Tax Assessment Act*. That provision taxes 5% of any amount 'paid in a lump sum in consequence of retirement'. The High Court had decided that this provision did not require that retirement be the dominant cause of the payment, only that 'the payment follows as an effect or result of the retirement' (*Reseck* (1975) 133 CLR 45, 51). A similar approach was taken by the Federal Court in *McIntosh* (1979) 25 ALR 557.

The words 'but for' in s.140(1) were (Toohey J said) 'a corollary of the words "in consequence of" and serve to explain those words' (p.15). It followed that the AAT should have asked itself, not whether Hangan's failure to comply with s.104A was the effective cause of the overpayment, but —

whether any of the payments of child endowment made to Mrs. Hangan between 1972 and 1978 were made as a result of any failure on her part to comply with s.104A and whether any of those payments would have been made had there not been such a failure. (Toohey J, p.15).

The result of the appeal

Each member of the Court was strongly critical of the actions of the DSS. For example, Fox J said 'Mrs Hangan has been sufficiently harassed, due to the patently crude and inefficient handling of her case by the Department'.

Fitzgerald J would have dismissed the Director-General's appeal (even though he agreed that the AAT had made an error on a question of law) because no

evidence had been placed before the AAT to establish that compliance by Hangan with s.104A would have led to her endowment being stopped.

But Fox and Toohey JJ declared that the AAT had jurisdiction to review the Director-General's decision to recover overpayment and repeated the interpretation of s.140(1) quoted above.

Toohey J said it was 'for the Director-General to consider whether he should take any further steps in the matter. In the circumstances, it would be quite inappropriate for him to do so' (p.21).

DIRECTOR-GENERAL OF SOCIAL SECURITY v HARRIS

Federal Court of Australia

Decided: 8 November 1982 by Fox, Northrop and Ellicott JJ.

This was an appeal to the Federal Court, under s.44 of the *Administrative Appeals Tribunal Act*, against the AAT's decision in *Harris*: see (1981) 3 SSR 22.

The difficult problem in this case is caused by the simple fact that many pensioners have private income which fluctuates: is that fluctuating income to be averaged? Or should it be left in 'peaks' and 'troughs', and have a fluctuating effect on the pension payable to the pensioner?

The Tribunal had decided that, in calculating the amount of age pension payable to Harris (and the effect of any private income on that pension), the DSS had to work on a 'pension year': to examine, on each anniversary of the original grant of pension, the amount of private income received over the previous 12 months, and then to fix the appropriate amount of pension payable for that (previous) period. This result, the Tribunal said, was based on the terms of s.28 of the *Social Security Act* which fixed the maximum rate of pension at an annual sum and directed that the 'annual rate' of pension be reduced by taking account of 'the annual rate of [private] income'.

By a majority (Fox and Northrop JJ), the Federal Court allowed the Director-General's appeal and adopted a different approach to the calculation of the rate of pensions. However, the majority judgments are obscure; and what follows is only an estimate (perhaps intelligent) of their effect. (By contrast, the dissenting judgment of Ellicott J is a model of clarity.)

It seems that both Fox and Northrop regarded s.45 as critical. This section obliged a pensioner to notify the DSS when-