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 exaggering 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-

ever her 'average weekly rate of [private] income' over eight weeks was higher than $20 a week or higher than the average rate last notified. The section gave the pensioner 14 days in which to make this notification. Section 46 then allowed the DSS to vary the rate of pension, 'having regard to the income of a pensioner'.

Fox took the view that the calculation of private income and, consequently, of the rate of pension was to be based on (flexible) blocks of eight weeks:

> This means a retrospective adjustment, in the light of later knowledge. What she should have done [when her income increased] was to give notice under s.45. The period of eight weeks there referred to is in my opinion a 'rolling' one, in the sense that one is always looking back to the immediately preceding period of eight consecutive weeks. (p.5)

Northrop rejected the argument that 'a pension year should be used as a basis for determining amounts of ... pensions'. Rather, [t]he calculations [of pensions] are based on rolling periods of eight consecutive weeks plus fourteen days and are designed to protect the revenue from the payment of amounts of pension in excess of the amounts properly payable' (p.26). The amounts of pension which were payable had to be calculated each fortnight, 'by dividing the annual rate of pension by twenty-six' (p.27). He conceded that '[t]his may appear to be an extremely difficult exercise, but with the use of computers the mechanics are made simple' (p.26). [It is worth noting that these provisions date from the *Old Age Pension Act* 1908, some time before computers were available for calculating pension levels.]

The effect of these judgments appears to be that the level of pension payable to a pensioner is determined each fortnight, using the latest 'eight week average weekly income' as the critical information on which the income test is applied. That 'eight week average weekly income' must, of course, be multiplied by 52 (to give an annual rate of income), the income test in (s.28(2)) applied and the resulting annual rate of pension divided by 26 to give the fortnightly pension. The 'eight week average weekly income' may be replaced at any time (the eight week periods are both 'rolling' and 'overlapping', to adopt the language of Northrop).

In his dissent, Ellicott adopted the approach of the AAT, and said that the 'pensioner years' (beginning on the date when a pension was first granted and on each anniversary of that date) should be used as the basis for assessing the effect of private income on the pension payable to a pensioner. This assessment was to be done annually and retrospectively – and the DSS would then need to recover overpaid pension or pay out underpaid pension from the past year.

Letter

CALCULTING THE INCOME TEST – A COMMENT ON THE HARRIS DECISION

Dear Editor,

The Federal Court decision in the appeal by the Director-General of Social Security against the Administrative Appeals Tribunal decision in the case of HARRIS will no doubt be the subject of much examination and discussion. A point which interests me is whether an overpayment calculated in accordance with the Court's ruling will be higher or will be lower than that calculated under the Tribunal ruling.

While the result will no doubt generally depend on the particular circumstances of the individual case, it does seem that in many instances the method of calculating an overpayment as indicated by the Court's decision may well result in a lower amount than by the method favoured by the majority of the Tribunal. I think this may result from the pensioner being given the benefit of the fourteen days in which to notify of the variation in income which the Court referred to as being 'in the nature of a period of grace'.

Another point of particular interest is the 'rolling concept' in relation to the period of eight consecutive weeks referred to in s.45(1) of the Social Security Act, and just what it is the pensioner is required to notify. Where a person's income increases to a fixed rate it would seem that the average weekly rate of income in the previous period of eight weeks will increase for each of the suceeding eight weeks before it stabilises. Does this mean, one wonders, that the pensioner is obliged to notify eight times? Furthermore, s.45(1) does not require the pensioner to notify of his new rate of income but of the amount received in the period of eight weeks. Dividing this amount by eight will not, of course, show what the new rate of his income is.

One might think there is still a considerable area of uncertainty about the intended, and the actual, effect of the income test and the obligations imposed on pensioners.

D.E. Franklin,
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Legislation

Sickness benefit

As foreshadowed in the last issue of the *Reporter*, s.108 of the *Social Security Act* has been amended to remove a restriction on grant of sickenss benefit.

This restriction, the DSS had claimed, resulted from s.108(1)(c) which required a claimant for sickenss benefit to satisfy the Director-General that she had, because of incapacity, suffered a loss of income. According to the DSS a person who was unemployed or who was a student or out of the work-force, before falling sick (and becoming incapacitated) could not show a loss of income.

A new sub-paragraph and a new subsection, now extend the eligibility for sickness benefit to any person who, but for the incapacity would have qualified for unemployment benefit s.108(1)(c)(ii), and to any person who was receiving invalid pension, sheltered unemployment allowance or rehabilitation allowance became temporarily incapacitated and lost that pension or allowance s.108 (1AA).

These amendments have been introduced by the *Social Security Amendment Act* 1982.