

## Special benefit: remand prisoner

### TROTTER and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. S82/71)

**Decided:** 4 March 1983 by R.K. Todd.

Anthony Trotter asked the AAT to review a DSS refusal to pay him special benefit for a period of about five months in 1977.

Trotter had been convicted of an offence in May 1977. He lodged an appeal against his conviction and, pending the outcome of this appeal, was held in the remand section of a gaol. It was for this period that the DSS refused to pay special benefit.

In 1977, s. 124 of the *Social Services Act* gave the Director-General a discretion to grant special benefit to a person if the Director-General was satisfied that the person was 'unable to earn a sufficient

livelihood for himself . . .'

Section 133(1)(a) of the Act provided that benefit was not payable to a person for 'any period during which . . . he is, following upon his conviction for an offence, imprisoned . . .'

#### 'Imprisonment following conviction'

The Tribunal decided that s. 133(1) prevented payment of special benefit to Trotter. It was not necessary that the imprisonment in question was part of a sentence imposed as a result of the conviction. It was enough that the imprisonment followed the conviction, that is, came after it. So the fact of Trotter being held on remand after his conviction was enough to bring s. 133(1) into play, even if no sentence of imprisonment had been imposed on him.

#### The s. 124 discretion

The AAT also suggested, without deciding, that the discretion in s. 124 might not be exercised in favour of an imprisoned person because he could be 'receiving in gaol a "sufficient livelihood", albeit at a very fundamental level':

[T] here is much to be said for the view that s. 124 was intended to be used as a 'life support' provision and that it is not appropriate to grant it to a single person, as was the applicant, who is being maintained by the State during a period of imprisonment.

#### Formal decision

The AAT affirmed the decision under review.

## Special benefit: resident of welfare hostel

### GOW and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. S82/13)

**Decided:** 18 February 1983

by G.D. Clarkson

Graeme Gow applied to the AAT for review of a DSS decision refusing to pay him special benefits for two periods in 1980-81.

At that time, Gow was 15 years of age and was living in a hostel operated by the

South Australian Community Welfare Department. That Department provided him with full board, clothing and pocket money. He also had occasional casual work which earned him small amounts of money.

The DSS had refused to pay special benefit because the Director-General was not 'satisfied that [Gow was] unable to earn a sufficient livelihood for himself' — a basic requirement for special benefit eligibility under s.124(1) of the *Social*

*Security Act*. The Tribunal agreed:

The material support supplied by the State Department of Community Welfare . . . supplemented by his own modest earnings justified the delegate in concluding that during the relevant periods the applicant was a person who was able to earn a sufficient livelihood for himself.

(Reasons for Decision, p. 5.)

#### Formal decision

The AAT affirmed the decision under review.

## Overpayment: suspension of current pension

### KIRBY & KIRBY and DIRECTOR-GENERAL OF SOCIAL SECURITY

(Nos N82/27 and N82/60)

**Decided:** 28 January 1983 by W. Prentice.

Ronald Kirby had been granted an invalid pension, and his wife a wife's pension, in 1966. Until August 1982, Mrs Kirby had worked as a school cleaner. Her earnings were taken into account in reducing the level of each pension.

Between 1966 and 1974, the DSS obtained information about Mrs Kirby's current wage both from her and from her employer. In 1975, 1976 and 1977 the DSS made no attempt to review her earnings (having abandoned its annual reviews of all pensions). In 1978, the DSS sent out a review form, to which Mrs Kirby did not respond. In 1980, the DSS found that her earnings had risen and calculated that each of them had been overpaid \$3426. The DSS then suspended the Kirbys' pensions in order to recover these overpayments.

#### Power to suspend

Section 46(1) of the *Social Security Act* gives the Director-General a discretion to

cancel or suspend a pension where a pensioner has failed to comply with s.45 (which obliges a pensioner to report changes in income).

The Tribunal found that the Kirbys had, on several occasions between 1974 and 1979, failed to report increases in Mrs Kirby's earnings, as required by s.45(2). That failure was enough to 'support the respondent's taking action of the kind which he did under s.46(1)(b) of the Act': Reasons for Decision, para. 7. The AAT assumed that suspension under s.46(1)(b) would be justified where the failure to report an increase in earnings was 'a contributory cause of (as distinct from *effective* cause of), an overpayment'; and the Tribunal referred to the Federal Court decision in *Hangan* (1982) 11 SSR 115: Reasons for Decision, para. 4.

The Tribunal rejected an argument that the DSS's change in review procedure (between 1974 and 1978) had confused the Kirbys about their obligations.

#### Discretion

However, the AAT decided that the Kirbys' pensions should be restored because Mrs Kirby had, in November 1982, become

totally incapacitated for work (as her husband had been since 1966).

Taking into account that the DSS's conduct might have contributed to the overpayment, 'the nature of the legislation (viz the welfare of disadvantaged citizens) with which the Tribunal is concerned, and the physical and financial circumstances of the applicants since November 1982' the Tribunal decided that the suspension should be stayed until either of the Kirbys was able to earn income or until either of them received 'a significant capital sum': Reasons for Decision, para. 8.

(In fact, the DSS had resumed payment of the Kirbys' pensions in August 1982, following a fall in Mrs Kirby's earnings.)

#### Formal decision

The AAT varied the decision under review so as to stay action to recover the balance of overpayments until either of the applicants obtained regular work which in the Director-General's opinion brings in income then comparable to that being earned by the female applicant in 1981, or either of them enjoys the gain of what is a significant capital sum in the opinion of the Director-General.