Age pension or special benefit

BAPTIST and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/508)

Decided: 18 April 1984 by W.A.G. Enright, M. McLelland and J. McClintock.

Baptist migrated to Australia on 3 September 1982, when he was 58 years-of-age. He did not qualify for an age pension when he reached 65 in 1978; but had to wait until 3 September 1982 when he had completed 10 years continuous residence in Australia (as required by s.21(1)(b) of the *Social Security Act*).

In October 1980, Baptist had applied for a special benefit but the DSS rejected that claim. In May 1982, he attempted to lodge a claim for an age pension, in anticipation of completing his 10 years residence but the DSS refused to accept the claim.

Because of his wife's illness, Baptist did not lodge the claim for his age pension on 3 September 1982 but delayed lodgment until 15 October 1982. The DSS granted him an age pension with effect from 21 October 1982.

Baptist appealed to an SSAT, claiming that payment of his age pension should date from 3 September 1982 or that he should be paid special benefit for the period between 3 September 1982 and 21 October 1982. The SSAT recommended against this appeal and, on 3 June 1983, the DSS confirmed its earlier decision. Baptist then applied to the AAT for review of the DSS decision of 3 June 1983.

No retrospective payment of age pension

Section 39 of the *Social Security Act* provides that a pension

> shall be paid from a date determined by the Director-General, but the date so determined shall not be prior to the date on which the claim for the pension was lodged or later than the first pension pay day occurring after the date on which the claim was lodged . . .

The AAT said that, on the merits, Baptist had 'made out a strong case for payment of his pension to commence on 3 September 1982'. The merits included the 'quite unsatisfactory' response from the DSS, when he tried to lodge his claim in advance, and his wife's illness.

But, the AAT said, the law did not permit retrospective payment of the pension. However it did allow payment from the date of lodgement – 15 October 1982 – and the merits of this case warranted payment from that date.

Special benefit

Section 124 of the *Social Security Act* gives the Director-General a discretion to pay a special benefit to a person where the Director-General is satisfied that the person is unable, 'by reason of age' physical or mental disability or domestic circumstances, or for any other reason . . . to earn a sufficient livelihood . . .'

The AAT first decided that Baptist's claim for special benefit lodged in October 1980 did not relate to a closed period, nor had it become stale. It was properly before the AAT, because the Director-General had confirmed, on 3 June 1983, his decision not to grant that benefit (after review by an SSAT); and so the jurisdictional requirements of s.15A of the *Social Security Act* were fulfilled.

The basic question was whether Baptist was, between 3 September 1982 and 15 October 1982 'unable to earn a sufficient livelihood'. That question, according to *Te Velde* (1981) 3 *SSR* 23, should be answered by considering whether he could reasonably be expected to earn a livelihood. The AAT said that it was not reasonable to expect Baptist to work at the age of 68:

> 31. As to working for a wage, we think that the thrust of the Act clearly rejects the view that a person over the age of 65 can be reasonably expected to work. Our general system of social security does not require that; indeed to require it might well be to impose a burden which is incapable of discharge.

Baptist had investment funds of about $25 000. But these were not capable, the AAT said, of providing income for living at a fundamental level (although 'capital of generous proportions might require an exercise of discretion against the grant of a special benefit'). And a pension of $10 a week, payable only in Sri Lanka (because of currency exchange restrictions) could not affect Baptist's entitlement.

Finally, the AAT rejected the DSS' argument that it should refuse special benefit because its grant would circumvent a refusal to back-date payment of the age pension. On this point, the AAT said:

> We find this reasoning for the rejection unacceptable. It reflects confusion between the result of granting the special benefit and the purpose for which the application was made. It ignores too the fact that the Act is welfare legislation which should be administered beneficially . . . We see the purpose of the Act as a relief of social insecurity and the provisions of the Act as a mechanism by which the ends are achieved.

(Reasons, para. 26).

Formal decision

The AAT substituted, as the commencing date for payment of age pension to Baptist and his wife, the date 15 October 1982; set aside the decision not to grant special benefit to Baptist and ordered that he be granted special benefit from 3 September 1982 to 15 October 1982.

Separation under one roof: 'married' or 'unmarried'

O'BRIEN and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/92)

Decided: 26 January 1984 by I.R. Thompson.

Jean O'Brien had been granted an invalid pension, because of asthma and alcoholism, in 1976. At that time she had been separated from her husband for four years and she was living with her four children.

In 1976, the children 'began to get into trouble with the police' and, in June 1977, O'Brien's husband moved into her house in order to try to keep them out of trouble.

At the end of 1978, the DSS learned that her husband was living in her house and decided that she should be paid at the married rate, taking account of her husband's income (from unemployment benefits). The DSS also decided that she had been overpaid since June 1977 and the overpayment should be recovered by deducting $10 a fortnight from her pension.

The legislation

Section 28 of the *Social Security Act* provides for an invalid pension to be paid to a 'married person' whose spouse has income at a rate lower than the rate for an 'unmarried person'.

'Married person' according to s.18(1), 'means a person in relation to whose income sub-section 29(2) applies'.

Section 29(2) provides that

> the income of a husband or wife shall –
> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines,
> be deemed to be half the total income of both.

'Living as part of the same family unit'

The Tribunal found, on the evidence, that O'Brien and her husband had lived in the same house since June 1977. They had occupied separate rooms and had not had a sexual relationship. However, they had shared meals and responsibility for the children. At various times, each of them had paid the rent and done the family's washing. Household expenses had been pooled. They represented themselves to outsiders as a married couple

but had no common social life. The children were now adults and only one of them remained in the house: she had children of her own and was receiving supporting parent's benefit.

The Tribunal referred to decisions in *Reid* (1981) 3 *SSR* 31; *McQuilty* (1982) 6 *SSR* 61; and *'A'* (1982) 8 *SSR* 79, where the AAT had said that it was a sufficient 'special reason' for disregarding a spouse's income, if a married couple were living separately under the one roof – that is, where the marriage had broken down.

However, the AAT said, the separation between O'Brien and her husband had ceased when he returned to her house:

> I am satisifed that the family was reintegrated by his return, and that he and the applicant both lived thereafter as integral members of the family . . . The scheme of the Act is such that it is not inequitable that section 29(2) should apply to the applicant and that she should be regarded as a married person for the purposes of Part III of the Act. She and her husband were living as part of the same family unit. The husband was qualified to receive, and did receive, unemployment benefits as a married man. It is certainly not inequitable that the total amount payable to them both under the Act should be the same as that payable to a happily married couple qualified for invalid pension and unemployment benefit respectively.

(Reasons, paras.13-4).

Recovery of overpayment: no hardship

Accordingly, there had been an overpayment to O'Brien between June 1977 and February 1979; and the Director-General had a discretion to recover that overpayment under s.140(1) or s.140(2). (In the present case, recovery was being sought under s.140(2) – by deductions from her pension.)

In exercising that discretion, 'one of the most important considerations' was the fact that public moneys had been paid to a person not entitled to receive them. But compassionate factors should also be considered. In the present case, recovery at the rate of $10 a fortnight would not cause hardship because the family unit until now had income from two invalid pensions (Reid and her husband), supporting parent's benefit and family allowances (Reid's daughter).

Formal decision

The AAT affirmed the decision under review.

Income test

TURNER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/453)

Decided: 6 April 1984 by J.O. Ballard.

This was an appeal against a decision to seek recovery of an alleged overpayment of unemployment benefits under s.140(1) of the *Social Security Act*.

While on unemployment benefits, Turner had received a refund of his superannuation contributions from the Hospitals Superannuation Board. The payments included an interest component but the Superannuation Board was unable to tell Turner how much of the refund was interest. The DSS argued that all these moneys were income.

The legislation

Section 140(1) states that any payment of benefit, which would not have been made but for a failure or omission to comply with the *Social Security Act*, is recoverable in a court of competent jurisdiction from the person to whom the payment was made.

Section 130(1) of the Act requires a person in receipt of unemployment benefits to declare any income received to the DSS. Turned had not declared his superannuation refund as income.

The AAT's assessment

The Tribunal followed the decision in *Lawrie* (see this issue) and said refund of the applicant's superannuation contributions was not income as defined in s.106 of the Act but rather capital. The interest on these payments, the Tribunal said, was income.

The Tribunal said that clearly there had been no false statement or omission in relation to the refund of superannuation contributions as these were not income. In relation to the interest component, 'the applicant could not be expected to comply with a requirement to supply information as to the income component if his own superannuation board could not define it for him': Reasons, para 12.

Recovery in court would not be possible unless the sum to be recovered could be stated, and it was impossible here to separate out the interest component.

Formal decision

The Tribunal set aside the decision to recover.

HALDANE-STEVENSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/94)

Decided: 17 April 1984 by E. Smith.

James Haldane-Stevenson held an age pension, which was reduced on account of his income from a UK pension, investments and a retirement allowance. He asked the DSS to off-set the income by taking account of expenses which he had incurred in the writing of a book. He expected the book to be published and to produce income in several years time.

The DSS refused to off-set that expenditure and Haldane-Stevenson applied to the AAT for review of that decision.

Not all expenses may be deducted

The Tribunal pointed out that 'income' was defined in s.18(1) of the *Social Security Act* to include 'profits earned, derived or received'. In assessing those profits, one could deduct expenses incurred in making them.

But expenses incurred on one enterprise could not be off-set against other income. In particular, the approach developed under the *Income Tax Assessment Act* 1936 (Cth) was not relevant to the calculation of income under s.18(1) of the *Social Security Act*. On this point, the AAT followed that the decisions in *Sheppard* (1983) 13 *SSR* 127; *Szuts* (1983) 13 *SSR* 128 and *Shafer* (1983) 16 *SSR* 159.

Formal decision

The AAT affirmed the decision under review.

LAWRIE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/450)

Decided: 4 April 1984 by J.O. Ballard.

Marjorie Lawrie retired from Telecom Australia (around July 1983) and was granted a widow's pension by the DSS. At the time of her retirement she was granted 'interim superannuation benefits' of $150 per fortnight, pending settlement of her superannuation entitlements.

The DSS decided that those payments were income and that her widow's pension should be reduced accordingly. Lawrie applied to the AAT for review of that decision.

After this application was lodged, her former employer decided that she was entitled to a lump sum superannuation payment of $11 804, from which $2357 ('the interim lump sum already paid to you') was deducted, leaving a payment of $9447.

Income or capital?

Section 18 of the *Social Security Act* defines 'income' as meaning 'any personal earnings, moneys, valuable consideration or profits earned, derived or received by [a] person for his own use or benefit by any means from any source whatsoever . . .'

The Tribunal said that the standard distinction between income and capital receipts was not obliterated by s.18 of the Act: 'If the legislature had intended this result in a beneficial or remedial Act one would have expected this to be stated in express terms': Reasons, para. 6. The Tribunal continued:

> As I see it, the word 'moneys' must be construed as being related to personal earnings, involving periodical payments, or with valuable consideration or profits earned for services or benefits earned. Such construction is consistent [with] the reference to 'periodical' payment or benefit by way of gift or allowance later in the definition. I do not think the definition of income was intended by Parliament to cover capital pay-