Supporting parent's benefit: maintenance is 'income'

MALARBI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/459)

Decided: 29 November 1983 by R. Balmford.

Guiseppina Malarbi had been granted supporting parent's benefit after separating from her husband.

She was unable to occupy the matrimonial home (because it was occupied by tenants) so the Family Court ordered her husband to pay $50 a week maintenance to cover the cost of rental accommodation. The DSS treated this maintenance as Malarbi's income and reduced the level of her benefit. She asked the AAT to review this decision.

The legislation

Section 18 of the *Social Security Act* defines income as

> . . . any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit from any source whatsoever
> . . .

Maintenance for accommodation is 'income'

Malarbi argued that it was unfair to treat the maintenance as income: it was no more than the provision of alternative accommodation; and, if she had been able to occupy the matrimonial home (rather than receive the maintenance), her benefit would not have been reduced at all.

The AAT referred to an earlier decision in *Hoy* (1983) 15 *SSR* 150, where maintenance payments had been treated as income even though the payments were intended to cover the husband's share of mortgage payments on the matrimonial home.

The AAT adopted that decision. While the Tribunal sympathised with Malarbi's argument, the Act required benefits to be calculated 'with regard to income, not with regard to assets'. Malarbi's maintenance 'was "moneys received by her for her own use or benefit" and, thus, as income, was properly taken into account in the calculation of her supporting parent's benefit': Reasons, para. 8.

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: share dividend income

HUGGINS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/41)

Decided: 23 December 1983 by I. R. Thompson.

Paul Huggins had been paid unemployment benefit from 13 April 1982. On 6 September 1982 he told the DSS that in the previous two weeks he had received a $15 annual dividend on shares. The DSS treated that amount as income received in that two week period. Under the stringent income test then in force, the DSS reduced the unemployment benefit payable to him for that period by $4.50.

After an unsuccessful appeal to an SSAT Huggins applied to the AAT for review of that decision.

Statements by DSS

When Huggins had first applied for unemployment benefit he had been told by officers of the DSS that any share dividends would be treated as if received pro rata each week throughout the year.

However, the DSS was subsequently advised by the Attorney-General's Department that the *Social Security Act* did not permit this 'spreading out' of share dividends, which had to be treated as income for the period when received.

Dividends from shares: income over a year?

Section 106(2) of the Act provides:

> Where a person is entitled to receive income by way of periodical payments made at intervals longer than one week, that person shall be deemed to receive in each week an amount proportionate to the number of weeks in each period in respect of which he is entitled to receive payment.

Did this section apply to the applicant? The AAT examined the nature of share dividends and concluded:

> . . . the entitlement of a shareholder to receive a dividend usually does not arise until after the dividend has been declared. He cannot, I consider, properly be described as 'as a person entitled to receive income by way of periodical payments'.

Another provision of the Act, s.114(1A) (since repealed) did not assist Huggins: it provided that a person's unemployment benefit should be reduced if the person's 'income exceeds $6 per week'. There was no justification in that section for 'spreading' receipts of income.

Case for *ex gratia* payment

Although the DSS had been correct in reducing the rate of Huggins' benefit, the AAT considered that this was a proper case for an *ex gratia* payment of $4.50. The applicant had relied upon the information supplied by the DSS and, if correct advice had been given, he could have disposed of his shares and avoided any reduction of his benefit:

> He may well have a valid equitable claim against the Department for loss suffered as a result of negligent mis-statement, although the cost of pursuing such a claim would be out of proportion to the quantum of the loss.

(Reasons, para. 17)

Formal decision

The AAT affirmed the decision under review.

Age pension: family trust

ROBERTS and ROBERTS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/329)

Decided: 15 November 1983 by C.E. Backhouse, M. McLelland, and G. Grant.

On 24 August 1979, Mr Roberts applied for an age pension and his wife applied for a wife's pension. On 7 February 1980 the DSS granted pensions to the Roberts, adjusted to take account of income from a family trust.

The Roberts asked the AAT to review the decision to take that income into account.

The trust arrangement

The family trust had been established in July 1979, when Mr and Mrs Roberts transferred several investment properties and building society accounts to the trust. The trustees were Mr and Mrs Roberts and the beneficiaries of the trust were named as Mr and Mrs Roberts, their son and their descendants. According to the trust deed, the trustees had complete discretion to pay the investments or income of the trust to any of the beneficiaries. However, Mr Roberts told the AAT that the intention was that the proceeds of the trust fund would be paid only to their son.

The legislation

Section 47(1) of the *Social Security Act* provides:

> If, in the opinion of the Director-General, a claimant or a pensioner has directly or indirectly deprived himself of income in order to qualify for, or obtain, a pension, or in order to obtain a pension at a higher rate than that for which he would otherwise have been eligible, the amount of the income of which the Director-General considers the claimant or pension has so deprived himself shall be deemed to be income of the claimant or pensioner.

Deprivation of income: intention necessary

The AAT considered that for s.47(1) 'to operate it is necessary to show that the applicant has deprived himself or herself of income and that he or she has done so with the intention to qualify for a pension or for a higher rate of pension': Reasons, para.24.

The transfer of assets to the trust was clearly a deprivation of income. As to their intention the Tribunal commented:

> Having regard to the fact that he and his wife were the Trustees of the Trust and that it was within their discretion to distribute the whole of the income to themselves, we are unable to accept that their decision to set up the Trust was divorced from the notion to apply for pensions, particularly in the light of their awareness of the means test.
> The closeness in time of the two events, namely the transfer of the assets to the Trust and their applications for pension, raises in our minds a strong possibility that each of the applicants was aware such transfer would have an impact upon or affect their eligibility for a pension . . .

(Reasons, para. 23)

The AAT concluded that it was the intention of the applicants to deprive themselves of income to qualify for a pension at a higher rate and that the trust income was correctly taken into account by the DSS.

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: wife's income

KARRASCH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W81/39)

Decided: 21 December 1983 by R.K. Todd

Winifried Karrasch asked the AAT to review a DSS decision that he had been overpaid $4044 in unemployment benefit between July 1979 and January 1981.

The benefits were paid on the basis that neither Karrasch nor his wife had any income. (Indeed, Karrasch regularly informed the DSS that his wife was not working and had no income.) However, his wife was in full-time employment throughout this period, and the DSS claimed that her income should have been taken into account so as to reduce the level of Karrasch's benefit.

The legislation

Section 114(3) of the *Social Security Act* provides that, for the purposes of the income test for unemployment benefit,

> the income of a person shall include the income of that person's spouse, unless that person and his spouse are living apart –
> (a) in pursuance of a separation agreement in writing or of a decree, judgment or order of a Court; or
> (b) in such circumstances that the Director-General is satisfied that the separation is likely to be permanent.

Separation under one roof

Karrasch claimed that, throughout the whole period in question, he and his wife were living separate lives, although residing in the same house, and had formally separated in January 1981, reunited and separated again in March 1983.

The Tribunal accepted that Karrasch and his wife were living apart under the same roof, but doubted whether s.114(3) of the Act contemplated that type of 'living apart':

> It seems more likely that a strict separation is required. In the first place, paragraph (a) clearly contemplates full separation. The only alternative separation envisaged is that provided for in paragraph (b) wherein it is requisite that the Department be satisfied that the separation is likely to be permanent. I find it hard to conceive that the legislation requires the Director-General to assess whether a separation under the one roof is likely to be permanent.

(Reasons, para. 8)

Even if the Tribunal were wrong on this point and s.114(3)(b) was applicable, there was not sufficient evidence in this case that the 'separation' of Karrasch and his wife was, between 1979 and 1981, likely to be permanent. It followed that her income should have been taken into account and there had been overpayment.

Amount of overpayment

The Tribunal observed that, during the hearing, the DSS had checked the calculation of the overpayment and discovered that it amounted to $3707 rather than $4044. The Tribunal said it was 'disturbed at the number of times on which calculations appear to require alteration'.

Formal decision

The AAT varied the decision under review by fixing the amount of overpayment at $3707.37.

[**Comment**: The Tribunal's doubt about the relevance of Karrasch and his wife 'living separately under the one roof' might be contrasted with earlier AAT decisions. In *'A'* (1982) 8 *SSR* 79, the Tribunal decided that 'separation under the one roof' was a sufficient 'special reason' for disregarding a spouse's income. (See also *McQuilty* (1982) 6 *SSR* 61 and *Reid* (1981) 3 *SSR* 31.) **PH**]

COSTELLO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/210)

Decided: 8 December 1983 by J.B.K. Williams.

Ronald Costello applied to the AAT for review of a DSS decision to recover an overpayment of $2289 in unemployment benefit.

Costello had been paid unemployment benefit between March 1979 and May 1982. Throughout this period his wife was being paid invalid pension (first granted in 1967). The DSS claimed that Costello failed to reveal his wife's invalid pension when he first applied for unemployment benefit and that he failed to inform the DSS of his wife's income from that source on each of the fortnightly income statements lodged between 1979 and 1982.

The DSS argued that this was a failure to comply with the requirements of the *Social Security Act*, which required a beneficiary to notify the Department of changes in circumstances which could affect the beneficiary's entitlements. The DSS claimed that it could recover the overpayment directly from Costello under s.140(1) of the Act or by deductions from his wife's invalid pension under s.140(2).

No recovery from wife's pension under s.140(2)

Section 140(2) gives the Director-General a discretion to recover any overpayment (whatever its cause) from any pension, allowance, or benefit being paid to the person who had received the overpayment.

The AAT pointed out that, if any overpayments had been made in this case, they were received by Costello, not by his wife. The Department's claim to reduce her invalid pension could not be sustained.

No recovery from Costello under s.140(1)

The DSS based its decision to recover the money from Costello on s.140(1) of the *Social Security Act*. This provision allows the Director-General to recover any overpayment caused by a beneficiary's false statement or representation: see *Kaiser* in this issue of the *Reporter*.

According to the DSS, there were two distinct omissions by Costello which had led to him being overpaid.

- First, the DSS claimed that he had told the Department, when applying for unemployment benefit, that his wife was not receiving invalid pension. (Section 112(2) of the *Social Security Act* provides that the rate of unemployment benefit paid to a married person shall take account of any pension being paid to the beneficiary's spouse, if the beneficiary is dependent on the spouse.)

The original application form completed by Costello had asked whether his wife was receiving invalid pension and the answer 'no' had been written on the form. But Costello claimed that he had not written this answer and the AAT found that there was no evidence that Costello was responsible for this answer.

- Second, the DSS claimed that Costello had failed to reveal his wife's income from her invalid pension when completing his fortnightly income statements. (Section 114 of the *Social Security Act* provides for the rate of unemployment benefit to be reduced according to any income of the beneficiary or the beneficiary's spouse.)