Qualified for sickness benefit?

The AAT then considered whether Whitehead was, from the date of his injury in March 1979 to December 1982 (from which date his invalid pension began) qualified to receive sickness benefit.

The AAT said that Whitehead had suffered a loss of income from that date because of his incapacity. The only question was whether that incapacity was of a temporary nature.

The medical evidence showed that Whitehead suffered from an unusual disability, called Sudeck's atrophy, which weakened his left arm (he was left-handed) and caused him continuing pain. There was no specific treatment for this condition; although the pain might be removed by an operation which would have drastic consequences – paralysis on one side of the body and the loss of sight of one eye. The medical evidence also established that this condition had probably commenced immediately after Whitehead's injury in March 1979.

In view of that evidence, the AAT concluded that Whitehead's incapacity for work had not been 'temporary' in the sense outlined by the Federal Court in *McDonald* (1984) 18 *SSR* 188. That is, it could not have been said during that period that the disability would probably terminate at some time in the foreseeable future. Rather, his incapacity for work had been permanent throughout the period between March 1979 and December 1982.

Invalid pension

The AAT then considered whether this produced the result that Whitehead would receive no income for that period (because his 'deemed claim' was for sickness benefit rather than invalid pension and because s.39 prevented backdating of the payment of invalid pension beyond December 1972).

The *Social Security Act*, the AAT said, was 'not so inflexible as to lead to such a result.' Section 119(4) was 'intended to enable flexibility in the administration of social welfare legislation. Another such section [was] s.145': Reasons, para. 32.

Because s.119(4) deemed a workers' compensation claim to be a claim for sickness benefit for the purpose of fixing the date from which that benefit was payable, it was open to the Director-General to treat that deemed claim for sickness benefit as a claim for invalid pension.

The AAT noted that, according to the evidence, Whitehead was left-handed with a useless left arm and in more or less constant pain. It concluded that he had been permanently incapacitated for work and therefore qualified to receive an invalid pension from the time of his injury. The AAT concluded:

> I consider it reasonable, for the purpose of determining the date from which that pension was payable, to treat the claim for sickness benefit deemed to have been lodged by him on 4 April 1979 as a claim for invalid pension, being the appropriate claim in the circumstances, and as having been lodged in accordance with the Act.

(Reasons, para.37)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Whitehead be granted an invalid pension from April 1979.

Special benefit

MACPHERSON and SECRETARY TO DSS
(No. N83/892)

Decided: 25 January 1985 by J.O. Ballard.

Robert Macpherson entered into a share-farming arrangement with his father in 1973. Macpherson was to farm a property owned by his father and retain two-thirds of the gross income. However, drought conditions between 1974 and 1984 reduced the farm's income so that it no longer provided a sufficient livelihood for Macpherson and his family.

In November 1977, Macpherson was granted special benefit; but the DSS cancelled this benefit in May 1978 because of his failure to supply it with a copy of his income tax return.

Macpherson was granted special benefit again from June 1980; but the DSS cancelled it in December 1982, again on the ground that Macpherson had failed to provide it with a copy of his income tax return for the previous year.

Macpherson then appealed to Director-General of Social Security under s.15 of the *Social Security Act*. That appeal was considered by an SSAT, which recommended that the cancellation of Macpherson's special benefit be affirmed. The Director-General adopted that recommendation and affirmed the cancellation.

Macpherson then asked the AAT to review that decision on three grounds.

(1) Because there was no obligation on Macpherson to provide the DSS with a copy of his tax return;
(2) because the procedures adopted by the Director-General in dealing with his s.15 appeal had denied Macpherson natural justice; and
(3) because, at all relevant times, Macpherson had been unable to earn a sufficient livelihood.

The legislation

Section 124 of the *Social Security Act* gives the Director-General a discretion to pay special benefit to a person who is 'unable to earn a sufficient livelihood for himself and his dependants (if any)'. At the time of the decision under review, s.15 allowed a person affected by any decision under the Act to appeal to the Director-General who could 'affirm, vary or annul the . . . decision'.

Obligation to provide information

The AAT said that the DSS had not been wrong in requiring Macpherson to produce his income tax return. Where information, such as that contained in the income tax return, was ' peculiarly within the knowledge of a party', it was reasonable to require that party to produce the information so as to satisfy the DSS as to his inability to earn a sufficient income.

Denial of natural justice

However, the AAT said, the DSS had not given Macpherson sufficient time to produce his income tax return before cancelling Macpherson's special benefit. That failure was a denial of natural justice. Moreover, the action of the Director-General in adopting, automatically, the recommendation of the SSAT showed that the Director-General had not properly considered Macpherson's appeal under s.15 of the Social Security Act.

The nature of AAT review

The denial of natural justice and the failure to fully consider Macpherson's appeal could have made the cancellation decision void, the AAT said.

However, it was the responsibility of the AAT to review administrative decisions and to decide what decision should be made in the exercise of an administrative discretion. The fact that the decision under review might be legally ineffective (because it was void) did not affect the AAT's responsibility. Accordingly, the AAT said, it should proceed to review the DSS decision to cancel Macpherson's special benefit.

'Unable to earn'?

The AAT then looked at the accounts of Macpherson's share-farming business and at the evidence given by Macpherson about his financial affairs. This material, the AAT said, contained many inconsistencies and omissions.

For example, Macpherson had not explained why the share-farming arrangement with his father could not be renegotiated or whether his father might provide some security for loans to Macperson. Each of these points related to information which Macpherson could reasonably be expected to supply and, therefore, it had not been established to the satisfaction of the Tribunal that Macpherson was 'unable to earn a sufficient livelihood'.

The discretion

Even if Macpherson was unable to earn a sufficient livelihood, the AAT said, it would not exercise the discretion in s.124. The AAT referred to *Te Velde* (1981) 3 *SSR* 23 where the Tribunal had said that, when exercising the discretion in s.124, the degree of control which a

person was able to exercise over his inability to earn a sufficient livelihood must be a relevant consideration.

The AAT also approved the minority view expressed by Davies J in *Watts* (1984) 21 *SSR* 237, to the effect that special benefit should not be seen as a means of helping farmers to survive difficult conditions when other means were available, such as borrowing money.

The AAT concluded as follows:

> 27. On the facts of this matter the applicant entered into the share-farming agreement with his father as a matter of choice. He has persisted in continuing to farm for some 10 years under that agreement notwithstanding that on his evidence he discovered that he could not make a living under that agreement. It is not the purpose of s.124 of the Act to provide public support to a person who makes such a choice notwithstanding the obvious attraction to the applicant of engaging in farming as a means to a livelihood and notwithstanding his expectation of ownership of the farm when his father died.

Formal decision

The AAT affirmed the decision under review.

BAHUNEK and SECRETARY TO THE DSS
(No. V84/46)

Decided: 31 January 1985 by J.R. Dwyer.

Mirko Bahunek migrated to Australia in 1979, when he was 67 years of age. Before his migration, his daughter signed a maintenance agreement under the *Migration Regulations*, in which she undertook to be responsible for Bahunek's maintenance.

After his arrival in Australia, Bahunek lived with and was supported by his daughter and son-in-law until September 1982. He then applied for special benefit because his son-in-law had refused to maintain him. In January 1983, Bahunek's son-in-law lost his employment. Nevertheless, in March 1983, the DSS rejected Bahunek's application for special benefit on the basis that his daughter's wages

of $529 a fortnight prevented Bahunek qualifying.

Bahunek asked the AAT to review that decision. When the matter came before the Tribunal, the DSS said that, because of new departmental guidelines, it had decided to grant Bahunek a special benefit equivalent to one third of the standard rate of unemployment benefit.

The legislation

Section 124(1) of the *Social Security Act* gives the secretary a discretion to grant a special benefit to a person who is 'unable to earn a sufficient livelihood'.

The maintenance guarantee

The AAT confirmed that the fact that Bahunek's daughter had signed the maintenance guarantee did not prevent Bahunek from qualifying for special benefit, as had been decided in *Blackburn* (1982) 5 *SSR* 53, *Sakaci* (1984) 20 *SSR* 221 and *Macapagal* (1984) 21 *SSR* 236.

'Unable to earn'

The Tribunal said that, given Bahunek's age (he was presently 72) and the fact that he had not worked since 1979, it was satisfied that he was unable to earn a sufficient livelihood and that, accordingly, he satisfied the eligibility requirements of s.124(1).

The discretion

The AAT noted that Bahunek's daughter was providing him with board and lodging. In *Sakaci* the Tribunal had said that the discretion to grant special benefit should not be exercised where a person was receiving some basic support from a relative.

However, as the AAT pointed out, that view had been rejected in *Macapagal*, where the Tribunal had decided that a reduced special benefit should be paid to a person who was receiving board and lodging from relatives, thus 'giving the applicant a measure of independence': Reasons, para. 14.

Moreover, the DSS had now adopted guidelines which reflected the approach in *Macapagal*. There was no reason, the AAT said, 'not to follow the newly implemented departmental guidelines in this case': Reasons, para. 17.

Formal decision

The AAT affirmed the decision under review as varied by the Secretary.

Income test: age pension

ARTWINSKA and SECRETARY TO DSS
(No. N84/365)

Decided: 5 March 1985 by J.O. Ballard, D.J. Howell and J.H. McClintock.

Edwarda Artwinska was born in Poland on a date not identified by the AAT, but clearly no later than 1920. When Poland was invaded by Germany in 1939, she an her family were confined in concentration camps, where 26 members of her familiy were murdered by their captors. Artwinska survived 6 years in captivity but was left in very poor health and completely destitute: all her property and all her family's property had been expropriated and was irrecoverable.

In 1958, Artwinska migrated to Australia; and in 1963 she was awarded a pension under a West German statute, the *Federal Restitution Act*, which had been enacted to provide compensation to people who had suffered injustice and persecution 'under the national-socialist tyranny'. This statute provided that compensation was payable to victims of the persecution who had 'suffered damage to life, body, health, freedom, property, wealth, his employment or economic livelihood': s.1(1); and to the next-of-kin of those victims: s.1(3)(i). The statute provided that a person entitled to compensation could 'elect to receive a pension instead of a capital compensation':

s.81.

At some (unidentified) time after her migration to Australia, Artwinska was granted an age pension. Subsequently, the DSS decided that her German restitution pension was 'income' under the *Social Security Act* and that this income disqualified her from fringe benefits. Artwinska asked the AAT to review that decision.

The legislation

Section 83CA of the *Social Security Act* provides that a 'prescribed person' (ie. a person not eligible for fringe benefits) was a person whose annual rate of income exceeded, in the case of a single person, $2808.

Section 6 of the Act defines 'income' as meaning –