Administrative Appeals Tribunal decisions

Income test: war restitution payments

Re TELLER and SECRETARY TO DSS (No. V84/230)
Decided: 16 April 1985 by J.R. Dwyer, G. Brewer and L. Rodopoulos.

Bedrick Teller had been born in 1899 in an area which, after 1918, became part of Czechoslovakia. In 1938, following the German invasion, Teller and his wife (who were Jews) were obliged to leave their homeland; and Teller abandoned his property, savings, and his right to a government retirement pension.

In the early 1960s, Teller was awarded a compensation pension under the West German *Federal Restitution Act*. This Act provides for compensation for any person who had been obliged to abandon property when fleeing from Nazi persecution.

In 1983, the DSS decided that Teller's Australian age pension should be reduced because of his pension under the *Federal Restitution Act* (which then amounted to $470 a fortnight). Teller asked the AAT to review that decision.

The legislation
In 1983, s. 18 of the *Social Security Act* defined 'income' as meaning -

> 'personal earnings, moneys, valuable consideration or profit earned, derived or received by that person . . . from any source whatsoever, within or outside Australia, and includes a periodical payment or benefit by way of gift or allowance. . . '

However, the definition went on to exclude, in para. (cc), any 'compensation payment made by reason by the loss of , or damage to, buildings, plant or personal effects'.

The basic definition of income
The AAT said that, despite the earlier decision in *Artwinska* (1985) 24 *SSR* 287, it thought that the compensation payments received by Teller fell within the definition of income. Moreover, the extension of that definition to include an 'allowance' made it even clearer that the definition covered the sort of payment received by Teller.

This view, the AAT said, was confirmed by the treatment of such compensation payments under the *Income Tax Assessment Act* 1936. Although the definition of income in the *Social Security Act* and the *Tax Act* were different, nevertheless the treatment of certain payments under the tax legislation was relevant in deciding whether those payments should be treated as capital or income in nature.

The AAT noted that two paragraphs had been inserted in s. 23K of the *Income Tax Assessment Act* in order specifically to exempt from assessable income any pensions or allowances paid as compensation to victims of persecution during the Second World War. The Tribunal said that these amendments would not have been necessary if those payments had been regarded as capital rather than income. Indeed, Prime Minister Menzies had said, in 1959 when para. (c) was added to s. 23K, that the compensation payments were 'technically within the income tax field'.

The legal position that these compensation payments were to be regarded as 'income' under the *Social Security Act* was further supported by remarks made when para. (ca) was added to s. 23K of the *Income Tax Assessment Act* in 1982. On that occasion, an Opposition member, Clyde Holding, had pointed to the anomoly of excluding such compensation payments from income for the purposes of income tax but treating them as income for the purposes of social security. The AAT observed:

> '23. However, when Mr Holding's Party came into Government and the income test for pensioners [aged over 70] was introduced, although Mr Holding was the member of the Government who made the Second Reading Speech on 5 October 1983, there was no amendment to exclude periodic payments or allowances by way of restitution or compensation to victims of Nazi atrocities from the income test.'

Accordingly, the AAT concluded, the payments received by Teller were properly characterised as income for the purposes of the *Social Security Act*, except to the extent that they were covered by the specific exemptions in s. 18.

Compensation for loss of property
The AAT said that it was possible that some part of the compensation pension being paid to Teller represented compensation for loss of property and personal effects and was, accordingly, excluded from his 'income' by para. (cc) of s. 18. The AAT noted that in *Artwinska* (above) the AAT had treated the whole of the compensation payment as excluded from income. But in this case, the AAT said, it proposed to exclude only that part of the compensation payment which was covered by s. 18(cc).

Before it could decide what proportion of the compensation payment was covered by that paragraph, the AAT said that it needed evidence as to the basis on which the compensation payments were calculated and as to the legal effect of the various provisions of the West German *Federal Restitution Act*. Accordingly, the AAT adjourned the hearing of the review so that further evidence could be collected and presented to it.

Interim decision
The AAT found that the compensation payments covered by s. 18(cc) were not properly regarded as income for the purpose of assessing Teller's rate of pension; adjourned the hearing of the matter; and granted leave to Teller to call further evidence to establish how far the payments he was receiving were covered by s. 18(cc).

Deprivation of income

STIPO and SECRETARY TO DSS (No. N84/513)
Decided: 16 May 1985 by J.O. Ballard.

Mr & Mrs Stipo sold their farm for $140 000 in 1980. From the proceeds, they gave $24 000 to a son, R, and $10 000 to another son, V, and placed $15 000 in a bank account in trust for their daughter, A.

In May 1983, the DSS told Mrs Stipo (who was an invalid pensioner) that, because of her income from the balance of the proceeds of the farm sale, the level of her invalid pension would be reduced. In June 1983, Mr & Mrs Stipo decided to contribute $24 000 towards the purchase of a house by their daughter A. (The balance of the purchase price was to be made up from the bank trust account and by a loan of $10 000 from V.) The purchase of the house was completed in August 1983.

The DSS then decided that each of the components in the purchase price of A's house should be treated as a deprivation of income on the part of Mrs Stipo under s. 47(1) of the *Social Security Act* and that her invalid pension should be reduced accordingly. Mr & Mrs Stipo then asked the AAT to review that decision.

The legislation
Section 47(1) gives the Secretary a discretion to treat as income of a pensioner an amount of money if the Secretary is of the opinion that the pensioner 'has directly or indirectly deprived [herself] of income in order to . . . obtain a pension at a higher rate than that for which [she] would otherwise have been eligible'.

A question of motivation
The AAT referred to the earlier decisions in *Ridley* (1983) 13 *SSR* 127 and *Nadenbousch* (1984) 21 *SSR* 242, which had emphasised that, before s.47(1) could be applied against a pensioner, it

was necessary to establish that the deprivation of income had been undertaken for the purpose of obtaining a pension at a higher rate, rather than for some other purpose.

In the present case, Mr & Mrs Stipo and their daughter had argued that the purpose behind providing the money for the daughter's purchase of a house was to provide her and her fiancee with some security and an income in anticipation of their marriage.

On the other hand, the DSS argued that, because Mr & Mrs Stipo had provided the money to their daughter within one month of being told that Mrs Stipo's pension would be reduced, the conclusion was inevitable that they had intended to obtain a higher rate of pension for Mrs Stipo.

The AAT said that there was no basis for treating the money provided by V or the money held in trust for A as a deprivation of income under s. 47(1):

> 'In my view money placed in trust for children before notice of the reduction in the pension rate [was] not so placed to obtain a higher pension and should be excluded . . .
> 25. However, I see force in the respondent's representative's argument that the timing of events is of significance in relation to the moneys provided by the applicant for A's house. It seems to me that the purchase of the house for A and the applicants' direct contribution, otherwise than from money in trust, must be seem as being effected in order to obtain the higher rate of pension; I so find.'

Formal decision

The AAT varied the decision under review by substituting for the DSS decision the applicant had deprived herself of income amounting to $8972 a decision that the applicant deprived herself an income amounting to $3839.

Overseas pension: 'special need'

Re HARRIS and SECRETARY TO DSS (No. V84/447)
Decided: 14 March 1985 by R. Balmford.

Thomas Harris had been born in England in 1897. In 1922 He migrated to Australia and worked here until 1967, when he returned to England. He was then granted a full United Kingdom age pension.

In 1984, Harris returned to Australia and claimed an aged pension under s. 21A of the *Social Security Act*. When that claim was rejected by the DSS, Harris applied to the AAT for review.

The legislation

Section 21A of the *Social Security Act* provides that a man aged at least 65 is qualified to received age pension if he fulfills certain residence requirements (which Harris met) and if he -

> '(f) is a person who, in the opinion of the Secretary, is in special need of financial assistance . . . '

Harris' financial situation

Harris told the AAT that his only income came from the UK age pension and that his expenses exceeded his income by 6 pounds a week. He had been able to cover this excess out of his savings until late 1984; but the savings had now been reduced to 300 pounds. Harris also told the AAT that he owned his own home, which was valued at 18 000 pounds.

'Special need'

The AAT said that, before a person could be described as 'in special need of financial assistance', that person's financial situation had to be exceptional or unusual judged by the standard of living of the country in which he had chosen to live. Because Harris was receiving an age pension from the UK government, a pension which appeared to be comparable with other pensions paid in that country, it could not be said that his financial circumstances were unusual:

> '[I]n terms of the standard of living expected of pensioners in the country generally, I do not consider that he can be said to be 'in special need of financial assistance' when the additional force which Parliament must have intended to give to that phrase by the use of the word "special" is taken into account. In my view, it is appropriate to measure the needs of a applicant under s. 21A . . . by reference to the standard of living in which that applicant has chosen to live. In saying this, I would not wish to suggest that there are not other means of measuring those needs which may be equally appropriate in other circumstances.'

(Reasons, para. 13)

In coming to this conclusion, the AAT adopted the approach taken in the earlier decision of *Buttigieg* (1983) 17 *SSR* 178.

Formal decision

The AAT affirmed the decision under review

'Income'

MARSH and SECRETARY TO DSS (No. N84/531)
Decided: 19 April 1985 by A.P. Renouf.

William Marsh had been granted a part-time training allowance (of $46 a week) under the Labour Adjustment Training Arrangements administered by the CES. At that time, Marsh was being paid unemployment benefit and the DSS decided to treat the training allowance as 'income' and to reduce Marsh's unemployment benefit. Marsh asked the AAT to review that decision.

'Income'

Section 114 of the *Social Security Act* provides an income test for unemployment benefit: where a person's income exceeds $20 a week, the unemployment benefit payable to that person is to be reduced.

Section 106(1) defines 'income' as meaning -

> 'any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever . . . and includes any periodical payment or benefit by way of gift or allowance, but does not include -
> (b) a payment received by a trainee in full-time training under a programme included in the programmes known as the Labour Force programmes . . .'

The AAT said that an allowance paid to meet training expenses would not fall within the normal meaning of 'income'; but, because there was a very broad definition of income in s. 106(1), the allowance paid to Marsh had to be treated as income for the purposes of unemployment benefit.

The Tribunal also pointed to the fact that, in the s. 106(1) definition of income, 'express exception is made for the allowance when received by a full-time trainee and not for one from which a part-time trainee benefits'. This, the AAT said, was a significant distinction .

A discretion to waive the income test?

The AAT then dealt with an argument raised on behalf of Marsh, that the Secretary had a discretion to increase the rate of Marsh's unemployment benefit, despite the terms of s. 114(1) of the *Social Security Act*.

It was argued that this discretion arose from s. 135TJ(3) of the *Social Security Act*:

> 'If, having regard to any matter that affects the payment of . . . benefit . . . the Secretary determines that the rate of . . . benefit . . . is less than it should be, the Secretary may, by determination, increase the rate of . . . benefit . . . '

The AAT said that the discretion given to the Secretary under s. 135TJ(3) was subject to s. 114(1) which left the Secretary with no discretion: the income test was an 'overriding provision'.

Formal decision

The AAT affirmed the decision under review