

official documents over the years showing that she had not reached the age of 45 years should be given more

weight than the applicant's own conviction and recollections. The preponder-

ance of the evidence indicated that she was born later than 8 December 1939.

Overpayment: discretion to recover

MARMONT and SECRETARY TO DSS (No.N85/306)

Decided: 4 February 1986 by Ewart Smith, J.H. McClintock and A.P. Renouf.

Ernest Marmont sought review of a DSS decision to recover overpayments of some \$5000 paid to him by way of sickness benefit. The DSS alleged the overpayment was in consequence of Marmont's failure to advise the DSS of, and false statements about, his wife's income.

Jurisdiction

The decision to recover was made under the 'old' s.140(1). The AAT suggested that the 1985 amendment to s.140(1) may have removed its jurisdiction to review the decision. The DSS argued the case on the basis that either the old s.140(1), or the new s.140(1) plus the discretion to waive recovery in s.146, applied. The AAT concluded that the same principles governed the exercise of the discretion in the old s.140(1) and the new s.146 and, as the case was argued on the merits, they would proceed on that basis.

An overpayment?

Marmont married in December 1980 and

told the AAT that he and his wife had separated in February 1981. If this was accepted, there would have been no overpayment because his wife's income from employment would not have been attributed to him.

The AAT reviewed what it described as 'a maze of conflicting evidence', and eventually relied on written statements, signed by Marmont and his wife, that they had separated on 27 September 1982. Consequently, Marmont's wife's income should have been reported to the DSS.

The AAT then considered Marmont's claim that he had not known that his wife was working, even though she had left home at 5 a.m. some days and was absent for 5 working days a week. This claim, the AAT said, 'stretches our credulity far beyond breaking point': reasons, para.10. It followed that Marmont's failure to advise the DSS of his wife's income had been deliberate.

The discretion

The AAT adopted the principles for the exercise of the discretion from the Federal Court decision in *Hales* (1981) 13 SSR 136, as articulated in *Ward*

(1985) 24 SSR 289. The Tribunal agreed with the DSS representative that this case was 'more towards the fraudulent area, rather than the area of innocent mistake'. It noted:

'The applicant has employment and is no longer in receipt of social security. He has voluntarily undertaken a number of commitments which indicate his ability to pay these amounts (some \$600 per month in all). It is hardly a case of considerable financial hardship to require him to repay the amount he has obtained from the Department ... We do not consider it to be appropriate that a person should be relieved of liability to repay moneys to the Commonwealth on the ground that he has voluntarily undertaken heavy financial commitments to others.'

(Reasons, para.16)

The AAT recommended that the DSS make arrangements with the applicant to repay the amount owing which took into account his present liabilities.

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: 'unemployed'?

WEST and SECRETARY TO DSS (No.N85/209)

Decided: 10 December 1985 by J.O. Ballard

James West asked the AAT to review a DSS decision to cancel his unemployment benefit.

West had purchased a perpetual lease of a 2400 acre property, outside Glen Innes, NSW, with a rent of some \$100 a year. He intended to make a living from primary production or handicrafts.

He had been employed as a car detailer prior to the primary production venture and sought similar employment in Glen Innes, while the farm became viable. He could not find employment, and applied for, and was granted, unemployment benefit in February 1982. His benefit was cancelled in July 1984. Early in 1985, after the prospect of employment in a local tin mine fell through, West returned to Sydney to look for work and asked the AAT to re-

view the cancellation of his unemployment benefit.

The issue - 'unemployed'?

The issue in this application for review was whether West was 'unemployed' for the purposes of s.107(1)(c) of the *Social Security Act*.

West said that he could look after the 900 sheep on his farm on weekends and was available for work during the week. His contention was supported by a letter from a firm of pastoral agents.

The Tribunal compared the decision in *Guse* (1981) 6 SSR 62 with that in *Vavaris* (1982) 11 SSR 110:

'The test that emerges ... is whether the person in question is so seriously engaged in the conduct of a business as to lead to the conclusion that he is not unemployed; it is not whether he is unoccupied or underemployed. Little importance attaches to the fact that in the absence of work the tasks he did on the farm were compatible

with full-time work if it became available.'

(Reasons, para.13)

The Tribunal decided that, as West's usual habitat was Sydney, his move to Glen Innes should be treated as a move to an area where work was virtually unobtainable: his commitment was to his farm, a commitment evidenced by his taking out a loan and an additional lease.

Once the tin mine opened in the Glen Innes area, West had employment prospects consistent with work on the farm. His eligibility for unemployment benefit arose from that date (July 1985) and continued after he had moved back to Sydney to look for work.

Formal decision

The Tribunal set aside the decision under review and decided that the applicant was entitled to unemployment benefit from July 1985.

Income test: whether debt repayments deductible

CROSBY and SECRETARY TO DSS (No.W85/118)

Decided: 24 January 1986 by G.D. Clarkson.

Mr and Mrs Crosby were age pensioners who, until 1984, had operated a motel business in a country town. The DSS had calculated the rate of their age pensions on the basis of the net profits from their business, deducting from their receipts from the

business payments made by them on account of trading debts.

In 1984, Mr and Mrs Crosby sold the business. Under the contract of sale, \$50 000 of the purchase price plus interest was to be paid to Mr and Mrs Crosby over 7 years. At the time of the sale of the business, Mr and Mrs Crosby owed trading debts of some \$54 000.

The DSS then re-calculated their

income for the purposes of the age pension income test: it took into account the interest paid by the purchasers on the outstanding balance of the purchase price but refused to deduct payments still being made by Mr and Mrs Crosby on account of the trading debts which they had incurred when carrying on the business. Mr and Mrs Crosby asked the AAT to review that decision.