

leaving before the end of the 12 month period 'arose from circumstances that could not reasonably have been foreseen at the time of his return to, or his arrival in Australia . . .'

Section 20 provided that, for the purposes of Part III, a claimant should be deemed to be resident in Australia while an 'absent resident'.

According to s.6(1), an 'absent resident' was a person whose domicile was in Australia, unless the Secretary was satisfied that the person had a permanent place of abode outside Australia.

Not an 'absent resident'

The AAT said that it seriously doubted whether the concept of 'absent resident' was applicable to s.83AD. The purpose of the latter section, the AAT said, was -

'to prevent people formerly residing in Australia and who would not qualify for the grant of age pension by reason of not being physically present in Australia (see s.21(1)) from making fleeting return visits to Australia in order to qualify for a grant, and then departing again for overseas.'

(Reasons, p.7)

However, it was not necessary to decide this point because Mr and Mrs Dracup had not been 'absent residents'

during their time out of Australia. They had sold their Australian home before going to America, where they had acquired permanent resident status and where their adult children lived. All these factors showed that Mr and Mrs Dracup had abandoned their Australian domicile and, moreover, that they had a permanent place of abode outside Australia.

Reason for leaving

Because Mr and Mrs Dracup were former residents of Australia (rather than current residents) at the time of their return, their pensions were not portable, unless they could take advantage of s.83AD(2).

Mr and Mrs Dracup gave 2 reasons for leaving Australia before the expiry of the 12 month period: first, that their daughter in America was expecting a child; and, secondly, that they needed to return early in order to avoid losing their resident status in America.

The AAT said that the second of these was the only substantial reason offered by Mr and Mrs Dracup. From the evidence before the Tribunal, it was a reasonable inference (the AAT said) that Mr and Mrs Dracup had been aware of the requirements of American law before

their departure from the United States in August 1983:

'Accordingly, it is my view that the fact that their American residential status would be endangered if they remained out of the United States for more than 12 months was a circumstance that would reasonably have been foreseen at the time of their arrival in Australia.'

(Reasons, pp.10-11)

In any event the AAT said, this is not a case in which the discretion in s.83AD(2) should be exercised in favour of Mr and Mrs Dracup:

'In this case, the applicants left Australia and have evinced a clear intention of severing their former associations with this country. Their return here was made solely for the purpose of qualifying for age pensions. They evidenced a clear intention to leave as soon as possible after this purpose had been achieved. Further, the circumstances of the departure were such as to make it difficult to resist the inference that they intended to mislead the Department.'

(Reasons, pp.11-12)

Formal decision

The AAT affirmed the decision under review.

Recovery of overpayment: bankruptcy

STEWART and SECRETARY TO DSS (No.V85/239)

Decided: 15 November 1985 by Jenkinson J.

Garry Stewart asked the AAT to review a DSS decision to recover, through deductions from his current unemployment benefit at the rate of \$1 a fortnight, an overpayment of unemployment benefits which totalled \$1,926.

These overpayments had been made to Stewart between April and November 1981 and Stewart had subsequently been declared a bankrupt under the *Bankruptcy Act* 1966 (Cth). Stewart argued that the *Bankruptcy Act* debarred the DSS from recovering the overpayment through deductions from current unemployment benefit.

The legislation

At the time of the decision under review, s.140(1) of the *Social Security Act* provided that an overpayment made to a person, in consequence of the person's failure or omission to comply with any provision of the *Social Security Act*, was recoverable from that person, or that person's estate, as a debt due to the Commonwealth.

Section 140(2) provided that an overpayment, made for any reason, could be recovered, at the Secretary's discretion, by deductions by any pen-

sion, benefit or allowance which was currently being paid to the person who had received the overpayment.

Section 58(1) of the *Bankruptcy Act* provides that, where a person becomes a bankrupt, the person's property vests in the Official Trustee.

Section 58(3) provides that, after a debtor has become bankrupt, a creditor cannot 'enforce any remedy against the person or the property of the bankrupt in respect of a proveable debt' nor can the creditor commence or take any fresh step in legal proceedings to recover that debt.

Section 131 declares that a bankrupt who is receiving income is entitled to retain it for his own benefit. Some income can be, by court order, paid to the trustee of the bankrupt's estate; but, because of s.144(1) of the *Social Security Act*, a pension, allowance or benefit under the *Social Security Act* can not be paid to the trustee.

Recovery under s.140(2) not barred

The AAT said that the recovery of an overpayment under s.140(2) of the *Social Security Act* was not prevented by s.58(3) of the *Bankruptcy Act*.

It was not a 'remedy against the person . . . of the bankrupt' - because it did not involve physical restraint. Nor was it a 'remedy against the . . . property of the bankrupt' - because

the 'property of the bankrupt' included only that property which vested in the trustee of the bankrupt's estate and s.131 of the *Bankruptcy Act*, in combination with s.144(1) of the *Social Security Act*, prevented unem-



ployment benefits payable to a bankrupt person vesting in that person's trustee in bankruptcy.

In any event, the AAT said, the recovery of an overpayment under s.140(2) of the *Social Security Act* could not be described as the enforcement of a remedy by a creditor:

'The Secretary is the person by whose determination deduction from pension, allowance or benefit may be authorised. The Secretary does not make such a determination at the instance, or on the application, or at the direction, of the

creditor, the Commonwealth: he exercises a statutory discretion committed to him by s.140(2), free of any influence by the creditor. Section 58(3) of the *Bankruptcy Act* 1966 speaks not of him, nor addresses any command to him, in my opinion.'

(Reasons, p.7)

The AAT rejected an argument that the general intention of s.131 of the *Bankruptcy Act* and s.144 of the *Social Security Act* was that bankrupt persons would be guaranteed the enjoyment of

payments under the *Social Security Act* during bankruptcy, and that the recovery power under s.140(2) should be read so as to authorise no deduction from pensions or benefits payable during bankruptcy.

The AAT pointed out that s.140(2) was declared to operate 'notwithstanding anything contained in this Act'. Although s.144(1) declared that a pension or benefit was to 'be absolutely inalienable', s.140(2) was clearly an exception to that proposition.

The AAT concluded by acknowledging that recovery under s.140(1) would be affected by s.58(3) of the *Bankruptcy Act*. Section 140(1) 'creates a liability enforceable by curial process'; but the *Bankruptcy Act* did not affect recovery under s.140(2) which 'authorises an administrative adjustment by deduction from particular statutory payments': Reasons, p.9.

Formal decision

The AAT affirmed the decision under review.

Late claim: negligent advice

MARTIN and SECRETARY TO DSS
(No.N85/19)

Decided: 7 November 1985 by A.P.Renouf.

Margaret Martin separated from her husband shortly before 28 September 1983. On that date she called at the office of the DSS and asked about eligibility for a health care card. A DSS officer (responsible for unemployment and sickness benefit claims) advised her to apply for supporting parent's benefit and gave her the necessary application form.

Martin eventually lodged her application for supporting parent's benefit on 28 November 1983. When the DSS refused to backdate payment of that benefit to September, she asked the AAT for review.

The legislation

At the relevant time, s.83AAF of the *Social Security Act* provided that a supporting parent's benefit, when granted, should be paid from a date not earlier than the date on which the claim for the benefit was lodged.

Section 135TA(1)(b) provided that a supporting parent's benefit should not be granted 'except upon the making of a claim for that . . . benefit'.

Section 135TD provided that a claim for a benefit should be made in writing on the form approved by the Director-General and lodged at a DSS office.

Misleading advice?

Martin told the Tribunal that, when she had first called at the DSS office, the officer with whom she had spoken had given her the impression that she could not claim supporting parent's benefit until she furnished information about a business which she and her husband had operated. The preparation of this information took 6 weeks. The DSS officer in question told the Tribunal that he had not discouraged Martin from lodging her application immediately; but he admitted that he may not have stressed (as an officer more experienced with supporting parent's benefit would have) the need to lodge the application immediately.

No power to backdate

The AAT said that, given the terms of s.83 AAF, there was no power to backdate entitlement to supporting parent's benefit - as the AAT had earlier decided in *O'Rourke* (1981) 3 SSR 31; and *Gray* (1984) 22 SSR 250.

Payment of compensation

The AAT noted that there was a Commonwealth Government Finance Direction 21/3, which gave to the Secretary of the DSS authority to settle any claim for compensation, if the claim did not exceed \$2000 and if the Secretary was, 'as a matter of common sense . . . satisfied that the Commonwealth [was] liable.'

The AAT also noted that the DSS Pensions Manual declared that consideration might be given to compensating a person under Finance Direction 21/3 if negligent advice had resulted in that person not lodging a claim on the appropriate date.

In the present case, the AAT said, 'there was some degree of negligence involved in the advice that Mrs Martin was given. Nonetheless, I find also that she herself contributed to that negligence. I feel too that each of the parties acted inadvertently, thus unconsciously producing an unfortunate misunderstanding.'

(Reasons, para.28)

Because responsibility for what happened should be shared between Martin and the DSS officer, it was appropriate 'that one half of the benefit for the period 6 October-13 November 1983 should be awarded to the applicant by way of compensation': Reasons, para.29.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that compensation pursuant to Finance Direction 21/3 equivalent to supporting parent's benefit for one half of the period 6 October to 30 November 1983 should be awarded to Martin.

Unemployment benefit: student

LONG and SECRETARY TO DSS
(No. W84/200)

Decided: 13 September 1985 by K. A. Kiosoglous, I. A. Wilkins and J. G. Billings.

Jonathon Long completed secondary school in 1980 and enrolled as a university student in 1981. Over the next 3 years, he attempted to combine university studies and part-time employment; and, by the end of 1983, he had completed first year studies in Arts and Jurisprudence courses.

Early in 1984, Long attempted to find full-time employment and, when that attempt was unsuccessful, he lodged a claim

for unemployment benefit with the DSS. The DSS rejected that claim and Long continued with the second year of his Jurisprudence course during 1984, working part-time throughout the academic year.

In August 1984, Long made another unsuccessful attempt to find full-time work and, at about the same time, appealed to an SSAT against the DSS rejection of his claim for unemployment benefit. Although the SSAT recommended that Long's appeal be upheld, the DSS affirmed the rejection of his claim for unemployment benefit. Long then asked the AAT to review the DSS decision.

The legislation

Section 107(1)(c) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person meets age and residence requirements and if the person satisfies the Secretary that—

- (i) throughout the relevant period he was unemployed and was capable of undertaking, and was willing to undertake, paid work that, in the opinion of the Secretary, was suitable to be undertaken by the person; and
- (ii) he had undertaken, during the relevant period, reasonable steps to obtain such work.

Not 'unemployed'

Long told the AAT that, throughout most