

compensation legislation both at State and Federal level.

16. Ms Godtschalk for the respondent also argued that the Act provided financial support for those in need. The blind pension was not means tested. It would be unfair if, when vision could be corrected by glasses, a blind pension should be paid so that a person might still get the pension and be able to work. Furthermore Ms Godtschalk argued that if blindness could be corrected it could not be described as "permanent" for the purposes of s.24 of the Act.

17. We think the argument based

upon the objectives of the Act [is] telling . . .

18. [W]e think there is sufficient in the word blindness to justify the application of an objective test as to what can be seen with normal correction by spectacles or contact lenses.'

(Reasons, pp.10-1)

#### Meaning of 'blind'

The AAT said that it did not 'feel competent to lay down a test for all cases for determining what permanently blind means'. It noted that the assessment of blindness did 'not include any consideration relating to incapacity for work' which was dealt with separately under s.24:

'Seen in the overall context of the Act it seems reasonable to interpret the intention of Parliament as requiring something more than incapacity to work due to lack of sight otherwise there would be no need for the separate qualifications of permanent blindness.'

(Reasons, para.21)

The AAT said that it was sufficient for it to conclude, from the evidence given in the case, that Smith was not permanently blind.

#### Formal decision

The AAT affirmed the decision under review.

## Federal Court decisions

### Age pension: income test

#### SECRETARY TO DSS v. BURMAN (Federal Court of Australia)

**Decided:** 18 April 1986 by Neaves J.

This was an appeal, under s.44(1) of the *AAT Act*, against the AAT's decision in *Burman* (1985) 27 SSR 332, where the Tribunal had set aside a DSS decision to treat as 'income' of Burman money paid to her by her daughter and son-in-law.

Burman, who was an age pensioner, had entered into a formal agreement with her daughter, M, and son-in-law, D. Under this agreement, Burman lent M and D \$20 000 to enable M and D to purchase a house, which Burman was to rent from them at a rent of \$350 a month for 2 years. M and D were to pay Burman interest on the loan at the rate of 12.5% a year - which was \$200 a month. Clause 4 of the agreement read as follows:

'The lender will pay the borrowers an amount of \$150 a month which represents the rent money payable by the lender to the borrowers of \$350 per month less the interest payable by the borrowers to the lender of \$200 per month.'

M and D purchased a house, which Burman occupied between January and November 1984; and Burman paid M and D \$150 each month during that period.

In November 1984, Burman moved out of the house when M and D were obliged to sell it because of financial difficulties. Between that date and March 1985 (when the sale was settled and M and D repaid the \$20 000 loan), M and D paid Burman \$200 a month.

The question raised by the DSS and AAT decisions, and in this appeal, was whether Burman should be regarded as having received 'income' of \$200 a month from January 1984 to March 1985.

#### The legislation

At the time of the decision under review, s.18 of the *Social Security Act* defined 'income' (which, under s.28(1) could reduce an age pension) as meaning -

'any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person . . . and includes any periodical payment or benefit by way of gift or allowance from a person other than the . . . daughter . . . of the first-mentioned person . . .'

#### An allowance from Burman's daughter?

The AAT had decided that the \$200 a month fell within the first part of the definition of 'income': the payments were 'moneys . . . derived or received'. The AAT had then concluded that the payments were an 'allowance . . . from [her] daughter' and were accordingly excluded from the s.18 definition.

The Federal Court noted that the first finding was not challenged by the parties; and, similarly, the assumption that the payments would fall outside the s.18 definition if they were an 'allowance' provided by Burman's daughter was not challenged.

The AAT had said that the character of the monthly payments could not be judged solely by the terms of the agreement; they had to be seen as part of a family arrangement assisting Burman to have somewhere to live.

However, the Federal Court concentrated on the terms of the agreement. It had several features, the Court said,

'which support the finding that it was intended to create legally enforceable rights, although it was probably never contemplated that those rights would be, or would

need to be, enforced by legal process.'

(Judgment, p.12)

Those features included the fact that the agreement was drawn up after Burman had obtained legal advice; Burman's understanding that the arrangement was for a loan bearing interest; the description in the agreement of the arrangement as a 'loan', of Burman as the 'lender' and of M and D as the 'borrowers'; and the fact that, at the time when the agreement was drawn up, 12.5% was a commercial rate for interest and \$350 a fair rent for the premises in question.

Taking those considerations into account, the Court said, there was no conclusion open other than that the amounts of \$200 a month 'were properly to be characterized as payments of interest on loan moneys'. They could not be characterized as 'a payment or benefit by way of gift or allowance': Judgment, p.13.

#### Formal order

The Federal Court set aside the decision of the AAT and restored the decision of the Secretary to the DSS.

#### Social Security Reporter

#### BACK ISSUES

\* 1981 (4 issues): \$2 an issue

\* 1982 (6 issues): \$2 an issue

\* 1983-5 (6 issues a year): \$2.50 an issue

Order from: Legal Service Bulletin, Law School, Monash University, Clayton, 3168.