

Remote area allowance: residence

TAYLOR and SECRETARY TO DSS
(No. W86/5)

Decided: 23 June 1986 by E. Smith.

Henry Taylor asked the AAT to review a DSS decision not to grant a remote area allowance.

Taylor, aged 81, and his wife lived in Esperance but due to medical advice lived in Carnarvon during the winter months, where the climate was warmer. Carnarvon is in Zone A for the purposes of s.79A of the *Income Tax Assessment Act 1936*, which allows residents certain tax allowances. The applicant had been granted such an allowance for the part of the year when he lived there.

The legislation

Section 17C of the *Social Security Act* provides that a person who is in receipt of a pension or benefit and who 'is physically present in, and whose

usual place of residence is situated in, the remote area, is eligible to receive a remote area allowance'.

Section 17B provides that 'remote area' has the same meaning as in the *Income Tax Assessment Act*.

'Usual place of residence'

The issue was, where was the applicant's 'usual place of residence'? The Tribunal referred to *Hafza (1985) 26 SSR 321* where the Federal Court said that a person could have only one 'usual place of residence', although the general legal concept of 'residence' would allow a person to have two or more places of residence.

The AAT adopted that principle and concluded that for the purposes of remote area allowance, a person can have only one usual place of residence.

Taylor had not abandoned his Esperance home and contacts there; he

and his wife they only moved temporarily for health reasons during the cold months. Esperance was the applicant's usual place of residence.

Intent of legislation

The AAT looked at the Second Reading speech and Explanatory Memorandum of the Act. These contained 'no indication of any intention to provide benefits in the circumstances' of this case. The Tribunal did not think it was the intention of the legislation to allow pensioners to take a holiday in a 'remote area' for part of each year and qualify for the allowance. Of course, had Taylor moved indefinitely, the conclusion may have been different.

Formal decision

The AAT affirmed the decision under review.

Income test: 'derived' or 'received'?

SHARP and SECRETARY TO DSS
(No. S85/131)

Decided: 4 August 1986 by R.A.

Layton.

Ronald Sharp had been granted unemployment benefit in January 1984.

In October 1984, he advised the DSS that he had performed some work for the National Parks and Wildlife Service, as a result of which he would be paid \$100 in a few weeks time. The DSS then decided to treat the \$100 as Sharp's income in the two week period from 11 to 24 October 1984 and to reduce the rate of his unemployment benefit accordingly. Sharp asked the AAT to review that decision.

The legislation

Section 114(1) provides that the rate of unemployment benefit payable to a person is to be reduced where that

person's income exceeds \$20 per week.

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

'Any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person . . .'

'Earned' or 'derived'?

The AAT said that the words 'earned, derived or received' in s.106(1), each had a separate and distinct meaning. Money was to be treated as part of a person's income if it was either 'earned' or 'derived', notwithstanding the fact that the money had not yet been received. This much, the AAT said, had been established in a series of decisions: *Smith (1982) 9 SSR 89*; *Siebel (1983) 14 SSR 142*; *McBow (1984) 20 SSR 224*; *Paula (1985) 24 SSR 288*; *Heidemann (1985) 26 SSR 312*.

It was necessary, the AAT said, for a person 'to have a present legal entitlement to moneys before they be described as either "earned" or "derived": Reasons, para.23.

The evidence before the AAT established that Sharp became legally entitled to payment of the \$100 during the period in question, although the \$100 was not 'received' by him until some weeks later. Section 114(1) conferred no discretion to disregard moneys: 'It is mandatory for the Secretary to reduce the . . . benefit for the week in which income is either earned, derived or received, whichever first occurs': Reasons, para.26.

Formal decision

The AAT affirmed the decision under review.

Sickness benefit: recovery from compensation

Re KHABBAZ and SECRETARY TO DSS
(No. S85/29)

Decided: 3 June 1986 by R.A. Layton.

Antonias Khabbaz had given up work in November 1982 because of industrial injuries. The DSS then granted him sickness benefit which was still being paid to him in June 1986.

In December 1983 Khabbaz settled a claim for worker's compensation against his former employer on terms that the employer pay him \$10 000 under s.69 of the *Workers' Compensation Act 1971 (SA)* and \$9900 under s.70 of that Act.

The DSS then calculated that \$14 200 of the total compensation payment had been paid for the same incapacity as that for which Khabbaz

was receiving sickness benefit. The DSS demanded that Khabbaz refund \$756 (representing part of the sickness benefit payments received up to January 1984); and decided that \$12 a week would be deducted from his future sickness benefit payments.

Khabbaz appealed against these two decisions but, when the SSAT considered his appeal, it only reviewed the decision to deduct \$12 a week from his continuing sickness benefit payments. The SSAT recommended that the appeal be upheld but the DSS did not accept that recommendation. Khabbaz then asked the AAT to review both the recovery decision and the deduction decision.

Jurisdiction

Section 15A of the *Social Security Act*

provides that the AAT may review a decision of the Secretary to the DSS affirming or varying an earlier decision if that earlier decision has been reviewed by an SSAT.

The AAT said that, as the decision to recover money from Khabbaz had not been reviewed by an SSAT, the AAT had no jurisdiction to review that aspect of the present case.

Compensation and sickness benefit: the same incapacity?

Section 115D(1) allows the DSS to reduce the weekly amount of sickness benefit being paid to a person for an incapacity if that person has received a compensation payment which is, in the opinion of the Secretary 'in respect of that incapacity'.