

The presumptions against retrospectivity are intended to avoid any such injustice.'

(Reasons, para.16)

However, the AAT then decided that the evidence did not support a finding that Reilly was at least 85% permanently incapacitated for work when he lodged his claim. Insofar as

he was unable to obtain work, this arose more from the limited range of jobs currently available in the labour market than from his medical disability.

Carer's pension

WAIN and SECRETARY TO DSS
(No.N87/199)

Decided: 3 July 1987 by A.P. Renouf.

Wain's friend, C, was suffering from acquired immunity deficiency syndrome/cryptococcal meningitis and was an invalid pensioner. Between July 1986 and January 1987, when C died, Wain lived with and cared for C. As a result, Wain was obliged to give up his unemployment benefit.

Throughout this period, no relative of C was available to provide him with the necessary care and attention. C regarded Wain as his guardian and, from October 1986, Wain held a general power of attorney executed by C. W did not need to exercise the power of attorney until the week before C's death.

Wain applied to the DSS for a carer's pension for the period from July 1986 to January 1987. The DSS refused that application but paid Wain special benefit at the unemployment benefit rate. Wain asked the AAT to review that decision.

The legislation

Section 33(1) of the *Social Security Act* provides that a person who personally provides constant care and attention for a severely handicapped 'relative', who is an invalid pensioner, in their mutual home is qualified for a carer's pension.

The DSS accepted that Wain would have been qualified for carer's pension if C had been a 'relative'.

Section 33(3) defines 'relative' as including a person to whom the carer is a 'guardian'.

Under s.124(1) the Secretary may grant a special benefit to a person if the Secretary is satisfied that the person is unable to earn a sufficient livelihood.

Section 125 gives the Secretary a discretion to determine the rate of special benefit payable to a person -- 'but not exceeding the rate of the unemployment benefit or the sickness benefit which could be paid to that person if he were qualified to receive it.'

'Guardian' is a technical legal term

The AAT noted that 'guardian' was not defined in the *Social Security Act*. It should, therefore, be given its ordinary legal meaning. The AAT said that this approach was supported by the detailed listing of other 'relatives' in s.33(3):

'It would be inconsistent with the nature of these parts of the definition to say that the remaining part, that dealing with "guardian", uses the term in a more liberal sense.'

(Reasons, para.17)

The AAT continued that a common element in most definitions of 'guardian' was that 'a guardian manages the affairs of a person who is incapable himself of so doing': Reasons, para.18.

In this case, C had remained capable of handling his own affairs until shortly before his death, although he had chosen to confer this task on Wain:

'19. The problem, as the Tribunal sees it, is that the delegation by C of the management of his affairs to the applicant did not negate his capacity to do so himself. While C may at this time never have intended to resume the management of his affairs, he retained the right to do so because the power-of-attorney he had given to Mr Wain was revocable at will.

20. I conclude in this way that the relationship between Mr Wain and

C was not one of guardian and ward as ordinarily understood in law, except for a few days before C's death.'

It followed, the AAT said, that Wain could not qualify for carer's pension apart from the week before C's death. The AAT commented:

'The Act, as it now stands, may not represent a sufficient response to the AIDS problem as regards carers but the Tribunal does not have the authority to remedy any deficiency which exists in the Act.'

(Reasons, para.23)

The AAT concluded that Wain had been qualified for special benefit while caring for C; and that, because he had given up his unemployment benefit to do so, the appropriate rate of special benefit was the unemployment benefit rate.

Formal decision

The AAT set aside the decision under review and remitted the matter to the respondent with a recommendation that Wain was qualified for carer's pension only for the last week of C's life.

[The *Social Security Act* is to be amended to overcome the restrictive impact of the definition of 'guardian' adopted in this decision. According to an announcement made at the time of the 1987 Budget:

'Carer's Pension will be extended to people who are not close relatives but who are providing constant care and attention to severely physically or mentally disabled age or invalid pensioners living in the same home.'

However, this change is not to come into effect until 1 February 1987.]

Income test

McCORMACK and SECRETARY TO DSS
(No.V86/469)

Decided: 13 July 1987 by H.E. Hallows.

McCormack had been granted an invalid pension in May 1984 on the basis that she was permanently blind.

Although she was married, she was paid at the single rate because her husband was not a pensioner. In October 1985, her husband was granted an age pension and, as a result of this grant, McCormack's pension was reduced to the married rate.

McCormack asked the AAT to review that decision.

The legislation

At the time of the DSS decision, s.28(1A) of the *Social Security Act* provided as follows:

'Subject to this Part, the maximum rate of age pension or invalid pension is -

(a) in the case of an unmarried person or a married person whose spouse is not in receipt of a prescribed pension - \$4,778.80 per annum; and

(b) in any other case - \$3,985.80 per annum.'

Sex discrimination?

McCormack argued that the reduction of her pension was inconsistent with the *Sex Discrimination Act* 1984, which had been intended 'to eliminate . . . discrimination against persons on the ground of sex, marital status . . .'

However, the AAT pointed out that s.40(2) expressly exempted the *Social Security Act* from the reach of the *Sex Discrimination Act*.

A 'prescribed pension'

McCormack also argued that her hus-

band was not receiving a 'prescribed pension' within s.28(1A)(a) because he was receiving only a part pension, as a result of the income test.

However, the AAT said, the *Social Security Act* defined a 'prescribed pension' as including an age pension: s.6(1):

'It is the "rate" of that pension which is less than the maximum rate due to other income received by Mr McCormack.'

(Reasons, para.8)

Formal decision

The AAT affirmed the decision under review.

INGUANTI and SECRETARY TO DSS

(No.V87/21)

Decided: 9 September 1987 by H.E. Hallowes, G.F. Brewer and R.W. Webster.

Salvatore Inguanti was granted an invalid pension in January 1978. In April 1978, he had become entitled to an Italian social security pension, paid from the INPS pension fund.

Inguanti arranged with his relatives in Italy for the Italian pension to be

paid to them so as to reduce a debt which he owed to them.

On 28 August 1986, Inguanti asked the INPS fund to pay his pension to him in Australia. The Italian Consul-General advised Inguanti in November 1986 that the new arrangements for payment of his Italian pension would take 12-18 months to implement; but that, when this was done, Inguanti would receive all the pension payments which had accrued to him since 28 August 1986.

The DSS decided that all the pension payments to which Inguanti had become entitled since 1978 should be treated as 'income' for the purposes of the income test. Inguanti asked the AAT to review that decision as it affected the pension payments which had become due since 28 August 1986, which he was still waiting to receive.

The definition of 'income'

At the time of the decision under review, s.6(1) of the *Social Security Act* defined 'income', in relation to a person, as meaning -

'personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for the person's own use or benefit by

any means from any source whatsoever within or outside Australia, and includes a periodical payment or benefit by way of gift or allowance . . .'

Pension payments 'derived', even if not 'received'

The AAT said that the Italian pension payable to Inguanti amounted to 'income' for the purposes of the *Social Security Act*. This had been decided in *Nemaz* (1987) 38 SSR 479.

Inguanti derived the pension payments for his own use or benefit outside Australia, the AAT said:

'He derives these moneys periodically. Money may be derived before it is received as long as the money has "come home to him in an immediately realizable form" (*Smith* (1982) 9 SSR 89). If "derived" was intended to mean no more or less than "received" there would be no need for that word to be used at all (see *Siebel* (1983) 14 SSR 142.'

(Reasons, para.12)

Formal decision

The AAT affirmed the decision under review.

Overpayment

PARSONS AND SECRETARY TO DSS

(No. W86/262)

Decided: 11 May 1987 by R.D. Nicholson, I.A. Wilkins and J.G. Billings

The applicant asked the AAT to review a DSS decision to recover an overpayment of \$4,014 in supporting parents benefit. He had been in receipt of that benefit between November 1982 and June 1983 and between November 1983 and March 1984.

The facts

The applicant did art work on a commission basis. The amounts paid to the applicant were usually in the sum of \$250 per week. In October 1982 he injured his ankle and was hospitalised. It was at this time he first applied for supporting parent's benefit.

The applicant said that after leaving hospital he asked the DSS whether his benefit would be affected if he received money on loan. He said that the DSS advised that it would not affect his entitlement.

Presumably on the basis of this advice the applicant then went to his employer and asked that the weekly payments of his commission be continued. The understanding was that these amounts would be earned by the applicant when he returned to work.

This arrangement continued until he returned to work in April 1983 although the DSS apparently did not cancel payment until June 1983. This

occurred in spite of the applicant notifying the DSS as to his return to work. A similar arrangement was also constituted with respect to the latter period that the applicant received the benefit.

Were the payments income?

The *Social Security Act* provides that the annual rate of a pension (which includes supporting parent's benefit) shall be reduced by one half of the amount of any income of the recipient that exceeds a specified sum.

Thus the question as to whether the loans by the employer were 'income' became important. In the view of the AAT the moneys had to be treated as income.

'The reason why that conclusion is unavoidable, in our view, is that the relevant paragraphs [of the Act] require computation of entitlement with reference to a pension year. Consequently, even if the moneys received by the applicant were in fact loans (and we make no finding to that effect) they subsequently became income within the pension year and were treated as such in the Applicant's tax returns. They are therefore taken into computation in respect of the pension year as income in respect of the periods in which they were paid. It is simply not open to the Applicant to apportion the pension year into segments.'

(Reasons,p.7)

Departmental error

However, with respect to the overpayment that occurred from April 1983 to June 1983 the considerations were different. That overpayment had been caused by Departmental error in failing to cancel the payment after notification by the applicant of his return to work.

Recovery

The Department had decided to recover the overpayment as a debt due to the Commonwealth. In considering whether there should be a favourable exercise of the discretion contained in the then s.146 of the Act to allow the payment of the debt by instalments, the AAT particularly focused on the hardship that recovery would cause to the applicant. The AAT also considered that the overpayment arose as a result of an innocent mistake. That mistake was made by the applicant in respect of his money being called loans, and in respect of the period between April and June 1983 on the part of the Department.

Formal decision

The AAT set aside the decision under review and substituted a decision that the amount of \$4,014 was a debt due to the Commonwealth, that recovery of that part of the debt constituted by payment from April to June 1983 and caused by Departmental error should be waived, and that the applicant should be allowed to repay the balance by reasonable monthly instalments given his financial position.