

Bank for living purposes. He cannot now claim that special benefit should be paid to him to enable him, in effect, to pay off part of that loan for, by his own action, he showed himself not in need of the benefit.

(Reasons, para. 24)

The AAT also quoted at length from the decision in *Watts* (1984) 21 SSR 237 in support of its conclusion.

Formal decision

The Tribunal affirmed the decision under review.

'Income'

HANLEY and SECRETARY TO DSS
(No.S86/35)

Decided: 24 October 1986 by
A.P.Renouf

Leonard Hanley had been in receipt of an invalid pension since October 1980. He had been injured as a soldier whilst serving abroad in 1949. Initially the Repatriation Commission ruled that his injuries were not due to military service and so held that he was not eligible for compensation under the *Repatriation Act*. However the applicant succeeded in having this claim re-opened and in 1985 he was granted a 100% disability pension backdated to December 1980.

As a result of this decision the DSS adjusted the applicant's rate of invalid pension and raised an overpayment of \$1,368. The Department of Veteran's Affairs deducted that amount from the arrears of disability pension. The applicant sought review by the AAT of the decision to raise the overpayment.

The legislation

The question for the Tribunal to decide was whether the payments

received by way of disability pension were income for the purposes of the *Social Security Act*.

Section 6 of the Act defines 'income' as:

...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 by way of gift or allowance, but does not include -...

The exclusions that follow specify a 'service pension' under the *Repatriation Act* but do not mention any other kind of pension under that Act.

War pension is 'income'

The applicant did not receive a service pension. He did not therefore come within the exclusion in section 6. The Tribunal could find no other conclusion than that the applicant's war pension, being 'moneys received' for his own use or benefit, amounted to income.

The applicant had attempted to rely on the decision in *Kolodziej* (1985) 26 SSR 315 where it had been decided that restitution payments made to persons persecuted by the Nazi regime were not income. But the AAT regarded that case as very different from the present case. The Tribunal agreed with the following comment made in *Kolodziej*:

[the restitution payments] are distinguishable from compensation payments paid pursuant to Workers Compensation Acts and Australian War Pensions which are related directly to 'services rendered in one form or another'.

(Cited in Reasons, para. 14)

Formal decision

The Tribunal affirmed the decision under review.

Sheltered employment allowance: assets test

MORGAN and SECRETARY TO DSS
(No.N86/339)

Decided: 17 October 1986 by
A.P.Renouf, M.S.McLelland and
G.P.Nicholls

The applicant applied to the AAT for review of a decision to cancel his sheltered employment allowance.

The facts

The applicant had been injured in a car accident when he was 2 years old. He was now 21. He had a spastic condition in his left arm and leg and had moderate mental retardation and epilepsy. He received over \$90,000 in compensation. This amount was handed to the Public Trustee to administer for the benefit of the applicant. By July 1985 the money invested had come to \$217,486.51.

In May 1981 the applicant applied for and was granted invalid pension at the full rate. In January 1984 this was

changed to sheltered employment allowance when he went to work at a sheltered workshop. This allowance was cancelled in March 1985 after the introduction of the assets test as the assets held by the Public Trustee exceeded the permitted limit.

Since that time the Public Trustee had been paying the applicant living expenses of \$500 per month.

No exemption for mentally retarded

Despite having much sympathy for the applicant the AAT had little choice but to affirm the decision under review. There was no real dispute that the assets of the applicant exceeded the limit. The Tribunal commented:

As the Act stands, it provides exemption from the assets test for only one class of disabled persons, the blind. It may be - and it was argued plausibly on behalf of the applicant - that in equity, the exemption from

the assets test should be extended to the mentally retarded and other classes of disabled persons where monies are held in trust for their wellbeing after those closest to them are no longer living. That is not a matter for this Tribunal but for Parliament. We note in passing that were the bulk of the applicant's trust funds invested in a 'principal place of residence', he would in all likelihood be once again eligible for the sheltered employment allowance. That is, however, not the case and we can do no more than apply the Act as it stands.

(Reasons, para.14)

Formal decision

The AAT affirmed the decision under review.