Overpayment: recovery

ZELENIKA and SECRETARY TO DSS
(NO. Q86/260)
Decided: 4 August 1987 by J.B.K. Williams, H.M. Pavlin and W.A. De Maria

Stanko Zelenika applied to the AAT for review of a DSS decision to recover an over payment of $9451.77 in sickness benefit. This decision was made after the DSS had been informed that the applicant had been in receipt of wages over the relevant period which had not been notified to them.

The issue

Section 114(3) of the *Social Security Act* at that time provided that the income of a person shall include the income of their spouse, unless they are living apart pursuant to a separation agreement of a court order, or in circumstances deemed likely to be permanent. As there was no separation agreement or court order in existence the only question was whether the DSS could be satisfied that any separation of the applicant and his wife was likely to be permanent.

The evidence suggested that the applicant and his wife separated temporarily at times. A written statement provided by the applicant's wife indicated that at the present time there was no intention to separate permanently. The applicant also continued to indicate that he was 'married' rather than 'separated' on his Sickness Benefit Review Form. These statements were also supported by oral evidence given by the applicant and his wife.

Accordingly, the AAT found that the income of the applicant's wife should have been included in the income of the applicant. As a result the applicant should have had his rate of benefit reduced.

Recovery: which head?

The DSS alleged that the overpayment was recoverable under s. 140(1) of the *Social Security Act*, viz, that as a result of a failure to notify the DSS of his wife's employment he had obtained a benefit to which he was not entitled and that the overpayment was therefore a debt due to the Commonwealth.

However, the AAT considered evidence that the applicant had informed a counter officer of the DSS that his wife was working. It appeared that the applicant went to the DSS when he discovered that his wife was working in order to get their assistance in seeking a contribution towards house repayments from his wife.

The AAT acknowledged that while the DSS may not have been informed about the wife's employment in the 'usual' manner, there was nevertheless 'notification'. The Tribunal was 'unable to find that it is more probable than not that the applicant was in breach of a statutory duty to notify this fact' (Reasons, p. 10).

Section 140(2) was the appropriate head under which to seek recovery. That section provided that where a benefit was paid that should not have been paid, then the amount was recoverable by deductions from ongoing entitlements.

However, there had been no consideration by the DSS as to the waiving of recovery under s. 146 of the Act. There was insufficient evidence before the Tribunal to make such a decision although a recent award of damages would be a relevant matter to consider.

Formal decision

The AAT set aside the decision under review and substituted the following decision:

(a) that the applicant's income should include that of his spouse;
(b) that the overpayment is recoverable under s. 140(2) of the Act;
(c) that the matter be remitted to the DSS for consideration under s. 146(1).

Federal Court decisions

Family allowance: children overseas

VAN CONG HUYNH v SECRETARY TO DSS
Federal Court of Australia
Decided: 27 October 1987 by Davies J.

The Federal Court *dismissed* an appeal from the AAT decision in *Huynh* (1987) 35 *SSR* 447, which had affirmed a DSS decision to cancel the applicant's family allowance for his children living in Vietnam.

The issue was whether Van had the 'custody, care and control' of his children. As mentioned in *Ho* (1987) 40 *SSR* 510, this test looked at the question of who cared for the children and was responsible for their control and welfare.

Van argued that the AAT had concentrated too heavily on the inability of his children to join him in Australia because they lacked exit visas from Vietnam.

The Court agreed that this approach was not consistent with such decisions as *Ta* (1984) 22 *SSR* 247 and *Le* (1986) 32 *SSR* 403, which had not emphasised the lack of exit visas. But, because this was an appeal on a question of law under s.44 of *AAT Act*, the appeal was not concerned with consistency, the AAT said:

> 'Provided that the Tribunal has taken into account all relevant factors, excluded from its consideration irrelevant factors and then applied the correct legislative criteria, the decision is not one for the intervention of the Court. Inconsistency of approach in the weighing up of like factors may lead to inconsistency in decision-making and a sense of injustice by those who are affected thereby, but it does not of itself lead to an error of law which will justify intervention by this Court.'

(Reasons, pp.6-7)

The Court concluded that the facts of the case were capable of supporting the conclusion of the AAT.

Invalid pension: permanent incapacity for work

ERSOY V SECRETARY TO DSS
Federal Court of Australia
Decided: 27 October 1987 by Davies J.

This was an appeal from the AAT's decision in *Ersoy* (1987) 38 *SSR* 478. The Tribunal, by a majority decision, had affirmed a DSS decision to reject the applicant's claim for invalid pension.

The applicant had migrated to Australia from Turkey in 1975. In 1976 he injured his back while working. Since that time he had been unable to do heavy work but the Tribunal majority had found that with appropriate retraining the applicant would be capable of doing semi-skilled work. Thus they decided that as he could perform work other than heavy manual work he was not 'permanently incapacitated for work' as required by the *Social Security Act* to qualify for invalid pension.

Was the future capacity of the applicant relevant?

The applicant submitted to the Federal Court that the Tribunal had not decided the application according to the applicant's present condition but according to his capacity at some time in the future should he undertake unspecified courses. As the Tribunal had not specified the courses it had in mind there was a denial of natural justice according to the applicant as