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

there had been no opportunity to argue before the Tribunal whether he would be able to undertake such courses.

The Federal Court did not accept this submission:

> '...the majority made it clear that the applicant had a sufficient capacity to carry out remunerated employment and to obtain that employment to preclude his satisfying the requirement of 85 per cent incapacity for work. The majority said that, although the market in which the applicant could be expected to sell his labour had been narrowed by his medical condition, a certain lack of fluency in spoken English and his limited English literacy, nevertheless, there was a work market still open to him to exploit if he wished to do so.
>
> The majority went on to find that the applicant's capacity for work would be enhanced by his undertaking a course or courses of study. This additional finding does not detract from the clear finding of fact made by the majority as to the applicant's existing capacity for work.'

(Reasons, pp.11-12)

Lack of evidence

The applicant also submitted that the Tribunal had not identified the labour market that was open to him. He also argued that the majority took into account factual circumstances of which there was little, if any, evidence. The Court did not perceive any errors in the approach of the AAT:

> '...When, as in this case, an applicant has not actively sought employment, there may be little that the Tribunal can do save rely on its general knowledge of the employment market and its view of the applicant's employability, having regard to his medical condition, his training, his skills, his personality and like matters...'

(Reasons, p.12)

Formal Decision

The Federal Court dismissed the appeal.

Income test: Public Trustee

FLANNERY v SECRETARY TO DSS
Federal Court of Australia
Decided: 7 December 1987 by Sweeney, Keely and Jenkinson JJ.

This was an appeal against the decision of the AAT in *Flannery* (24 December 1986). The AAT had decided that money received by the Public Trustee, on behalf of an infirm person, should be treated as income received by the person for her own benefit and so within the definition of 'income' under the *Social Security Act*.

Special benefit

It was not disputed that Flannery qualified for special benefit. The rate of that benefit, according to s.114(1) of the *Social Security Act*, was to be calculated by reference to his income and the income of his wife. At the time of the decision under review, s.106 defined 'income' to mean -

> 'any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever . . . and includes any periodical payment or benefit by way of gift or allowance . . .'

'Profits . . . derived'

Flannery lived in a *de facto* relationship with a woman, S, who was an 'infirm person' under the *Public Trustee Act* 1958 (Vic.), and for whom he provided daily care. The 'general care, protection and management' of her property, including a fund of around $50 000, was in the hands of the Public Trustee; and S had no control over her property.

The *Public Trustee Act* provided that the Public Trustee could invest money held by him for any person. The investments were to be in a 'common fund'; and the Public Trustee was obliged to allocate the returns on those investments to the account of each person for whom the Public Trustee held money, 'at such times and intervals as the Public Trustee determines': s.57(2). This allocation took place every 6 months, and the amounts allocated were immediately reinvested in the common fund.

The Federal Court said that the allocation of this interest to S's account amounted to 'a derivation by her of profits, and for her own benefit, in the sense contemplated by the definition of "income"'. **Jenkinson J.** noted that S could not accept payment of the amount of interest and that the money credited to her account was immediately invested in the common fund. Jenkinson J. continued:

> 'But the indebtedness, evidenced in the books of the Public Trustee, in that amount of interest to the protected person is at the moment of allocation her property, in my opinion. The Public Trustee holds no interest in her property, not even the bare leg al estate of trustee. His custody of her property is the custody of a bailiff or a statutory agent . . . At the moment of allocation of interest, pursuant to s.57(2), there was in my opinion a derivation of profits by the protected person for her own benefit, which brings the amount of interest allocated within the defined meaning of income . . . It was derived for her own benefit notwithstanding her legal incapacity to deal with it personally, in my opinion.'

(Judgment, p.10)

Repatriation pension

The AAT had also considered the position of a pension payable to S under the *Repatriation Act* 1920 (Cth), but being paid to the Public Trustee. It had decided, on the basis of advice from the parties, that this pension had been expressly excluded from the definition of 'income' in s.106 of the *Social Security Act* up to 10 September 1984; but that it had not been excluded after that date.

The Federal Court said that the AAT had been in error on this point: the s.106 definition of 'income' had excluded a repatriation pension throughout the relevant period; and, therefore, S's repatriation pension could not affect the rate of special benefit payable to Flannery.

Carer's pension

Flannery had also applied for a carer's pension, which the AAT had said would have been payable but for the level of S's income (defined in similar terms in s.6(1) of the *Social Security Act*). The AAT said that this income consisted, not only of the interest payments credited to her account by the Public Trustee, but also of the repatriation pension.

The Federal Court agreed that S's income would affect the level of carer's pension payable to Flannery. It also agreed that the interest allocated to her account and the repatriation pension were 'income', as defined in s.6(1). (At no time during the relevant period did the s.6(1) definition of 'income' exclude a repatriation pension.)

However, the Court went on to say that, apart from the income question, Flannery could not have qualified for a carer's pension. At the relevant time, s.33(1) provided that this pension was payable to a person who cared for a relative, in their home, if the relative was a severely disabled age or invalid pensioner.

Although Flannery would have qualified for an invalid pension, the level of her income prevented payment of any pension to her. The term 'invalid pensioner' was defined in the Act to mean 'a person in receipt of a pension under Part III'. Accordingly, the Federal Court said, she was not an invalid pensioner.

Formal decision

The Federal Court varied the decision of the AAT by excluding S's repatriation pension from the calculation of the rate of Flannery's special benefit throughout the period under review.