

been misappropriated by her husband. The AAT 'reluctantly' concluded that

'even if the applicant could demonstrate that none of the family allowance was applied by the husband to the maintenance, training or advancement of the children in respect of whom it was granted, she would have no remedy under the present application.'

The legislation

The relevant sections of the *Social Security Act* were (at the time):

- s.94(2) [now s.79(5)], which provided, in effect, that a wife was the person eligible for family allowance where she and her husband were living together and sharing custody of a child;
- s.99A [now s.86], which prevented family allowance being paid to 2 persons for the same child unless the Secretary to the DSS declared in writing that 2 persons qualified for the allowance which was to be shared between them;
- s.135TC [now s.161], which authorised the Secretary to direct payment of a benefit or allowance (1) to a person to whom it was granted, or (2) to a person on behalf of a person specified in 135TC(1).

Decision

The husband had not been charged or convicted of any offence and the AAT said that even if he were, 'the fact that ... payments were recoverable from him could not oblige the respondent to pay any moneys to the applicant'. Section 135TC [now s.161] confers the power on the DSS to pay family allowance to the husband's account and 'is ... in absolute terms. There is no indication of any specific matters which may or ought to be taken into consideration': Reasons, pp.6-7.

The Tribunal found that the DSS could not be held responsible for either the ignorance of an apparent claimant or any fraud committed upon her to secure her signature. Even though a comparison of signatures between the two claims 'would have put any reasonable person on enquiry', there was nothing in the Act to oblige the DSS to satisfy itself that a claim was signed by the person entitled to make it.

Conclusion

The AAT noted that neither the Act nor the claim forms paid attention to circumstances such as those in the present case:

'One wonders what special provision has been made to ensure that migrant mothers who have little knowledge of our language and our laws are protected from their own ignorance or the defection and fraud of others, especially one who might reasonably be assumed to be helping them, like a husband.

I hope this case is drawn to the attention of those responsible for such matters'.

(Reasons, p.8)

[B.W.]

Overpayment: recovery

DUNCAN and SECRETARY TO DSS

(No. N87/1048)

Decided: 6 April 1988 by A.P. Renouf.

An overpayment of \$20 358.90 occurred when Duncan received unemployment benefit while running a business. The AAT found that at the relevant times Duncan was not unemployed, but was 'a self-employed businessman who was forced to fall back upon unemployment benefit as a means of trying to make his business viable and to earn a living for himself and his family'. While the Tribunal accepted that Duncan had taken some steps to obtain suitable work his inability to do so 'was conditioned by his overriding (and natural) commitment to his business'.

Duncan's failure to advise the DSS of the existence of the business misled the respondent into paying benefit which should not have been paid. A debt to the Commonwealth was thereby created. The appellant argued that financial hardship existed and the DSS should write off the debt, or waive recovery by exercising the discretion in s.146(1) [now s.186(1)] of the *Social Security Act*.

The AAT accepted that the financial circumstances were bad but, because the appellant had misled the respondent to obtain money to which he was not entitled, the financial hardship imposed by recovery of the debt was not severe enough to warrant exercise of the discretion in the appellant's favour. The Tribunal did, however, recommend that the rate of recovery should be reduced until the applicant was able to improve his financial situation.

The AAT was unimpressed by an argument that the amount of the overpayment should be reduced by the amount of Family Income Supplement to which Duncan would have been entitled, had he known of its existence and claimed it. It found that, if a person misrepresents his situation, he has to accept that a consequence of the misrepresentation may be the denial of a benefit of a nature different to the one he is seeking.

[B.W.]

MALAJ AND SECRETARY TO DSS

(No. S86/142)

Decided: 20 April 1988 by J.A. Kiosoglous, J.T.B. Linn and D.B. Williams.

The appeal dealt with three separate periods during which the appellant had

received unemployment benefit. In the first period the Tribunal accepted that Malaj was employed for part of the period during which he had received unemployment benefit so that part of the benefit was recoverable. The Tribunal decided that, during the other two periods, Malaj was conducting a sub-contracting business and was not unemployed within the meaning of the *Social Security Act*. Malaj had earlier been prosecuted successfully but no reparation order was made. The overpayment was recoverable 'in the normal way'.

The AAT did not accept that this was a case in which it was appropriate to exercise the discretion in s.107(3) [now s.116(4)] to disregard the work. A considerable amount of work had been done and the appellant could not rely upon the fact that he did not receive much money for the work. The Tribunal repeated the words of the AAT in *Hine* (1981) 4 SSR 38, that unemployment benefit is not a support scheme for inadequately remunerated employment.

[B.W.]

Widow's pension: recovery of overpayment

BYRNE and SECRETARY TO DSS

(No. N87/82)

Decided: 28 March 1988 by Dr A.P. Renouf.

Margaret Byrne appealed to the AAT against a DSS decision to raise and recover an overpayment of widow's pension of \$40,385.60 on the basis that throughout the period under review, she was living in a de facto relationship with Mr Ingo Golab.

Byrne had first moved to premises owned by Golab in October 1977 and in March, 1979 her third child, later acknowledged to be the child of Byrne and Golab, was born. In 1979 she had stated that she received board and lodging in return for services as a housekeeper. In 1980, Byrne had stated that she paid board and lodging to her mother. In 1983, she informed the department that board was paid to her brother, Ingo Golab.

Byrne had admitted to the DSS, when interviewed in February 1985, that she had been residing in a de facto relationship with Golab since 1977. Pension was cancelled and an overpayment, which she offered to repay over a period of time, was raised in October, 1985. Byrne signed an acknowledgement of debt and agreed to recovery being made from her family allowance.