

one roof. The house was put on the market but not sold.

In early 1982 the husband left the house and in April 1982 the wife applied for and was granted sickness benefit. In the latter part of 1982 the husband returned to the family house and her benefit was terminated. It was agreed he would pay her \$100 per week for housekeeping and taking care of his letters and some work documents.

The husband again left the home in early 1985 and she again applied for and received sickness benefit. In August 1985 she asked him to return because of her illness. He did so and paid her \$20 to \$30 per week for doing his washing. As a result of her November 1985 invalid pension claim the DSS accepted she was 85% permanently incapacitated for paid work but was considered as married.

#### The decision

The AAT examined s.3(1), 3(5), 3(8) and s.33(1) and (12) of the *Social Security Act*. It found Keenan had not established that she and her husband were separated under the one roof as there was no corroboration of her evidence. Even had she proved separation under the one roof under s.3(1), the inclusion of s.3(8) meant she would still be treated as a 'married person' after 26 weeks unless property proceedings were instituted.

The AAT used the factors listed in the *Annotated Social Security Act* (4th edn) to assess the nature of the relationship and to conclude that a 'marriage of sorts' existed.

Under s.3(5) of the *Social Security Act*, a wife is deemed to receive 50% of the aggregate of her income and that of her husband. The AAT had encouraged the applicant to call her husband as a witness. She had failed to do so and no evidence regarding his income was available. Since she had failed to establish a fact crucial to her case the AAT said it had no choice but to reject her claim and affirm the decision under review.

[B.W.]

## Assets test: 'deemed income'

### HUGHES and SECRETARY TO DSS

(No. 4917)

Decided: 10 February 1989

by R.A. Balmford.

The AAT *affirmed* a DSS decision to grant Sufiya Hughes a family allowance for her child from 15 August 1987 and not from the date of the child's birth, 19 April 1987.

Hughes had contacted a DSS office shortly after the birth of her child and had been told that she would have 6 months in which to lodge her claim for family allowance. Section 102(1)(a) of the *Social Security Act* then allowed a 6-month period for the lodging of claims for family allowance.

However, the *Social Security and Veterans' Entitlements Amendment Act* 1987 amended s.102(1)(a) from 1 July 1987. The amended section provided that family allowance would only be payable from the first day of the family allowance period during which a person lodged a claim for the allowance. The Bill for this Amendment Act had been introduced into Parliament at the time when Hughes was advised by the DSS office that she would have six months in which to lodge her claim.

At that time, s.135TA(1) prevented the grant or payment of any allowance, 'except upon the making of a claim for that . . . allowance', which, according to s.135TB(1), was required to 'be made in writing'.

Hughes eventually lodged her claim for family allowance on 26 August 1987 (that is, a little over 4 months after the birth of her child) and the DSS then decided, in accordance with the amended s.102(1)(a), that the allowance should be paid to her from 15 August 1987.

#### An 'accrued right'?

Hughes argued that the Amendment Act had not taken away her 'accrued right' to family allowance, which was protected by s.8(c) of the *Acts Interpretation Act* 1901. That section provides:

'8. Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not -

(c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed.'

The AAT referred to a decision of the Privy Council, *Abbott v Minister for Lands* [1895] AC 425, where the following observation had been made:

'Their Lordships . . . think that the mere right (assuming it to be properly so-called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by the individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment.'

The AAT said that it was satisfied that the intention of Parliament in passing the Amendment Act had been to change the law; and that any substantive entitlement to the payment of family allowance for a period prior to the family allowance period during which the claim was lodged had been removed by the Amendment Act.

[At that time, s.135TA(1) prevented the grant or payment of any allowance, 'except upon the making of a claim for that . . . allowance', which, according to s.135TB(1), was required to 'be made in writing'.]

[P.H.]

## Invalid pension: lump sum preclusion period

### TRIKILIS and SECRETARY TO DSS

(No. 4930)

Decided: 21 February 1989

by H.E. Hallowes.

Steve Trikilis claimed invalid pension on 28 September 1987. In so doing he advised he had settled a claim for compensation on 23 September 1987 for \$35 000. The award was made pursuant to the *Accident Compensation Act* 1985 (Vic.).

The DSS accepted his claim on medical grounds but decided his compensation award precluded him from receiving pension from 23 September 1987 until 14 March 1989.

### The legislation

At the time the claim for invalid pension was lodged the relevant sections of the *Social Security Act* were s.152, 153(1)(b) and (d).

Section 153(1)(b) provided:

'Where a person who is receiving a pension receives . . . (b) a lump sum payment by way of compensation, then, . . . (d) . . . a pension is not payable . . . at any time during the lump sum payment period.'

Section 153(1) was amended by the *Social Security and Veterans' Entitlements Amendment Act (No. 2)* 1987. This amended the introductory words to read: 'where a person . . . who is qualified to receive a pension receives . . . '.

Further amendments were made by s.18 and s.19 of the *Social Security Amendment Act* 1988 (the *Retrospective Act*) which provided that the amendments to s.152 and 153 'shall be taken to have commenced on 1 May 1987' and apply to any payments of compensation 'received on or after 1 May 1987'.

Between 1 May 1987 and 15 December 1987 s.153(1) of the Act read: 'Where a person who is receiving a pension receives or has received (whether before or after becoming so qualified) . . . After December 1987 it reads: 'Where a person . . . who is qualified to receive a pension receives or has received (whether before or after becoming so qualified) . . . '.

### The decision

Trikilis was not 'receiving a pension' on the date he received the lump sum. He lodged his claim for invalid pension on 28 September 1987 following his receipt of the lump sum. The AAT said Trikilis was caught by the *Retrospective Act*. His consent award was made before 9 February 1988 so the compensation part of the lump sum was 'so much of the lump sum payment as is, in the opinion of the Secretary, in respect of an incapacity for work'.

The Tribunal considered that the entire \$35 000 was the compensation part of 'the lump sum payment . . . in respect of an incapacity for work'. No special circumstances existed which might bring s.156 into play to justify the making of an exception to the principle of preclusion from receipt of pension.

In conclusion the AAT said:

'When Mr Trikilis received his award for compensation he was not receiving a pension. he was not "caught" by the legislation. He is caught because of the *Retrospective Act*. Nor does he receive the benefit of the amendments to paragraph 152(2)(c) by the *Retrospective Act* which

apply to lump sum payments when the settlement was made or entered into on or after 9 February 1988.'

[B.W.]



## Overpayment: effect of AAT's stay order

HALL and SECRETARY TO DSS  
(No. 4745)

Decided: 28 October 1988

by J.O. Ballard.

Catheena Hall was granted a supporting parent's benefit in September 1986. In May 1987, the DSS cancelled this benefit on the ground that she was living in a *de facto* relationship.

Hall asks the AAT to review that decision and, on 2 July 1987, the Tribunal ordered that the cancellation of Hall's supporting parent's benefit be stayed until the determination of the review.

After hearing evidence from several witnesses, the AAT decided that, throughout the relevant period, Hall had not been qualified to receive supporting parent's benefit because she had been living in a *de facto* relationship with a man (referred to as 'Mark').

The question then arose whether the DSS could recover from Hall the amounts of supporting parent's benefit paid to her before and after the AAT's stay order.

### The legislation

Section 41(2) of the AAT Act authorises the Tribunal to make an order 'staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates', where the Tribunal 'is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review'.

The AAT is authorised to attach conditions to a stay order and to vary or revoke a stay order.

### The AAT's jurisdiction

The Tribunal decided that it did have jurisdiction to determine whether the supporting parent's benefit paid to Hall following the stay order could be recovered from her by the DSS.

The Tribunal noted that, in *Dart* (1982) 8 SSR 80; 4 ALD 553, the AAT had said that payments of benefit to a person following a stay order by the Tribunal would not be recoverable from that person under the *Social Security Act* as overpayment, even if the person were subsequently found not to be eligible for that benefit. The AAT said:

'During the period of the operation of the stay order the benefit was not paid to the applicant in consequence of a failure or omission to comply with any provision of the Act but lawfully in consequence of the stay order. That being the case those moneys paid are not recoverable under s.181 of the Act.'

(Reasons, para.25)

Turning to the payments made to Hall before the stay order (but during the period when she was not qualified to receive them), the AAT noted that the decision which it was reviewing was a decision to cancel Hall's supporting parent's benefit, not a decision to recover any overpayments from her. Accordingly, the AAT did not have any jurisdiction to review the question whether the moneys paid to Hall by way of supporting parent's benefit prior to the stay order should be recovered from her.

### Formal decision

The AAT varied the decision under review by ordering that the DSS could not seek recovery of payments made consequent upon the stay order under s.41 of the AAT Act.

[P.H.]

