Interest on money withheld by DSS

TRIMBOLI v SECRETARY TO DSS

Federal Court of Australia

Decided: 23 March 1989

by Woodward, Beaumont, and Hill JJ.

This was an appeal, under s.44 of the *AAT Act*, from the decision in *Trimboli* (1988) 42 *SSR* 534.

The Tribunal had reduced the amount which the DSS could recover from Trimboli (as sickness benefits recoverable from a compensation award) from $15 114 to $12 545. As the DSS had recovered the higher amount direct from the insurer involved in the worker's compensation claim, the consequence was that the DSS was obliged to refund to Trimboli the sum of $2569, which it had held for more than 3 years.

The AAT had rejected Trimboli's argument that the DSS should be obliged to pay interest to Trimboli on the amount which it had unlawfully withheld. The AAT had said that neither the Secretary nor the Tribunal had any legal authority to make a payment of interest on money improperly withheld by the DSS.

Power to order payment of interest

The principal judgment in this case was delivered by **Hill J**. He accepted, without deciding, that there was no power under the *Social Security Act* for the Secretary to pay out interest on moneys which had been unlawfully withheld by the DSS. However, it did not follow that the Secretary could not make such a payment independent of the *Social Security Act*. Hill J referred to the High Court decision in *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, where the Court had decided that, in litigation, the legal position of the Commonwealth was to be decided in the same way as the legal position of any other party to legal proceedings.

The High Court had also said that, even before the Commonwealth was involved in litigation, it was proper to recognise that the Commonwealth's legal liability could be enforced in legal proceedings, in the same way as the legal liability of a private individual could be enforced in legal proceedings. The High Court had said: 'A payment in satisfaction of such a liability will not be unlawful': 161 CLR at 266. Hill J said that —

> 'It might . . . follow from the High Court's judgment in *Evans Deakin* that the Department could compromise a claim for an excess of sickness benefits withheld under s.115D by paying to the claimant interest rather than litigating the issue in a Court and becoming liable to interest pursuant, for example, to s.94 of the *Supreme Court Act* [N.S.W.] . . .'

(Reasons, p.7)

However, Hill J said, that issue was not raised in the present matter for two reasons. First, there was no provision in the *Social Security Act* or in the *AAT Act* for the Secretary or the AAT to award interest on moneys unlawfully withheld. Secondly, even if the Secretary had power under the *Social Security Act* to make a payment of interest (so that this power would be available to the AAT on review, pursuant to s.43(1) of the AAT Act), the exercise of any such power had not been properly before the AAT, in that the question of the payment of interest had not been reviewed by the SSAT or by a delegate of the Secretary, as required by the former s.17 of the *Social Security Act*.

Accordingly, on the basis of the Federal Court's decision in *Riley* (1987) 41 *SSR* 527, the power of the AAT to order a payment of interest could not arise in the AAT appeal.

In his separate judgment, **Beaumont J** expressed the clear opinion that the Secretary to the DSS did have legal authority, apart from any provision in the *Social Security Act*, to make a payment of interest relating to moneys unlawfully withheld by the DSS.

Beaumont J referred to the principle in the case of *Auckland Harbour Board v The King* (1924) AC 318, that a government department could not pay out funds in the absence of parliamentary authorisation. He referred to the High Court's decision in *Evans Deakin* (above), which had pointed out that s.64 of the *Judiciary Act* 1903 (Cth) said that the rights and liabilities of the Commonwealth in litigation were to be the same as the rights and liabilities of other parties; and that this was to be taken into account in determining the legal position of the Commonwealth even before litigation was commenced.

Beaumont J said that, if Trimboli had begun court proceedings to recover the moneys unlawfully withheld by the DSS and had also claimed interest (pursuant to State legislation in force in NSW), the Commonwealth would have been 'potentially liable to pay interest'. The Secretary could have agreed to pay the claim for interest and so discharge the Commonwealth's potential liability. In the view of Beaumont J, there was no substantial difference before the commencement of such court proceedings:

> 'At all material times the Commonwealth was subject to a potential liability to pay interest under one or other of the statutes in force in the several jurisdictions in which [Trimboli] could have litigated his claims. In my view, it must follow from the existence of this potential statutory liability, that the principle stated in the *Auckland Harbour Case* can have no application here. This is so independently of the operation of s.115E of the *Social Security Act*.'

(Reasons, p.5)

Discretion to disregard part of compensation award

However, **Hill J** said, it did not follow that the question of Trimboli being wrongfully deprived of his money over an extended period was irrelevant to the issues before the AAT when dealing with this matter. One issue which was clearly within the jurisdiction of the AAT (because it had been dealt with by the SSAT and a DSS officer) was the exercise of the discretion in the former s.115E [now s.156] of the *Social Security Act*.

That section gave the Secretary a discretion to disregard all or part of a compensation award (which would otherwise be available for the recovery of sickness benefits) in the 'special circumstances of the case'.

Hill J said that it was not appropriate to attempt to define what circumstances would be regarded as 'special' as they would vary with the facts of each particular case. Similarly, the discretion in s.115E should be seen as 'extremely broad' and should not be confined, except that it was 'to be exercised *bona fide* and for the purposes for which the discretion is conferred, such purposes being determined by reference to the policy and purpose of the *Social Security Act*': Reasons, pp.10-11.

The fact that Trimboli had been 'wrongly deprived of money to which he was entitled, and so lost the opportunity of that money' was a factor to be taken into account in deciding whether there were 'special circumstances' to justify disregarding part of the compensation award received by Trimboli (resulting in a refund to him of an additional part of the recovered sickness benefits). Hill J said:

> 'It seems to me that while a pensioner who has been deprived of money may have no

legal right to interest unless awarded it in curial proceedings, the exercise of discretion under s.115E in an appropriate case can substantially put a pensioner who does not commence court proceedings in the same position as one who does and thereby prevent an anomalous situation arising.'

(Reasons, p.12)

Beaumont J agreed with Hill J that s.115E provided a basis on which a payment could be made to Trimboli to compensate him for the unlawful retention of the money in question. (**Woodward J** also agreed that the fact that Trimboli had been deprived by the DSS of money to which he was entitled 'was a matter proper to be taken into account... in considering... s.115E of the *Social Security Act* . . .': Reasons, p.2.)

However, Beaumont J said that s.115E was not the only way in which the Secretary to the DSS could compensate Trimboli:

'[T]he statutory provisions in force in this State conferring power upon courts to award interest provide an alternative source of Parliamentary authorisation for such payment. This source is available notwithstanding that proceedings have not yet been instituted in a court for recovery of the amount in dispute.

This is not to say that the Secretary has any obligation to pay interest, or its equivalent. Nor is it to say that the Secretary ought to exercise his power to compromise any such claim in any particular way. But it is not correct to suggest that, by virtue of the *Auckland Harbour* principle, any such payment would be illegal unless and until court proceedings had been commenced.'

(Reasons, pp.5-6)

Formal decision

The Federal Court allowed the appeal, set aside the orders made by the AAT, and remitted the matter to the AAT 'to review the exercise of the discretion under s.115E . . . in accordance with the reasons for decision of this Court . . .'

[P.H.]

Invalid pension: granted from date of AAT decision

SECRETARY DEPARTMENT OF SOCIAL SECURITY v GOUDGE

Federal Court of Australia

Decided: 5 May 1989 by Neaves J.

This was an appeal, under s.44 of the *Social Security Act*, against the decision of the AAT in *Goudge* (1988) 43 *SSR* 553.

Goudge had asked the AAT to review a DSS decision that he was not permanently incapacitated for work and could not, therefore, qualify for invalid pension.

The AAT decided that Goudge had not been permanently incapacitated for work at the time when he lodged his claim for invalid pension (May 1985) but, because his condition had deteriorated, he was at least 85% permanently incapacitated for work at the date of the AAT hearing.

The AAT decided that Goudge was not entitled to invalid pension prior to the date of its decision (14 April 1988) but was qualified for invalid pension from that date.

The 3-month rule

In support of its appeal, the DSS argued that the former s.135TB(2) [later renumbered as s.159(2)] of the *Social Security Act* prevented the grant of a pension to a person who was not qualified at the date when the claim for that pension was lodged, unless the person became qualified within 3 months of lodging the claim.

Section 135TB(2) provided that a claim for pension or benefit, lodged at a time when a person was not qualified for the pension or benefit, should 'be deemed to have been lodged' on a later day, where the person became qualified for the pension on that later day and the later day occurred within 3 months of the day on which the claim was lodged.

This provision came into operation on 5 September 1985, some 3 months after Goudge had lodged his claim for invalid pension. However, by virtue of s.123(2) of the *Social Security and Repatriation Legislation Amendment Act* 1985, the newly enacted s.135TB(2) applied to Goudge's claim, even though that claim had been lodged before the section was inserted into the *Social Security Act*.

Neaves J referred to the decision of the AAT *Tiknaz* (1981) 5 *SSR* 45, where the Tribunal had said that an invalid pension could be granted to a claimant from a date substantially later than the date on which the person had lodged a claim for that pension, where the person had become qualified for invalid pension on that later date. The amendments to the *Social Security Act* introduced in September 1985 did not have the effect, Neaves J said, of limiting the grant of an invalid pension to a person who was qualified for the pension on the date of the lodgment of the claim or within 3 months after that lodgment:

'Section 135TB(2), in the form which it then took, relevantly did no more than provide that, in the circumstances envisaged, a date other than the date on which a claim for invalid pension was lodged was to be treated as the date of lodgment.'

(Reasons, p.17)

Neaves J noted that, with effect from 1 July 1986, s.135TA(1A) [later renumbered as s.158(2)] was inserted in the *Social Security Act*. That sub-section declared that, subject to s.135TB(2), a claim should be deemed not to have been made by a person, if at the time of the making of the claim, a person was not qualified for the pension claimed. This provision, the AAT said -

'gave effect for the first time to a legislative intention that the grant of an invalid pension is to be made only if the claimant is qualified to receive the pension at the date of the lodgment of a claim for such pension or on a date within 3 months thereafter.'

(Reasons, p.18)

Clearly, the AAT said, this would be the position where a claim for a pension was lodged after the date on which s.135TA(1A) had commenced, namely 1 July 1986. However, where a claim had been lodged before that date, the rule expressed in that sub-section had no operation. This was because the legislation which inserted s.135TA(1A) had contained no provision providing that it was to apply to claims lodged before it came into operation and it should 'be read as having a prospective operation only': Reasons, p.19.

Neaves J expressed his conclusion as follows:

'It follows, in my opinion, that, as the respondent's claim was lodged prior to 1 July 1986, the Secretary, and consequently the Tribunal, was not precluded by the provisions of s.158 or s.159 from considering whether the respondent was qualified to receive an invalid pension at any time between the date of the lodgment of the claim and the date upon which the matter was determined.'

(Reasons, pp.19-20)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]