

Family allowance: income test

MORRISON and SECRETARY TO DSS

(No. 5188)

Decided: 21 April 1989 by S.A. Forgie. Vivien Morrison was granted family allowance for her child from February 1987.

In July 1987, the *Social Security Act* was amended to introduce an income test for family allowance, to take effect from 15 October 1987.

In response to a request from the DSS, Morrison lodged a form with the DSS, setting out details of the combined taxable income of herself and her husband. The form showed that the family's combined income in the 1986-87 tax year was \$59 283 — well above the income test limit. However the form also showed that the family's combined income would be more than 25% below that amount in the 1987-88 tax year.

The DSS then mislaid Morrison's form and, when the income test came into operation in October 1987, cancelled Morrison's family allowance.

In August 1988, Morrison lodged a second form relating to the family's combined income in the 2 tax years 1986-87 and 1987-88. She indicated on this form that the family's income for 1986-87 had actually been higher than she had notified in the previous year; and that the family income for the 1987-88 tax year had been higher than her original estimate. In fact, the actual family income for 1987-88 was not 25% less than the family income for 1986-87, although it did fall below the maximum income level for payment of family allowance.

Following Morrison's lodgment of this second form, the DSS found her first form. The DSS decided that Morrison should be paid family allowance from July 1988; but refused to pay her family allowance for the period between October 1987 and June 1988.

Morrison asked the AAT to review the decision not to pay her family allowance for that period.

The legislation

Section 85(3) of the *Social Security Act* provides that the rate of family allowance payable to a person is to be

reduced where the combined family taxable income of the person exceeds a specified threshold.

Section 85(7) provides that, where a person makes a written request and the combined taxable family income for the following year of income 'is, or is likely to be, at least 25% less than the taxable income . . . for that last year of income', then 'that following year of income shall be used' for the purposes of the s.85(3) income test.

The DSS had issued a Staff Direction relating to the administration of s.85(7), and this read as follows:

'It should be remembered that where the delegate accepts the claim of a substantial reduction in income and that reduction does not eventuate, the family allowance paid is not recoverable unless there was a misrepresentation.'

Predicted or actual income?

The central question to be decided in this matter was whether the family allowance income test could be based on Morrison's 1987 prediction of the combined family income for 1987-88 or whether it should be based on the actual family income for that period.

The AAT noted that it was not limited to the facts which had been before the original decision-maker when reviewing a decision. In particular, the AAT could take account of changes in the factual situation up to the time of the AAT review. This point had been established by the decision *Tiknaz* (1981) 5 SSR 45.

However, the AAT said, that approach would have to be qualified in the light of the legislative basis of the decision which was being reviewed. This point was made by the Federal Court in *Banovich v Repatriation Commission* (1986) 69 ALR 395 at 404:

'The task of the AAT, in reviewing a decision relating to an application for a pension, is to make the decision which the primary decision-maker ought to have made, upon the basis of the evidence before the Tribunal. Subject to any change in the relevant law, the Tribunal should put the applicant in the position in which he or she was entitled to be put at the time of the primary decision.'

In the present case, the AAT said, the legislative basis was provided by s.85(7). Morrison had made a written request in accordance with that provision and provided an estimate of the family's current taxable income. On the basis of that estimate, the AAT said, the DSS ought to have made a decision granting family allowance to Morrison at the time of her request:

'On the evidence before the Tribunal, the applicant would seem to have provided reliable information and the Tribunal is reasonably satisfied that she did so.

Therefore, on the evidence before the Tribunal at the date of the hearing, the proper decision for the respondent to make at the time the application was made would have been to grant the family allowance.

16. The legislation permitted the decision to be made on an estimate. Had sub-section (7) required the respondent to consider only her actual income and had omitted the words "or likely to be" then this Tribunal might have reached a different conclusion.'

Formal decision

The AAT set aside the decision under review and declared that Morrison was entitled to family allowance for the period from 15 October 1987 to 14 July 1988.

[P.H.]

Assets test: investment bonds

WILLE and SECRETARY TO DSS
(No. 5249)

Decided: 7 July 1989 by B.M. Forrest. George Wille purchased investment bonds before January 1988. Under the terms of the investment, a bonus was added to the value of the bonds at the end of each financial year until the bonds matured after 10 years. At that time Wille would be entitled to the original capital sum plus the accrued bonuses.

The DSS decided that, as the bonuses were added to the value of the bonds each year, they should be included in Wille's assets for the purposes of the age pension assets test.

Wille asked the AAT to review that decision.

The legislation

Because Wille's investment was made before January 1988, the value of the bonuses was not treated as his 'income' for the purposes of the *Social Security Act* until bonds matured or were redeemed: s.3A(5) *Social Security Act*.

The DSS decision was that, although the value of the bonuses did not amount to 'income' they should be included in Wille's 'property' for the purposes of the assets test. The term 'property' is not defined in the *Social Security Act*.