# Administrative Appeals Tribunal decisions

## Jurisdiction to review 'decisions'

**BOWRON and SECRETARY TO DSS**
**(No. 6248)**
**Decided:** 26 September 1990 by R.A. Balmford.

Bowron was in receipt of sole parent's pension. On 1 March 1989 she received a review form, which indicated that if it was 'not returned on [ ]', pension would be stopped. No date was indicated in the space.

Bowron did not return the form and payment ceased from 30 March 1989. After a fresh claim was lodged, Bowron was re-granted sole parent's pension from 25 May 1989.

Bowron had also filled in a form headed 'Late Lodgment of Sole Parent's Review Form' on which the box marked 'delegate's signature' was left empty. There was however a note saying 'Not approved' with a name on it and marked '25.5.89. Re-claim required'.

Bowron sought review of the decision not to pay pension from 30 March to 25 May 1989, first from the SSAT and subsequently from the AAT. Before the AAT, the issue was raised whether there was a 'decision of an officer under this Act' which could be reviewed by the SSAT or by the AAT.

### The legislation

The review jurisdiction of the SSAT is set out in s.177 of the *Social Security Act*, which provides that 'a person affected by a decision of an officer under this Act' may apply to the SSAT for review.

Under s.205 of the *Social Security Act*, the AAT may review a decision which has been reviewed by the SSAT.

Section 3(1) gives the word 'decision', where used in the *Social Security Act*, the same meaning as under s.3(3) of the *Administrative Appeals Act*.

An officer is defined in s.3(1) of the *Social Security Act* as a person exercising powers and functions under the Act.

Section 163(2) of the *Social Security Act* provides the Secretary to the DSS with power to serve a notice requiring a pensioner or beneficiary to supply the information requested 'within the period and in the manner specified in the notice'.

Section 168(1) provides the Secretary with power to cancel or suspend a pension for failure to comply with a provision of the Act; while s.169(3) specifically provides that if a person receiving sole parent's pension does not comply with a notice under s.163(2), pension ceases to be payable to the person.

Section 169(4) gives the Secretary a discretion to determine in writing that s.169(3) is not to apply if satisfied that it is appropriate to do so 'in the special circumstances of the case'.

### A self-executing provision

According to the AAT, the relevant distinction between action taken under s.168(1) and action taken under s.169(3) is that, while the former requires the making of a decision, the latter 'operates automatically without human intervention'.

The significance of this is that s.177 provides that a person affected by a 'decision of an officer' may have the decision reviewed by the SSAT. Since a decision under s.169(3) is not a decision of an officer, it is not reviewable by the SSAT though a cancellation under s.168(1) would be.

### No decison to review

The AAT rejected a DSS submission that the review form received by Bowron on 1 March 1989 constituted a notice under s.163(2) and that pension had been cancelled under s.169(3), as there was no period specified in the notice sent to Bowron. The specification of a period was essential for a s.163(2) notice, the AAT said.

The AAT also noted that there was no document evidencing or recording a decision of a person to cancel Bowron's pension from 30 March 1989 and no document advising her of the decision. The DSS submitted that a computer generated suspension letter would have been sent from a bulk computer run but the AAT decided that 'a letter generated automatically by a computer of which no copy was kept, cannot have been a 'decision of an officer' which would require at the very least a signature by a person': Reasons, para. 10.

Had the late lodgment form been considered by an officer of the DSS to determine whether there were special circumstances to justify a decision under s.169(4), and a decision that the provision did not apply, this would have been a decision of an officer and thus reviewable. However, the form did not evidence any consideration of 'special circumstances'. After considering three different views on the significance of the late lodgment form, the AAT decided that it had no meaning or effect in this context.

The AAT noted that the SSAT had treated the matter as if there was a decision to cancel pension pursuant to s.168(1) of the Act. However, if there were such a decision, it would have to have been expressed in that form and notified in writing (with a notification of rights of review).

### The AAT's findings

The AAT held that the cancellation of Bowron's pension was not effected by a 'decision of an officer' and thus 'cannot be the subject of review by the Secretary'. Specifically, the AAT found that:

> '(i) the review form was not a "notice under sub-section 163(2) being a notice that relates to payment of that pension . . . in respect of a period specified in the notice";
> (ii) accordingly the review form did not comply with sub-section 169(3) and that provision could not operate to stop payment of Ms Bowron's pension;
> (iii) T19 [the late lodgment form] has, for several reasons, no effect; and
> (iv) Exhibit 1 [a document dated 6 September 1989 and headed 'Pensions Full Assessment', which contained a recommendation that Ms Bowron not be paid sole parent's pension for the period, and which was not before the SSAT or in the 'T' documents lodged with the AAT], . . . similarly has no effect.'

(Reasons for decision, para. 22)
The AAT continued:

> '23. The result of these conclusions is twofold: first, that Ms Bowron was wrongly deprived of her pension for the period from 31 March 1989 to 24 May 1989; and second, that there is no decision which I can review. The stopping of payment of Ms Bowron's pension was not justified by the Act: but it was not a "decision of an officer", and accordingly was not reviewable by the SSAT.'

The AAT continued by noting that the late lodgment form did not confer review jurisdiction, as it would have had it contained a decision as to whether or not special circumstances existed to warrant the exercise of the discretion in s.169(4). Nor was 'Exhibit 1' effective and, in any event, it had not been before the SSAT.

The SSAT having had no power to review the cancellation of the pension, its decision was a nullity and could not be the subject of review by the Administrative Appeals Tribunal.

On this conclusion, the AAT stated that nothing would be gained by consid-

ering the submission as to special circumstances within the meaning of s.169(4).

Nor did the AAT consider it possible to exercise the power conferred by the Secretary in s.168(3) to direct the grant of a claim or an increase in payment since the AAT could only exercise the powers of the Secretary, under s.43 of its Act, 'for the purpose of reviewing a decision'.

### Formal decision

The AAT decided that it had no jurisdiction to review Bowron's application for review of a decision made by the SSAT.

There being no decision to review, the AAT directed that the matter be removed from the list of matters before the Tribunal.

[R.G.]

# Dismissal of application for review: AAT's jurisdiction to entertain new application

**NICHOLSON and SECRETARY TO DSS**
**(No. 6187)**
**Decided:** 11 September 1990 by S.A. Forgie.

Nicholson was injured in a motor vehicle accident in 1980. Since then he had received sickness benefits at various times. In 1984 he received compensation for his injuries and the DSS recovered $32 853 as reimbursement for the benefits paid to him, and a further $3365 was repaid in respect of rehabilitation costs. Nicholson contested these repayments and the DSS refused to refund the moneys. An appeal to the SSAT was unsuccessful and Nicholson first applied to the AAT for review of the decision in March 1987.

In March 1988, a direction under s.42A(1) of the *Administrative Appeals Tribunal Act* was made, to the effect that, with the consent of both parties, the application be dismissed without the AAT reviewing the decision.

In June 1988 Nicholson again sought review of the decision. In May 1989 the AAT directed that it had no jurisdiction to receive the application for review as the jurisdiction of the Tribunal had been exhausted by the order made in March 1988 dismissing the application.

In March 1990 Nicholson lodged a further application for review of the original decision to recover the moneys. This matter was concerned with the third application.

### Did the AAT have jurisdiction in relation to the third application?

Nicholson had argued at the first hearing that he had withdrawn his application and so there was nothing for the Tribunal to dismiss. He said that he did not consent to the dismissal. Relying on *Eastman and Department of Treasury* (No. 1731, 17 August 1984) and *Stevenson and Commonwealth of Australia* (No. 3811, 5 October 1987), he argued that the dismissal order should not have been made in March 1988.

However, the AAT commented that, even if this were the case, only an order of the Federal Court could set aside the decision of March 1988. The AAT could not treat the decision as a nullity because the AAT could not review its own decisions.

The DSS argued that the Tribunal was *functus officio* as a dismissal under s.42A(1) was final and exhausted the AAT's jurisdiction. The Department also referred to *Eastman* and *Stevenson*.

### The law

The AAT first examined the relevant law in this area. *Eastman* and *Stevenson* dealt with the effect of the withdrawal of an application. In both cases the AAT had decided that an applicant who withdrew his or her application could come again, subject to an extension of time to apply, if necessary.

The Tribunal drew a distinction between the withdrawal of an application and the dismissal of a case. The effect of a dismissal was the subject of some debate in decided matters. In *Nolan and Minister for Immigration and Ethnic Affairs* (No. 3557, 29 April 1987), the Tribunal considered the effect of a dismissal of an application under s.42A(2) of the *AAT Act* where the applicant had failed to attend a conference under s.34. In *Nolan* the AAT had said:

> '[W]here an application to review a decision has been dismissed under section 42A of the *AAT Act*, the AAT has power to extend time for a fresh application to be made to it for review of that decision. Section 42A provides simply for the dismissal of an application. Such dismissal results in the termination of the proceedings on the application; consequently the decision of which review was sought remains unchanged, but no decision is made to affirm the decision under review, as may be made after the hearing of the application for review.'

(cited in Reasons, p.8).

This approach was followed in *Babiker and Minister for Immigration and Ethnic Affairs* (No. 3745, 26 June 1987). However, the decision in *Re Taxation Appeals* (No. 4218, 18 March 1988) took a different line of argument. The conclusion of the AAT in that matter was that the dismissal of a matter ended the jurisdiction of the Tribunal unless there was an express statutory provision enabling it to entertain a further application for reinstatement of the matter by varying or setting aside the dismissal order.

The AAT also referred to the decision in *Kretchmer and Repatriation Commission* (1988) 16 ALD 206. The Tribunal there had decided to treat as a nullity an earlier decision to dismiss an application of the Tribunal as the Tribunal had not been properly constituted. It did not think it necessary to seek a court decision to establish a nullity as the error was obvious and the parties consented to the relisting of the matter. But the AAT did consider the matter as one requiring caution. The Tribunal in *Kretchmer* also referred to the Federal Court's decision in *Boggards v McMahon* (1988) 80 ALR 342, where the Court decided that the AAT did not have jurisdiction to review a determination which had been made strictly in accordance with orders which it had made earlier.

The AAT noted that no case dealt with the dismissal of an application by consent by a tribunal. *Nolan* and *Babiker* dealt with dismissal for non-appearance at a conference.

The AAT then turned to the provisions in the *AAT Act*. The 'finalisation' of matters could come about in 3 ways: s.34(2) provides that parties may agree to an order being made by the Tribunal in accordance with their agreement; s.43 provides that the Tribunal may exercise the powers of the decision-maker and affirm, vary or set aside the decision under review; and s.42A provides that an application may be dismissed for non-appearance at a conference or the hearing, or pursuant to s.42A(1) where the parties consent to the dismissal of the application without the Tribunal proceeding to review the decision or completing the review.

The AAT then commented:

> 'Unlike the Supreme Court Rules considered in the *FAI Case*, the Act does not contain any provisions that an order for dismissal, a decision entered by consent or a decision made after a review has been held does not prevent the applicant bringing fresh proceedings. It is silent on the subject. The authorities themselves are not silent on the point. In *Boggards*