

Receipt of income: objective test

SECRETARY TO DSS v DELLIS
(Federal Court of Australia)

Decided: 7 September 1990 by
Neaves J.

This was an appeal, under s.44 of the *AAT Act*, from a decision of the AAT, made on 7 June 1990.

The DSS decision

The DSS had decided that Dellis had been overpaid unemployment benefit between October 1985 and February 1986 because of his failure to report to the DSS casual earnings as a 'disc jockey' at an hotel. The obligation to report these earnings when he filed his fortnightly income statements was imposed on Dellis by s.135TE(2) of the *Social Security Act*.

The AAT's decision

The AAT had set aside this decision, on the basis that Dellis had not received 'income' within the meaning of the *Social Security Act*. This decision was apparently based on the AAT's finding that Dellis had believed that he was not receiving income from his casual employment, but money with which to purchase recorded music to be used in that employment.

The Federal Court's decision

The Federal Court said that the AAT 'clearly applied an inappropriate test' in deciding whether Dellis had received income during the relevant period:

'The question whether certain payments answer the description of "income" as defined is to be answered by making findings of fact as to the circumstances in which the payments were received and the consideration for them and objectively assessing those facts against the requirements of the statutory definition. It cannot be correct to determine the question, as the Tribunal did in this case, by reference to the belief of the recipient that the payments are properly to be characterised as falling outside the statutory definition.'

(Reasons, pp.9-10)

Formal decision

The Federal Court set aside the decision of the AAT. (No additional order was made because the DSS had indicated to the Federal Court that it did not intend to pursue recovery against Dellis, but wanted 'a definitive opinion' on an important principle of law.)

[P.H.]

Income test: permanently blind pensioner

SECRETARY TO DSS v RURAK
(Federal Court of Australia)

Decided: 7 December 1990 by
French J.

This was an appeal, under s.44 of the *AAT Act* from the decision of the AAT in *Rurak* (1990) 54 SSR 720.

The AAT had decided that none of the invalid pension payable to a permanently blind pensioner was subject to the pension income test.

The legislation

Section 33(12) of the *Social Security Act* declared that a pension payable to a permanently blind pensioner was not to be reduced on account of the pensioner's income or assets.

However, s.33(6)(b) declared that a blind pensioner should not be paid any guardian's allowance or additional pension for dependent children which would not be payable if the pensioner were not permanently blind.

The Federal Court's analysis

The AAT had concluded that these two provisions were inconsistent and that s.33(12) displaced s.33(6)(b).

The Federal Court decided, on the basis of the history of s.33 and its predecessors, that there was no inconsistency between the two provisions in the sense found by the AAT. However, the Federal Court found that s.33(6)(b) was 'impervious to logical analysis', because of its use of the word 'comprise':

'No doubt it was intended simply to apply the means test to the additional benefits by reducing them on the formula provided in s.33(12). The Department appears to have applied that approach to reducing the pension payable to Mrs Rurak. But in my opinion, the language of s.33(6)(b), if it has any intelligible meaning, does not authorise such a deduction . . . Unfortunately, in my opinion, neither context, purpose nor policy can rescue s.33(6)(b) from the realms of unintelligibility. Nor can it be saved by reference to the complex legislative history to which I have given consideration. It did not authorise the reduction, and although I am satisfied that the Tribunal's approach is erroneous, the appeal will be dismissed.'

(Reasons, pp. 26-7)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

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