Maintenance income test

YOUNG and SECRETARY TO DSS (No. 6663)

Decided: 12 February 1991 by H.E. Hallowes.

Thelma Young was in receipt of an age pension and was, for the purposes of the *Social Security Act*, an unmarried person with no dependent children. The DSS had reduced her pension when she notified them she was receiving maintenance from her husband, using the maintenance income test provisions, rather than the ordinary income test provisions. The money was paid by Young's husband out of his superannuation payments.

Young appealed against this decision to the AAT.

The legislation

Section 33(12) of the *Social Security Act* provides that the rate of pension is reduced by 50% of the sum of the amount by which a person's annual income exceeds $40 per week and the amount per annum by which her annual rate of maintenance income exceeds the annual maintenance free area of $15 per week.

'Maintenance income' is defined in s.3(1) of the Act to mean, amongst other things, an

> 'amount of a payment, or the value of a benefit received by the person . . . from the person's spouse or former spouse for the maintenance of the person'.

Section 3(1) further provides that a payment or benefit received from a person includes a payment or benefit receieved —

> '(i) directly or indirectly from the person;
>
> (ii) out of any assets of, under the control of, or held for the benefit of, the person; and
>
> (iii) from the person under or as a result of a court order, a court registered or approved maintenance agreement or otherwise;'

Maintenance Income?

Counsel for Young argued that the money she received was not 'maintenance income' as the money was paid from Mr Young's superannuation entitlement and was therefore in the nature of a property settlement. She further argued that the definition of maintenance income in its entirity only made sense if it referred to child maintenance and the maintenance of a person with dependent children.

The AAT rejected both these arguments. It said that, whilst superannuation may be treated as property rather than maintenance under the *Family Law Act*, the *Social Security Act* contained its own definition of maintenance income which had to be applied. The fact that Mr Young used his superannuation payments as the source of payments to Mrs Young did not prevent these payments being made for Mrs Young's maintenance.

Maintenance income could not be confined to payments for children or to those with children, the AAT said, as the definition applied to age pensioners as well as sole parent pensioners. The AAT said that it understood the frustation Young might feel at the application of the Act to her and stated:

> 'Men or women receiving maintenance payments have the rate of their pension calculated under more stringent provisions that those who receive money from investments or as a result of their own endeavours. This appears to be an anomaly in welfare legislation . . .'

(Reasons, para. 16)

Formal decision

The decision under review was affirmed.

[J.M.]

Maintenance income test: SSAT jurisdiction

HADDON and SECRETARY to DSS (No 6759)

Decided: 21 March 1991 by R.A. Balmford.

Fiona Haddon asked the AAT to review a decision of the SSAT affirming a DSS decision that payments of maintenance received by her were not 'saved' by the savings provisions introduced at the time of the introduction of the maintenance income test in 1988.

The legislation

The maintenance income test was introduced by the *Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Act* 1988, which came into force from 17 June 1988.

That Act imposed a separate income test for maintenance income and introduced a series of definitions into the *Social Security Act* of maintenance income, in-kind maintenance income and in-kind housing maintenance income.

Section 21 of the amending Act was a transitional provision which applied to people who, at the time of the introduction of the new income test, were receiving maintenance income. It operated to save the amount of the pension they were receiving in the 'final pre-amendment period', i.e., the fortnight ending on the day before the amending Act came into effect.

The facts

Haddon was granted supporting parent's benefit in March 1987. She had a maintenance consent agreement with her ex-husband, under which he was to pay the rent on her property directly to the estate agents.

After Haddon's husband defaulted on that agreement, a new order was made in March 1988, and he was required to pay $50 per week for each of their 2 children with the intention that it be used for rent. A further order made in May 1988 was similar, but made no mention of rent.

In May 1988, the Child Support Agency took over enforcement and since that time, payments had been regularly made.

On her sole parent review forms, Haddon had not indicated that she received any maintenance until the form lodged on 4 August 1988. On earlier forms, including those lodged 10 February 1988 and 1 May 1988, she had answered 'no' to the question asking whether she received any maintenance for herself or her children.

The issues

The AAT set out 2 issues: first, whether Haddon was receiving a qualifying pension and had maintenance income in the final pre-amendment period so that s.21 (the savings provision) applied to her; and, secondly, if she had been receiving a qualifying pension and maintenance income in the final pre-amendment period, had she notified the DSS of this so that s.21 could be applied?

While there was no dispute that she was receiving a 'qualifying pension' in that period, the question of whether she 'had' maintenance income was more complex. The AAT pointed out that the statutory language used, ('had' maintenance income rather than 'received' maintenance income) was clearly intended to extend the scope of maintenance to in-kind maintenance (in this case, to the provision of accommodation, or payments to a third party) in addition to any direct payments made to the person.

The AAT found that, even though the payments made by Haddon's husband were spasmodic, by the final pre-amendment period, they were being enforced by the Child Support Agency. Therefore a payment was made in the final pre-amendment period and Haddon 'had maintenance income' at that time.

Haddon had received a general letter from her local office under s.163 of the Act, which informed her that she was required to notify the DSS of any income received, including maintenance. The AAT found that the notice referred to income 'received', whereas the savings provision depended on whether she 'had maintenance income'; and so the AAT was unable to find that she had failed to notify the DSS in accordance with the s.163 notice.

However, with regard to the sole parent review form, the Tribunal held that she had failed to notify of maintenance income for the relevant period until 4 August, even though the form was due to be returned by 18 July. Accordingly, her notification was outside the period specified in s.163(2).

Because she had not notified her income as required, the AAT held that s.21 did not apply to her.

No jurisdiction to review

Moreover, after considering this matter in detail, the AAT went on to note that the SSAT did not have jurisdiction to review this decision.

This was because the SSAT's jurisdiction is limited to review of decisions made by an officer under the *Social Security Act* (s.177) and the transitional provisions in s.21 of the 1988 Amendment Act do not form part of the *Social Security Act*.

However, relying on *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, the AAT held that it had power to review a decision made in the purported exercise of powers conferred by an enactment.

Decision

Although the AAT reached the same decision in substance as had the SSAT, the formal decision of the AAT was to set the decision aside and remit the matter to the Secretary for reconsideration in accordance with the direction that the SSAT did not have power to review the decision of the delegate.

[R.G.]

Overpayment: recovery

SMITH and SECRETARY TO DSS (No. 6668)

Decided: 14 February 1991 by P.W. Johnston.

James Smith asked the AAT to review a DSS decision to recover an overpayment of $9999.08 in unemployment benefit.

The facts

Smith lodged a claim for unemployment benefit in November 1988. He continued to receive this benefit during 3 periods of employment which were not disclosed to the DSS. In December 1988 he separated from his wife. Although she did not apply for sole parent's pension, he continued to receive his payment at the married rate. His wife had access to the account into which it was paid.

During the periods of employment, Smith was involved as a union representative in industrial disputes related to risks from asbestos fibres. He claimed to be depressed at times because he thought he might die from a asbestos related disease. He also claimed that this depression was aggravated because of his marital problems and health problems experienced by his wife. He also entered a relationship with another woman who became pregnant. All these circumstances were advanced as reasons why he did not disclose his employment while receiving benefits.

The AAT noted that Smith's employment prospects were good. He was at present in work and looked likely to remain employed. His financial circumstances were not good. He had maintenance commitments of $50 per week and debts relating to credit cards and a car loan. He owned a car and some land, although he owed some money on the land to his father.

Exercise of discretion to vary or waive recovery

The only matter to be determined by the Tribunal was whether the discretion to vary or waive recovery of the overpayment contained in s.251 of the *Social Security Act* should be exercised in Smith's favour. The AAT concluded that the stress suffered by Smith during the relevant period was not a satisfactory explanation for failing to notify the DSS of his employment.

Smith put to the Tribunal that there should be some discount of the overpayment because, if he had disclosed his circumstances to the DSS, then his wife would have been entitled to sole parent's pension. Thus the amount saved by the DSS in not paying Smith's unemployment benefit would have been offset by payments of sole parent's pension to his wife.

The AAT referred to the criteria set out in *Hales* (1983) 13 *SSR* 136 with respect to the exercise of the discretion to waive recovery in s.251 of the *Social Security Act*. The AAT said that the criteria worked against Smith:

> 'He has received a large amount of public moneys through his own deception and whilst on a day-to-day basis his financial situation is precarious, he has substantial assets at his disposal in the form of the block of land and a motor vehicle. It is true that he has been subject to a degree of stress and remorse but this is not of such magnitude to cut much ice with this Tribunal.'

(Reasons, p.4)

As far as the 'discount' was concerned, the AAT decided that it should not consider a hypothetical situation. The applicant continued to receive unemployment benefit at the full married rate. The fact that his wife received the full benefit paid and Smith did not directly benefit during his periods of employment did not affect this conclusion. The applicant did benefit in the sense that during those periods his wife was no direct burden on him.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Assets test: financial hardship

GATES and SECRETARY TO DSS (No. S89/218)

Decided: 12 March 1991 by B.H. Burns.

Mr and Mrs Gates sought review of a decision of the SSAT not to apply the hardship provisions of s.7 of the *Social Security Act* for their benefit.

The facts

The Gates owned a farm which had been their primary source of income and which had been in the family for 3 generations. They also conducted a small scale tractor repair business. Their son