

might be used to ground a later prosecution, the AAT acknowledged that she might either incriminate herself or through relying on the privilege against self-incrimination, not be able adequately to put her case.

The AAT thought that this state of affairs could be remedied by the DSS altering its procedures. It said:

'Ms Pluta is not the only party to proceedings before the Tribunal in this situation. While the numbers do not seem to be large, the Tribunal is concerned about the problems they face and the fact that Tribunal proceedings themselves have the potential to be compromised. The solution to the problem would seem to be an administrative one . . . [T]he facts upon which the Department relies to support a cancellation of pension and to raise an overpayment are essentially the same. Once the appropriate investigations have been carried out decisions on both these issues can be made. If these decisions are made at the same time, the person affected can proceed to have both decisions reviewed by the Social Security Appeals Tribunal and, if necessary, matters can then come to this Tribunal. There may be particular cases where that course is not able to be followed. As a general rule, however, the Tribunal would recommend that the two issues be dealt with simultaneously by the Department.'

(Reasons, p.5)

#### Formal decision

The AAT refused the request for an adjournment.

[B.S.]

## Backdating invalid pension: claim for another payment

**CALDERARO and SECRETARY TO DSS**

(No. 7038)

**Decided:** 12 June 1991 by J.R. Dwyer, G. Woodard and A. Argent.

Rosanna Calderaro, who was born in 1959, left school at the end of 1975 and abandoned a business college course a few months later because of ill health. She had never been in paid employment.

In November 1976, Calderaro claimed and was granted sickness benefit, which continued until July 1977. From then until June 1983, Calderaro was fully maintained by her parents.

In July 1983, Calderaro claimed and was granted unemployment benefit, payment of which continued until October 1986.

On 31 March 1989, Calderaro lodged a claim for invalid pension, which was in due course granted with effect from the next pension pay-day, 13 April 1989.

Calderaro then claimed that payment of her invalid pension should be backdated to 1976, when she had claimed and been granted sickness benefit.

The DSS conceded that Calderaro had been qualified for invalid pension since 1976. This concession was based on a psychiatric diagnosis of phobic anxiety and panic attacks made in 1989 and 1990.

A medical report, dated May 1976, indicated that Calderaro was then suffering from chronic eustachian obstruction; and there was no medical evidence of any significant neurosis before February 1982.

#### The legislation

Section 159(5) of the *Social Security Act* allows the Secretary to treat a claim lodged by a person for one payment under the Act (or under any Commonwealth program) as a claim for another pension, allowance or benefit under the Act 'that is similar in character'.

The exercise of this discretion would permit the person to be paid the substituted pension, allowance or benefit from the date of the earlier claim.

#### 'Similar in character'?

The AAT said that, in determining whether a pension, benefit or allowance was 'similar in character' to another pension, benefit or allowance, attention should be focused on the legislative qualifications for each payment rather than the social and economic reality associated with those payments. It did not matter, therefore, that unemployment benefit had become for many people a scheme of long-term income support similar to invalid pension.

The intention behind the legislation for unemployment benefit had been to provide short-term support. There was not sufficient similarity between the qualifications for unemployment benefit and those for invalid pension to regard those payments as 'similar in character' for the purpose of s.159(5): the former was a payment to a person who was capable of working and who was seeking work; the latter was paid to a person permanently incapacitated for work.

On the other hand, the differences between sickness benefit and invalid

pension (which hinged on the elusive distinction between temporary and permanent incapacity) were less significant than the fact that they were similarly grounded in the circumstance of the physical or mental disability which incapacitates a person from supporting herself or himself by engaging in paid employment.

Accordingly, the claim lodged by Calderaro in 1976 was available to ground an exercise of the Secretary's discretion under s.159(5).

#### The discretion

However, the AAT said, the facts of the present case did not support a favourable exercise of the s.159(5) discretion. These facts included:

- the length of time involved;
- the grant to Calderaro of the benefits for which she had applied;
- her assertion when claiming unemployment benefits in 1983 that she was capable of working; and
- her relative youth in 1976 (she was 17 years of age).

Moreover, it appeared to the AAT that, despite the DSS concession at the hearing of this review, Calderaro had not been qualified for invalid pension at the time of her claim for sickness benefit in 1976, in that her medical condition at that time was not such as was likely to last indefinitely.

The AAT pointed out that it was not bound by the DSS concession but was bound to give its own decision accompanied by its own reasons for its findings. The AAT said that, if it had intended to reject the DSS concession, it would be preferable to give notice to both parties and seek written submissions on the point. However, the AAT made no concluded finding on the question whether Calderaro had been qualified for invalid pension as far back as 1976.

#### Formal decision

The AAT affirmed the decision under review.

[P.H.]