

Deprivation of income: variation

BRADNAM & BRADNAM and SECRETARY TO DSS
(No. 7109)

Decided: 1 July 1991 by K.J. Lynch, H.M. Pavlin and J.D. Horrigan.

In 1983, the applicants sold a partnership property and transferred the proceeds of the sale, \$165 000, to a company which held its assets upon trust for a family trust of which the applicants, their daughter and grandson were the primary beneficiaries. In August 1984, the DSS decided that the applicants had deprived themselves of income in order to obtain a higher rate of pension contrary to the then s.47(1) and (2) of the *Social Security Act 1947*. The deprivation occurred through the applicants directing that they were to receive only \$1000 per annum from the income of the trust. The amount they would have received, had they taken their full share of the income, would have been \$4725. Thus the amount that was held to be the sum deprived was \$3725.

In 1988, the trustees resolved to distribute \$1600 to the applicants from the trust. This caused a reduction in the pension received by the applicants. The applicants argued that this reduction should not have occurred because the \$600 increase should have been offset against the amount of deprived income. This had been the method of calculation employed previously (see above paragraph). But the DSS submitted 'that the amount of deprived income in relation to a deprivation which occurred before 1 June 1984 cannot be reviewed but remains the amount of deprived income presumably so long as the trust exists or either of the applicants is entitled to receive a pension payment: Reasons, p.3.

■ The legislation

The applicable legislation was s.47(1) of the *Social Security Act 1947* as it stood at 6 August 1984, the date the money was transferred to the trust. Section 47 then provided:

'(1) If, in the opinion of the Secretary, a claimant or a pensioner has directly or indirectly deprived himself of income in order to qualify for, or obtain, a pension, or in order to obtain a pension at a higher rate than that for which he would otherwise have been eligible, the amount of the income of which the Secretary considered the claimant or pensioner has so deprived himself shall be deemed to be income of the claimant or pensioner.'

Section 47 was repealed effective from 21 March 1985. The determination under s.47 was preserved by s.51(3) which stated:

'Where, by virtue of the operation of section 47 or 76 of the *Social Security Act 1947* an amount was deemed to be income of a person in respect of a deprivation of income of a person that took place before 1 June 1984, that amount shall, on and after 21 March 1985, continue to be deemed to be income of the person.'

The deprivation of income by the applicants occurred in November 1983 and so s.51(3) applied in this case.

■ Can the DSS redetermine the amount?

The DSS submission was that the amount of deprived income could not be reviewed but persisted for the duration of the trust. The AAT commented:

'We found it difficult to understand why the respondent says that a deprivation of income can be determined once only. Income is by its nature something variable. A person may deprive himself or herself of income for a time but the deprivation is viewed on an annual, financial year basis. Even in a case such as this with fluctuation in return on investments, it is artificial to say that the deprivation of income in one year determines the matter for all subsequent years. The deprivation of income although effected by something done before 1 June 1984 ordinarily should be assessed anew each year to determine the extent of the deprivation of income.'

(Reasons, p.5)

However, s.47 had been repealed and there was no longer authority for the DSS to make a determination with respect to this disposition. The new provisions of the Act only covered dispositions of income made after 1 June 1984 and the Tribunal characterised the disposition in this case as occurring prior to that date. This led to the conclusion that the DSS decision was correct although unjust:

'... it appears that the applicants have been caught in a time warp by the changes made in 1984 to the assessment of pension entitlements. Section 51 of the *Social Security and Repatriation (Budget Measures and Asset Test) Act* was concerned to preserve, understandably, as deemed income an amount of income of which a person had deprived himself or herself. However, it appears to have overlooked the possibility that a deprivation of income could be effected by a disposal of the property producing the income so that the deprivation extends to future years after 1 June 1984 without any "disposal of income" as dealt with by section 6AC being necessary. It appears to the Tribunal to be desirable that the situation should be remedied as it appears

unjust that deemed income should not be able to be reduced when the distribution to the applicants from the Trust income has been increased or when some other change occurs in the actual income.'

(Reasons, p.6)

■ Formal decision

The AAT affirmed the decision under review.

[B.S.]

Health care card: allowable income

SECRETARY TO DSS and SMITH
(No. 7223)

Decided: 2 August 1991 by I.R. Thompson, C.G. Woodard and P.J. Burns.

Lorraine Smith was receiving a Health Care Card under the *Health Insurance Act 1973*, as a result of a declaration that she was a 'disadvantaged person' under s.5B.

On 7 September 1990, Smith applied for renewal of the card and her application was rejected as it was decided that her income was more than the 'allowable income'. She successfully appealed to the SSAT which decided that her income should be calculated by offsetting losses from her farm property against her earnings from employment. The DSS asked the AAT to review that decision.

■ The legislation

Section 5B(2) of the *Health Insurance Act* provides for the Secretary to the DSS to declare a person to be a disadvantaged person where the person's income for the previous 4-week period is less than the 'allowable income'.

Section 5B(12) defines the allowable income for a 4 week period for a person with dependants as 4 times the aggregate of—

- (i) the weekly income that would preclude a married person with no children from receiving unemployment benefit;
- (ii) \$20; and
- (iii) an extra \$34 for each child.

For a person without dependants, the allowable income is 4 times 60% of the sum of (i) and (ii) above. For the purposes of this calculation, income has the same meaning as in s.3 of the *Social Security Act 1947*.