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Section 47 was repealed effective from 21 March 1985.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.

The issue

Smith and her husband had purchased a farm which was operating at a loss. They were attempting to sell it and, in the meantime, Smith obtained paid outside employment to supplement their income. The DSS treated her income from employment as the relevant income for the purpose of the calculation.

Smith, on the other hand, argued that the farm losses should be offset against her income from employment in determining whether her income fell within the 'allowable income'.

Therefore, the sole issue was the legal question of whether the losses from the farming business should have been taken into account in calculating the amount of her income for the purposes of section 5B(2).

The case law

The AAT noted that the question of offsetting losses against income had been considered by the Federal Court in a number of previous cases. In *Haldane-Stevenson* (1985) 24 *SSR* 296, the Full Federal Court held that, while income as defined in the 1947 Act meant net rather than gross income, where a person's income was derived from several sources, the net income from each of those sources had to be ascertained by offsetting against the gross income from that source only expenditure associated with it. In that case, expenditure on research for the writing of a book could not be offset against any other source of income, such as a UK pension.

In *Garvey* (1989) 53 *SSR* 711, Garvey and his wife had income from the wife's wages, from interest and from 4 rental properties. They had borrowed money to buy the properties and estimated their expenses in generating the rental income of $16 396 as $43 000. Garvey argued that those expenses should be offset against the total income in order to calculate his income. Although he succeeded before a single judge of the Federal Court, the Full Court allowed the DSS appeal, stating that they were 'of the view that the definition of "income" in the Act does not permit the "negative yield" of one source of income to be offset against the yield from other sources'.

The AAT's reasoning

The AAT decided that, following the decision of the Full Federal Court in *Garvey*, there can be no room for argument that expenditure which is associated with one source of income can be set off against income from another source.

Applying that decision to this case, expenditure incurred in carrying on the dairy farming business can be offset only against income derived from carrying on that business. The AAT disagreed with the SSAT which had decided that *Garvey* could be distinguished on the basis that Smith and her husband were making all reasonable efforts to sell the farm and thus to relinquish activities which were occasioning loss (para.14).

It was also argued in the AAT that, since Smith had obtained employment only because money had to be put into the farming business to enable it to continue, her income from employment was associated with the farming business.

The AAT rejected both submissions, relying on *Garvey*, and on an AAT decision cited with approval by the Full Federal Court in *Garvey*, *VXB* (1989) 49 *SSR* 633, where the facts, though different, were analogous.

Nor did the AAT consider it relevant that what was at issue here was a decision under the *Health Insurance Act*, while *Garvey* and *Haldane-Stevenson* both concerned claims for pensions or benefits under the *Social Security Act*. The Tribunal was satisfied that, since the definition of income is essentially the same in the two Acts, the principles in those cases were applicable to this case.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that the original decision not to declare Smith a disadvantaged person with effect from 22 September 1990 was correct.

[R.G.]

Assurance of support debt

SECRETARY TO DSS and AQUINO-MONTGOMERY

(No. 7203)

Decided: 26 July 1991 by B.G. Gibbs, C.G. Woodard, and P.J.B. Burns.

The DSS asked the AAT to review an SSAT decision that set aside a DSS decision to recover an assurance of support debt from Mrs Aquino-Montgomery.

The facts

Mrs Aquino-Montgomery was born in the Philippines in 1958. She came to Australia in 1982. She became an Australian citizen, married and had a daughter and a son now aged 13 and 7. In 1987 her sister and niece came to live with her in Australia. Her mother came to Australia in December 1985 on a visitor's visa and departed in June 1986. She returned to Australia on a visitor's visa in December 1986.

In June 1987 Mrs Aquino-Montgomery made a statutory declaration giving an assurance of support for her mother for a period of 10 years. The declaration acknowledged that it was given for the purpose of the *Migration Regulations* and that in the event of any special benefit being paid to her mother during the period of her assurance she would repay the payment to the Commonwealth.

Mrs Aquino-Montgomery's mother was granted permanent residence in November 1987 and Australian citizenship in November 1990. In January 1989 she claimed special benefit and this payment was granted to her in March 1989. On 24 January 1990 the DSS wrote to Mrs Aquino-Montgomery advising her that, as her mother was in receipt of special benefit and she had given an assurance of support, she was accruing a debt, but that the debt would only accrue from the date of the letter. There was no response to this letter and on 19 June another letter from the DSS stated the debt to be $2344.75 and increasing at the rate of $279.50 per fortnight.

On 26 June 1990 Mrs Aquino-Montgomery wrote to the DSS saying that she disputed the debt claimed on the basis that she had not been advised of her mother's claim, that she had not been informed or invited for an interview concerning this claim, and that she had not been informed that the claim for special benefit had been granted. This letter was treated as an appeal to the SSAT.

The legislation

It was not disputed that there was a debt of $2344.75. The only issue was whether the amount should be recovered. Section 251(1) of the Social Security Act 1947 provided that the Secretary could write off debts owed under the Act in certain circumstances, waive recovery of debts or allow the debts to be paid in instalments.

The Tribunal referred to the principles which governed the operation of the discretion contained in s.251. In