

in relation to the second overpayment cannot be supported and must be set aside.'

(Reasons, p.29)

Formal decision

The Federal Court allowed the appeal; set aside the AAT's decision to set aside the Secretary's decision to recover an overpayment from Greenwood in respect of payments of sole parent's pension made between 29 March and 26 April 1990; and set aside the AAT's decision to direct the Secretary to refund to Greenwood any amounts recovered from her.

[P.H.]

Family allowance: cancellation set aside by SSAT

SECRETARY TO DSS v O'CONNELL

Federal Court of Australia

Decided: 19 May 1992 by Jenkinson J.

This was an appeal, under s.44 of the *AAT Act 1975*, from the decision of the AAT in *O'Connell* (1991) 61 SSR 851.

O'Connell's family allowance was cancelled by the Secretary in January 1990, after she had not responded to a notice posted to her former address. O'Connell reclaimed the allowance in

August 1990, as soon as she discovered that payments had stopped. The DSS granted her the allowance but refused, in September 1990, to pay her the 8 months arrears between January and August 1990.

The SSAT affirmed the decision not to pay O'Connell the arrears. O'Connell applied to the AAT for review. The AAT decided that the January cancellation had not been the preferable decision, set it and the September decision aside and directed that the arrears be paid to the respondent.

Jenkinson J decided that the AAT's decision had not involved any error of law.

What was the decision under review?

Jenkinson J said that the decision under review by the AAT was the September decision not to pay arrears of family allowance. But that decision could only be effectively reviewed if the AAT also reviewed the January decision to cancel family allowance: because O'Connell's application for payment of arrears could be granted only by first setting aside the January decision, any consideration of that application required a review of the January decision: Reasons, para. 14.

Cancellation decision: discretion

The January decision to cancel family allowance had been made under s.168(1) of the *Social Security Act 1947*, which authorised the Secretary to cancel a pension, benefit or allowance if the person did not respond to a notice. This provision, Jenkinson J said, imported a discretionary judgment.

In concluding that it would have been preferable for the Secretary's delegate not to cancel O'Connell's allowance, the AAT had not committed an error of law, Jenkinson J held. In particular, the AAT had not, as the DSS argued, confined itself to deciding whether the evidence available to the delegate in January 1990 had justified that decision. If the AAT had confined its consideration to the material available to the delegate, it would have fallen into the error of approaching its review task as if it were judicial review rather than administrative review.

Jenkinson J said that the appropriateness of the delegate's decision on the material available to the delegate had been treated by the AAT as no more than a relevant consideration; that was not an error of law. The AAT had considered other relevant factors – the claims of O'Connell's children to public support and the interests of efficient administration.

Jenkinson J decided that the decision of the AAT to set aside the January decision to cancel family allowance was not open to appeal on the ground of error of law.

Date of effect of AAT's decision

The DSS then argued that the AAT had made an error of law in deciding that O'Connell should be paid arrears of family allowance. This argument was based on the rule, expressed in s.183(5) of the 1947 Act, that a decision to set aside a DSS decision can only take effect from the date of the DSS decision where the person affected has applied for review within 3 months of being given notice of the DSS decision.

The AAT had decided that O'Connell was never given effective notice of the January decision. Jenkinson J found it unnecessary to deal with this issue. Although Jenkinson J agreed with the AAT that s.183(5) did not allow written notice to be served on a person, his Honour said that the deficiency was supplied by s.28A of the *Acts Interpretation Act 1901*.

It was not necessary to deal with this issue, Jenkinson J said, because, even if s.183(5) operated to limit the date of effect of the AAT's decision to set aside the January decision, O'Connell would still be entitled to the arrears of allowance:

'What is in my opinion important is to recognise that a decision to set aside a decision to cancel a family allowance has its effect when it comes into operation. It makes legally inoperative the decision which it sets aside when it is made, and once the January decision to cancel the allowance ceased to have legal effect there was revived Mrs O'Connell's legal entitlement to receive payment of family allowance payable on each family allowance pay day falling after the cancellation, until some disentitling event or act in the law should supervene. The other important consideration, in my opinion, is that the "decision under review" contemplated by s.183 is the September decision, not the January decision. And whenever a decision to set aside the January decision was "taken to have effect", that effect would be the same: to remove the only obstacle to the continued legal entitlement of Mrs O'Connell to receive family allowance after cancellation as it had existed before cancellation. In such a case the deeming provisions of s.183(4) and (5) do not produce any different result from that which s.183(1) produces, in my opinion.'

(Reasons, para. 14)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

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