

Administrative Appeals Tribunal decisions

Income: distribution from family trust

SECRETARY TO DSS and
BROWNE

(No. V91/762)

Decided: 19 June 1992 by R.A. Balmford, G.F. Brewer, and D.L. Eisum.

The Secretary asked the AAT to review a decision of the SSAT which had set aside a DSS decision to reduce the annual rate of pension paid to Mrs Browne by taking into account a distribution made under a trust.

Mrs Browne was a beneficiary of the F.H. Browne Family Trust which made a distribution to her of \$14 598 on 24 June 1990. On 27 December 1990, her husband died and she applied for age pension on 12 February 1991, which was granted on 14 April.

The DSS took into account the amount paid to her under the family trust for the purpose of calculating her annual rate of income for the year commencing on 24 June 1990. It was this decision that was set aside by the SSAT, which took the view that, as the money was paid to Mrs Browne prior to her lodging a claim for pension, it should not be taken into account for these purposes.

The legislation

The AAT first considered which of the 1947 and 1991 Acts applied and decided that the substantive issues were to be determined under the *Social Security Act 1947*, as the decision was made prior to the coming into force of the 1991 Act, even though the application for review had been lodged under the 1991 Act. This was because the issue related to a closed period of 52 weeks terminating on 23 June 1991.

At the relevant time, income was defined under s.3 of the 1947 Act as including

'personal earnings, moneys, valuable consideration or profits, whether of a capital nature or not, earned, derived or received by that person for the person's own use or benefit from any source whatsoever...'

Section 12L of that Act also provided that, where a person became entitled to receive an amount of income that was not income from periodic pay-

ments, from remunerative work, from an accruing return investment or from a market linked investment, the person was taken to have received one 52nd of that amount during each week in a 12-month period commencing on the day of the receipt.

The Authorised Review Officer who had reviewed the decision had stated that s/he had applied government policy in making the decision and had referred to s.3, but not to s.12L.

However, the AAT noted that in fact the decision was made directly under s.12L and that the SSAT had not been aware of this provision. The AAT commented:

'Many decisions are necessarily made on the basis of policy. But where a decision is made on the basis of a specific statutory provision, this should be clearly stated.'

(Reasons, para. 8)

Applying s.12L, the AAT decided that the original decision to maintain the amount received over the twelve month period commencing on the day of the receipt had been correct and the fact that the money was received prior to the claim was irrelevant.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration in accordance with the direction that the annual rate of income be determined by reference to s.12L of the 1947 Act.

[R.G.]

Income: whether bank accounts held in trust

MARICIC and SECRETARY TO
DSS

(No. N91/98)

Decided: 29 June 1992 by D.J. Grimes, T.R. Russell and J. Kalowski.

Maricic asked the AAT to review a decision of the SSAT affirming the cancellation of his unemployment benefit on 5 October 1990, due to his

income. The DSS had treated as income interest payments made on a number of bank accounts in various names.

The AAT first considered which legislation governed the decision and held that, notwithstanding the coming into effect of the 1991 Act and in particular the *Social Security (Job Search and Newstart) Amendment Act 1991*, the applicant had an accrued right to have the matter determined in accordance with the *Social Security Act 1947*.

The AAT noted that there was no dispute about the fact that Maricic held a number of accounts in the Advance Bank under different names. If the income from interest from those accounts was found to be his income, then it had to be taken into account in calculating his entitlement to benefit under s.122 of the 1947 Act, which set out the maximum allowable income and assets for payment of unemployment benefit.

Was there a trust?

Maricic submitted that he held the money in the accounts on trust for his daughter and various others and therefore the interest earned should not be treated as his income. However, the AAT found that Maricic did not have the requisite intention to create a trust and that merely opening accounts in the names of others was not sufficient to declare an intention to create a trust. Moreover, it was not clear that the named beneficiaries were even aware of the existence of these accounts and, in any event, they had no power to withdraw from the accounts or use them in any way as Maricic was the only signatory.

The AAT concluded, after considering case law on trusts, that Maricic did not intend to create a trust relationship between himself and the other parties but had merely earmarked money for certain purposes. Maricic was able to, and in fact did, use the money in the accounts as his financial circumstances required. Therefore, the interest earned was income for the purposes of the Act and was sufficient to render him ineligible for benefit as it exceeded the allowable amount.

Formal decision

The AAT affirmed the decision under review.

[R.G.]