

It was submitted for Mrs Riddell that the directions should not bind the exercise of the discretion, as to do so would give the directions retrospective effect. This was because the original decision of the DSS not to waive recovery was made in 1990, before the directions came into force. It was also submitted that she had an accrued right to have her application for waiver considered according to the law in force on the date when she made that application. These arguments failed, the AAT deciding that the applicable law was the 1991 Act and that the Minister's directions limited its discretion. The Tribunal referred to the decisions in *VXR* (1992) 65 SSR 914 and *Cirkovski* (1992) 67 SSR 955.

It was also put on behalf of Mrs Riddell that the term 'special circumstances', mentioned in para. (g) of the directions, was so uncertain as to not amount to a direction, that her circumstances were 'extremely unusual, uncommon or exceptional' and that the directions were of no legal effect because s.1237 did not permit directions which confined the exercise of the discretion in s.1237(1). It was argued that the directions were statutory rules which had not been published as required by the *Statutory Rules Publication Act* 1903 (Cth).

The AAT rejected the argument that the term 'special circumstances' was incapable of application in this context. The Tribunal noted:

'In particular, the Federal Court [*Beadle v Director-General of Social Security* (1985) 7 ALD 670] indicated at p.673 that special circumstances must include events which would render the normal position, in this case that the debt should be recovered, "unfair and inappropriate".'

(Reasons, p.11)

The argument that the directions could not confine the discretion was also rejected by the Tribunal. It was recognised that the directions reduced the range of matters to be considered in the exercise of the discretion to waive recovery which had been set out in *Hales* (1983) 13 SSR 136. It was also acknowledged that the directions required that the special circumstances must be 'extreme'. The Tribunal commented:

'While we are conscious that in *Clark* [(1992) 65 SSR 915], the Tribunal in similar circumstances evaluated whether there were sufficient grounds to support waiver of recovery on the basis of the criteria set out in *Hale's* case, we note that the Tribunal accepted the contention expressed on behalf of Mrs Clark that

the absence of the date of effect in the Minister's Notice raises a presumption against retrospectivity and that consequently the Tribunal was not bound by it in that particular case. The Tribunal further believed that Mrs Clark had accrued rights to have the exercise of the discretion reviewed unrestricted by the Minister's Notice. As we have already stated, while Mrs Riddell incurred a debt under the operation of the 1947 Act, a debt which continues in part to exist, nevertheless the power of the Tribunal to waive the balance of the debt can only be exercised as it exists at the date of its exercise, which is to say, the date of our decision. It follows, therefore, that we must exercise our discretion restricted by the terms of the Minister's Notice . . . That paragraph (g) of the . . . Notice introduces the notion that the special circumstances are extremely unusual, uncommon or exceptional, a notion arguably more strict than the criteria expressed in *Hale's* case, is not to the point.'

(Reasons, p.12)

The AAT also rejected the other submissions: para.(g) in the Notice was not uncertain; and s.46A(c) of the *Acts Interpretation Act* provided that directions are not statutory rules for the purposes of the *Statutory Rules Publication Act*.

#### The exercise of the discretion

The Tribunal expressed sympathy with Mrs Riddell's family circumstances which included a range of medical and social problems. These included assaults by her husband on some of their children, her husband's unemployment, psychological problems stemming from her abused childhood, restricted employment potential due to her limited education, medical and behavioural problems on the part of her twin sons, a son who is asthmatic and special dietary needs of a daughter.

The AAT observed that, based on an income and expenditure statement, there appeared to be an excess of income over expenditure in the family at the moment. She owed \$270 in legal, medical and domestic accounts, and had \$1500 available in arrears of child disability allowance. The present debt to the DSS was \$3750.85 and with deductions of \$50 per fortnight this would be repaid in 2 years and 9 months.

It was submitted by Mrs Riddell that although her income seemed able to allow for such deductions, her list of expenses offered to the AAT did not take into account potential expenses which, given the family circumstances, could be quite high.

The Tribunal concluded:

'While we are sympathetic to Mrs Riddell's family circumstances, particularly in respect of the range of medical and social problems confronting her children, we are nevertheless of the view and find that while these may be characterised as special circumstances and are certainly unfortunate, they are not circumstances which, even in conjunction with the family financial state, can properly be regarded as "extremely unusual, uncommon or exceptional" within the terms of the Minister's Notice.'

(Reasons, p.19)

#### Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with a direction that the balance of debt owed to the Commonwealth by Mrs Riddell be recovered.

[B.S.]

## Recovery of overpayment: which Act?

SECRETARY TO DSS AND VXC

(No. 7907)

Decided: 15 April 1992 by B.G. Gibbs, D.B. Travers and E.H. Stephenson.

The DSS asked the AAT to review a SSAT decision to set aside a Departmental decision that the respondent was not entitled to widow's pension and sole parent's pension between March 1984 and April 1989 and to raise and recover an overpayment of \$42 604.40 for that period.

#### The issue

The respondent had applied for widow's pension in February 1980, having separated from her husband in October 1979. She was paid this pension from April 1989 until March 1989 when she was transferred to the new sole parent's pension. This payment was cancelled on her request in April 1989. The overpayment was raised when it was decided by the DSS that the respondent was 'residing in a relationship similar to that of a married couple' while in receipt of the pensions. The respondent appealed against that decision in May 1990.

### The applicable law

The decision being reviewed was made under the *Social Security Act 1947*. But prior to this application, the 1947 Act had been repealed and replaced by the *Social Security Act 1991*. Which Act should the AAT apply in determining this application?

The Tribunal noted that in a number of decisions it had held that the effect of the transition provisions in the *Social Security (Rewrite) Transition Act 1991* was that, where an application for review was lodged before July 1991, the 1991 Act dictated procedural matters but that the substantive law to be applied was that in the 1947 Act.

However, it was also noted that in *Simek* (1992) 65 SSR 920 this approach was not followed. In *Simek* the AAT observed that s.5(4) of the *Transition Act* stated that a claimant for a pension had no rights under the 1947 Act arising from the claim. As a consequence s.5(4) ousted s.8 of the *Acts Interpretation Act 1901* (Cth), which provides that, unless the contrary intention appears, the repeal of an Act does not affect any right accrued under the Act, because it expressed a contrary intention in regard to accrued rights under the 1947 Act. The right to payment was preserved under the *Transition Act* but the qualification for the pension was to be decided under the 1991 Act where the claim had not been decided before 1 July 1991.

The different construction placed on the transition provisions in *Mifsud* (1992) 65 SSR 919 was also noted. But the AAT referred to the decision of the President of the AAT in *Cirkovski* (1992) 67 SSR 955, which disagreed with *Mifsud* in the following terms:

'It should be noted that in general the provisions of the 1947 Act are mirrored in the 1991 Act. The 1991 Act is intended to be the "plain English" version of the *Social Security Act*. In practical terms it will make very little difference to the outcome of an application whether the 1947 Act or the 1991 Act is applied. Nevertheless there may be situations where, for example, differences of interpretation lead to different results under each Act. For administrative certainty, however, it needs to be decided which Act in fact applies to review of decisions by this Tribunal. I agree with the Tribunal in *Re Simek* that the effect of clause 15 is procedural only.'

(Cited in Reasons, pp.9-10)

The AAT also noted that:

'The President agreed with the Tribunal in *Re Simek* that the substantive law to be applied is to be determined by the general law and by an examination of the provisions of the *Transition Act*, not-

ing that while it is subject to Section 8 of the *Acts Interpretation Act*, the general proposition is that the Tribunal applies the law as at the date of its decision . . . It was agreed that, as discussed in *Re Simek*, the effect of Clause 5(4) is to oust s.8 of the *Acts Interpretation Act*.'

(Reasons, pp.10-11)

The AAT continued:

'As pointed out in *Re Cirkovski*, the distinction between what is and what is not a "right" in the context of s.8 of the *Acts Interpretation Act* is "one of great fineness". However, the Tribunal noted that in *Reilly* [(1987) 12 ALD 407] and in many other cases since then, the Tribunal has held that a claimant for a pension or benefit has an accrued right to that pension or benefit, although that right remained "inchoate or contingent until determined". Thus the legislation to be applied in such circumstances in determining eligibility for pension or benefit is the legislation in force at the date of the making of the claim.'

(Reasons, p.11)

The Tribunal then referred to cl.4 of Schedule 1A to the 1991 Act, which provides that 'an instrument that was in force under a provision of the 1947 Act immediately before 1 July 1991 has effect, from 1 July 1991, as if it were an instrument under the corresponding provision of this Act'. 'Instrument' is defined to include determination, direction, approval, notice, declaration or authorisation.

The AAT noted that a determination to raise and recover an overpayment of pension is an instrument to which cl.4 applied. However, this clause was silent as to the applicable law where a decision was pending. The conclusion of the Tribunal was that, pursuant to s.8 of the *Acts Interpretation Act*, the substantive law to be applied was the 1947 Act.

### Was the claimant qualified for the payments?

Applying the 1947 Act the Tribunal examined the eligibility of the respondent for widow's pension and sole parent's pension. After reviewing the evidence and having regard to the factors listed in s.3A of the 1947 Act, the AAT concluded that the respondent was not eligible for the payments she received over the relevant period as she was living with a male person in a marriage-like relationship. As a consequence the payments made to her were a debt due to the Commonwealth under s.246 of the 1947 Act.

### Should recovery be waived?

The debts due under s.246 of the 1947 Act were, by ss.1222A and 1223 of the 1991 Act deemed to be debts due to the

Commonwealth under the 1991 Act. Thus, s.1237 of the 1991 Act could be applied which provides that the Secretary may waive recovery of the whole or part of a debt, but that such power must be exercised in accordance with directions given by the Minister. Directions issued in July 1991 provided that the circumstances in which waiver could occur included the following:

'(a) Where the debt was caused solely by administrative error on the part of the Commonwealth, and was received by the person in good faith, and recovery would cause financial hardship to the person.

...

(g) Where in the opinion of the Secretary special circumstances apply such that the circumstances are extremely unusual, uncommon or exceptional (as discussed by the Federal Court of Australia in *Beadle v Director-General of Social Security* (1985) 7 ALD 670).'

(Cited in reasons, p.27)

### Were the Ministerial directions binding on the power to waive in this case?

The SSAT had made its decision in August 1990. The Tribunal concluded that the decision made by the SSAT operated from July 1991 as if it had been made under the 1991 Act. The AAT referred to the decision in *VXR* (1992) 65 SSR 914, which pointed out that the AAT's power to waive recovery can only be exercised in accordance with the law in force at the date of the Tribunal's decision. It followed that the Ministerial directions were binding on the AAT in this case.

The debt had not been caused solely by administrative error, the respondent having omitted to declare her *de facto* relationship on her review forms. There was no evidence that hardship would be caused by recovery of the debt. Nor could the AAT find any special circumstances under para. (g) of the directions.

### Formal decision

The AAT set aside the decision under review and decided that during the relevant period the respondent was not entitled to widow's pension or sole parent's pension, that the respondent owed to the Commonwealth the sum of \$42 604.40, that this sum be recovered from the respondent and that the matter be remitted to the DSS with the direction that recovery action be taken in accordance with the decision.

[B.S.]