Administrative Appeals Tribunal decisions

AAT jurisdiction: defective SSAT review

ANDERSON and SECRETARY TO DSS

(No. 8261)

Decided: 21 September 1992 by P.W. Johnston, R.D. Fayle and S.D. Hotop.

The AAT gave an interlocutory decision following a directions hearing convened to consider a submission by the DSS that the AAT lacked jurisdiction to proceed to a review of the substantive issues.

The Secretary's delegate had decided that Anderson had received sole parent pension to which she was not entitled and had thereby incurred a debt to the Commonwealth. On 17 September 1991, Anderson was convicted on 8 counts of knowingly obtaining a pension, contrary to s.239(1)(b) of the *Social Security Act* 1947 and ordered to pay reparation of $2943.84.

Before the prosecution, the DSS wrote to Anderson on 27 August 1990 asking her to repay a debt of $3746.40. An Area Review Officer affirmed the decision, and on 9 April 1991, Anderson appealed to the SSAT. The SSAT recorded its decision as follows:

> 'Having considered the papers provided by the Department and the detailed submissions made on behalf of the applicant, the Tribunal finds that it has no authority to deal with the appeal and therefore makes no findings. The main points in issue were clearly before the Midland Court of Petty Sessions where a magistrate determined, beyond reasonable doubt, that Mrs Anderson had breached the provisions of the *Social Security Act* 1947. It would challenge the integrity of the court if this Tribunal were to re-open the issues and find otherwise.'

The legislation

Sub-section 1283(1) of the *Social Security Act* 1991 provides that, if a decision has been reviewed by the SSAT and has been *affirmed, varied or set aside*, application may be made to the AAT for review of the decision of the SSAT [emphasis added].

Jurisdiction

The DSS submitted that the SSAT had made no decision to affirm, vary or set aside the original decision to recover the amount alleged to be a debt due to the Commonwealth. It had simply decided that it had no jurisdiction, without embarking on a review of the merits. The AAT was therefore precluded from undertaking a review.

The applicant submitted that the SSAT was in effect choosing to make its findings in conformity with those of the Court of Petty Sessions, and that it had not concluded as a matter of law that it lacked jurisdiction. Therefore the SSAT should be taken to have affirmed the original decision.

In a previous interlocutory ruling given by the AAT in *McGregor and Secretary to DSS* (W91/189; 29 May 1992), the AAT had decided in similar circumstances that it was competent to proceed to a review of the substantive issues. In that case the terms in which the SSAT had expressed its decision were sufficiently equivocal that the SSAT could be taken to have entered into a review of the original decision. In the present case, the AAT concluded that the SSAT's decision should be read as a determination that it lacked any authority to review.

The AAT found that the decision of the SSAT was a nullity. The AAT concluded that such an error should not prevent the AAT from reviewing the original decision. Referring to the Federal Court's decision in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338 and to the AAT decisions in *Ibarra* (1991) 60 *SSR* 822 ; *Mathias* (1991) 60 *SSR* 823 and *Sinclair* (1992) 66 *SSR* 939, the AAT said that the SSAT, after the matter had been formally before it, had left unaffected the previous decision. The result was the same as if the decision had been affirmed. A defective decision purportedly made in exercise of a power under an enactment was reviewable whether or not the decision was a nullity.

The decision

The AAT determined that it was not precluded from hearing the application before it by reason of the decision of the SSAT.

[*Note*: The AAT did not explain why the SSAT's decision, that it did not have jurisdiction to review the original decision, was a nullity. Some guidance may be found in *Pommersbach* (1991) 65 *SSR* 912, where the AAT discussed the jurisdiction to review administrative recovery of a debt following the making of a reparation order].

[P.O'C.]

Family allowance supplement: review of cancellation

SPENCER-WHITE and SECRETARY TO DSS

(No. 8324)

Decided: 19 October 1992 by I.R. Thompson, G. Brewer and L.S. Rodopoulos.

In March 1990, Carmel Spencer-White lodged a claim with the DSS for family allowance supplement (FAS) for 3 of her 4 children. On 21 March 1990, a delegate of the Secretary granted Spencer-White FAS at a reduced rate.

On 18 July 1990, another delegate cancelled Spencer-White's FAS. In May 1991, Spencer-White lodged another claim for FAS for 2 of her children. A delegate of the Secretary granted FAS at the maximum rate from 16 May 1991.

Spencer-White then requested payment of arrears for the period from July 1990 to May 1991. That request was refused by another delegate.

When Spencer-White asked that this refusal be reviewed, a review officer affirmed the refusal. The review officer wrote to Spencer-White, saying that he had reviewed the March 1990 decision to grant FAS at a reduced rate, the July 1990 decision to cancel FAS and the July 1991 decision not to pay arrears of FAS.

Spencer-White then appealed to the SSAT against 'the refusal to pay FAS at the full rate from the date I first claimed in February 1990'. The SSAT confined itself to the third decision — to refuse payment of arrears of FAS — and affirmed that decision. The SSAT recommended that an act of grace pay-