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-

ment be made to Spencer-White, equivalent to the FAS which she should have received between March 1990 and May 1991.

Spencer-White applied to the AAT for review of the SSAT's decision.

The March 1990 decision

Spencer-White was a married woman with 4 children. When she claimed FAS in March 1990, the eldest child was receiving AUSTUDY and, accordingly, FAS was not payable for that child.

The taxable incomes of Spencer-White and her husband in the 1988-89 tax year were such that the amount of FAS payable to Spencer-White would be below the maximum rate if the income test set out in s.74B of the *Social Security Act* 1947 applied.

Spencer-White had recently stopped working and was enrolled as a full-time student. When claiming FAS, Spencer-White indicated that she had applied for AUSTUDY for herself but had not yet been notified of the result of her application. Section 74B(6B) provided that the s.74B income test did not apply where the claimant was in receipt of AUSTUDY.

The DSS processed Spencer-White's claim for AUSTUDY without waiting for the result of her application for AUSTUDY; and advised her that she had been granted FAS at a reduced rate. The DSS did not advise Spencer-White about the terms of s.74B(6B).

Spencer-White told the AAT that she had assumed that the DSS had checked her AUSTUDY application before making its decision and had taken into account the amount of AUSTUDY payable to her. Consequently, when her AUSTUDY application was granted, she thought it unnecessary to notify the DSS.

The AAT said that, given the fact that AUSTUDY was payable under reg. 43 of the *Student Assistance Regulations* from 1 January in an academic year, the DSS officers who considered Spencer-White's claim should have known that, if her AUSTUDY application was granted, AUSTUDY would be paid to her from before the date of her FAS claim. It was not reasonable for those officers to make a decision on her FAS claim without checking with the Department responsible for AUSTUDY or asking Spencer-White to notify the DSS of the result of her application.

The AAT said that, because the 1947 Act (and the 1991 Act) disadvantaged people who delayed in claiming pensions, benefits and allowances to which they were entitled,

> 'particular care should have been taken by the Department to ensure that the procedures for making claims and for dealing with them were such that *bona fide* claimants who acted reasonably did obtain the pensions etc. if they were in fact qualified for them.'

(Reasons, para. 11)

The decision to impose the s.74B income test on Spencer-White should not have been made without investigating the possibility that s.74B was not applicable. As Spencer-White actually qualified for FAS at the full rate (because she was an AUSTUDY recipient), that decision should have been made.

The July 1990 decision

In July 1990, the eldest of Spencer-White's 3 children turned 16 and applied for AUSTUDY. The DSS sent Spencer-White a review form which she was unable to complete. She contacted the AUSTUDY office and was told that her child had been granted AUSTUDY.

Spencer-White then 'phoned the DSS and spoke to an officer who told her that, because of this change in her circumstances, the combined income of herself and her husband prevented payment of FAS for her remaining 2 children. The DSS officer also said that it was pointless for Spencer-White to return the review form.

A delegate of the Secretary then cancelled Spencer-White's FAS for all 3 children.

In fact, the AAT pointed out, if the correct decision had been made by the DSS in March 1990, the change in Spencer-White's circumstances in July 1990 would have been irrelevant — because she was receiving AUSTUDY, the income test was irrelevant. Although the DSS decision to cancel FAS for Spencer-White's second child was correct, the decision not to pay FAS for the other 2 children was incorrect; and FAS should have been paid for them at the full rate.

The July 1991 decision: Date of effect of review

In July 1991, a delegate of the Secretary decided that Spencer-White could not be paid FAS for any period before her May 1991 claim. That decision was based on s.158 of the *Social Security Act* 1947, which provided that payment of FAS could only be made as a consequence of a claim.

The AAT noted that, in *Garratt* (1992) 68 *SSR* 981, the Federal Court had held that s.168(3) and s.168(4)(ca) allowed the Secretary to set an earlier date for the commencement of payments. However, the *Social Security Act* 1991 contained no equivalents of those provisions.

If Spencer-White had requested internal review before 1 July 1991, the approach taken by the AAT in *Cirkovski* (1992) 67 *SSR* 955; 15 AAR 55 as confirmed by the Federal Court in *Garratt* (above), required the 1947 Act to be applied in the current proceedings. If Spencer-White had not requested internal review before 1 July 1991, she had no accrued right to any discretion under s.168(4)(ca) being exercised in her favour.

The AAT then considered the evidence relating to Spencer-White's contacts with the DSS in May, June and July 1991. These included a letter dated 6 June 1991, in which Spencer-White wrote: 'I would respectfully appeal that all arrears be paid in full.' The AAT observed:

> 'It would be wrong in our view in the administration of beneficial legislation such as the 1947 Act and the 1991 Act to require that a member of the public who has not been informed of the terms of its review provisions should be held not to have made an application for review because he or she has not used the terminology of the review provisions of the Act. A statement made in terms of appealing which is made by referral to a decision made under the Act should, we are satisfied, be treated as an application for review of the decision.'

(Reasons, para. 24)

The AAT found that Spencer-White had applied for review of the 1990 decisions before 30 June 1991. The provisions of the 1947 Act, dealing with the date from which a changed decision could take effect, were accordingly applicable.

Section 168(3) of the 1947 Act gave the Secretary power to increase the rate at which an allowance was being paid.

Section 168(4) fixed the date from which a decision under s.168(3) could take effect:

> '(a) where the s.168(3) decision was made following a person applying for review of a previous decision, from the date of that previous decision, if
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> (i) the review was requested within 3 months of the person being given notice of the previous decision; or
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> (ii) no notice was given to the person of the previous decision;
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> (b) where the s.168(3) decision was

made following a person applying for review of a previous decision, from the date of the s.168(3) decision, if the person requested review more than 3 months after being given notice of the previous decision;

(c) where the s.168(3) decision was made following a person advising a change in circumstances, from the date of the advice;

(ca) where the s.168(3) decision granted a claim 'when none of the preceding paragraphs applies', on the day when the s.168(3) decision was made or such later day or earlier day as is specified in the s. 168(3) decision;

(d) in any other case, on the day when the s. 168(3) decision was made or such later day or earlier day (no more than 3 months before the s.168(3) decision) as is specified in the s.168(3) decision.'

Spencer-White had been given written notice of the March 1990 and July 1990 decisions. Accordingly, the AAT said, s.168(4)(b), and not s.168(4)(ca) (the provision applied in *Garratt*), was applicable in the present case. It followed that, when the Secretary's delegate was reviewing those decisions in July 1991, the delegate could have increased Spencer-White's FAS only from that date of her request for internal review — 6 June 1991.

Spencer-White's application for a review of the May 1991 decision had been made within 3 months after receiving notice of it. Section 168(4)(a) applied to fix, as the date of effect of any change to that decision, the day on which the May 1991 decision took effect — 16 May 1991.

The AAT's powers and discretions were the same as those of the SSAT: *AAT Act*, s.43(1); and the latter were the same as those of the Secretary's delegate: *Social Security Act* 1947, s.182(4); *Social Security Act* 1991, s.1253(3). Where the delegate had no discretion, the SSAT and the AAT had 'no option but to make their decisions strictly as required by the legislation': Reasons, para. 28.

The AAT distinguished the Federal Court decision in *O'Connell* (1992) 67 *SSR* 964. In that case, setting aside a decision to cancel family allowance had the effect of reviving the earlier decision to grant family allowance. But, in the present case, setting aside the March 1990 decision to grant FAS at the wrong rate would leave no decision authorising any payment to Spencer-White. If the July 1990 decision was varied so as to continue payment to Spencer-White's 2 youngest children, it would supersede the March 1990 decision.

A decision by the SSAT or the AAT to set aside the March 1990 decision and to vary the July 1990 decision could only take effect from the date of Spencer-White's application to the Secretary on 17 May 1991 or her appeal to the SSAT on 30 July 1991. There was no power to decide that FAS should be paid for any period before 16 May 1991.

Act of grace payment

Section 34A of the *Audit Act 1901* allows an 'authorized person' appointed by the Minister for Finance to determine that an amount is properly payable to a person 'by reason of special circumstances . . . notwithstanding that the amount is . . . not payable in pursuance of the law or under a legal liability'. (The exercise of the s.34A discretion is discussed in the *Administrative Law Service*, p.6050.)

In the present matter, the DSS had obtained advice from the Attorney-General's Department; and then decided not to make a payment under s.34A. Apparently, the DSS had followed Finance Direction 21/3, which requires that advice to be obtained. The AAT said that the Finance Direction was not concerned with moral obligations in the absence of legal liability; and observed that it was 'not so easy to understand . . . why the question of the Commonwealth's moral obligation was apparently not considered': Reasons, para. 42.

There was no doubt, the AAT said, that Spencer-White should have been paid FAS at the maximum rate for 3 children until the eldest turned 16 ann at the maximum rate for 2 children. She was not paid correctly because the DSS claim form and procedures were inadequate to deal with her claim. (The form had since been amended to cope with similar situations.)

The AAT said that it had no power to review decisions relating to act of grace payments. It was generally not appropriate for the AAT to make any recommendations about such payments. This case was no exception: the AAT declined to make a recommendation.

However, noting that the Ombudsman could investigate decisions refusing to make act of grace payments and could recommend the making of such payments, the AAT instructed the District registrar to send the Ombudsman a copy of the current decision and reasons, a copy of the T documents and a copy of the transcript of the hearing.

Formal decision

The AAT varied the delegate's decision of March 1990 by providing that the rate of FAS payable to Spencer-White should be calculated on the basis that the s. 74B income test was not applicable.

The AAT varied the delegate's decision of July 1990 so that it provided that Spencer-White should be paid FAS for her 2 youngest children on the basis that the s.74B income test was not applicable.

The AAT affirmed the delegate's decision of May 1991 that FAS be paid Spencer-White following her May 1991 claim from 16 May 1991.

The AAT decided that the varied decisions of March and July 1990 should have effect from 17 May 1991, so that no FAS, other than the amount already paid, was payable to Spencer-White.

[P.H.]

Assurance of support debt: waiver

FLORES and SECRETARY TO DSS

(No. 8303)

Decided: 13 October 1992 by D.P. Breen.

In October 1987, Gloria Flores signed an assurance of support for her parents, who had applied for permanent resident status. Her parents were given that status on 18 October 1988 and became Australian citizens on 21 August 1990.

Flores' parents were paid special benefit between January and September 1989, and from November 1989 to August 1990. The DSS decided that Flores owed a debt of $18 826.28, representing the full amount of special benefit paid to her parents.

In June 1991, the SSAT affirmed the DSS decision that a debt had arisen but decided to waive recovery of the part of the debt which arose between 21 February and 20 August 1990. Flores applied to the AAT for review of the SSAT decision.

The evidence

The AAT accepted Flores' evidence that she had no memory of having