

2 years, the AAT said that the training referred to in s.94(2)(b) could not be 'on the job training', because it was formal training conducted prior to the person taking up employment: Reasons, para. 50. And training specifically designed for people with impairments was excluded from the definition of educational or vocational training in s.94(5).

It was clear from the evidence of the psychologist, the AAT said, that Hamal's impairment would prevent him undertaking educational or vocational training during the next 2 years: he did not have the intellectual capacity or aptitude for formal study; he lacked English skills, did not have sustained concentration and was unable to sit for prolonged periods; he had been assessed as unemployable by the Commonwealth Rehabilitation Service; and he had 3 failed attempts at rehabilitation.

Formal decision

The AAT set aside the SSAT decision and decided that Hamal was qualified for DSP and that his DSP should be reinstated.

[P.H.]

Income test: Italian pension

SECRETARY TO DSS and
PELLONE
(No. 8786)

Decided: 11 June 1993 by W.J.F. Purcell.

Maddalena Pellone, an Australian resident, began to receive an Australian age pension in June 1985. She was granted an Italian 'survivor's pension', with effect from 1 August 1989, in November 1991.

The DSS then reduced Pellone's age pension on the basis that the survivor's pension was 'income' under the *Social Security Act* 1991.

Pellone appealed to the SSAT, which decided that Pellone's pension should be maintained without regard to the Italian pension (which Pellone had not yet received).

The DSS appealed to the AAT.

The legislation

Section 8(1) of the *Social Security Act* defines 'income' of a person to mean

'an income amount earned derived or received by the person for the person's own use or benefit'.

Section 1208(1) of the Act reads as follows:

'The provisions of a scheduled international social security agreement have effect despite anything in this Act.'

According to s.1208(4), an agreement is a scheduled international social security if it is an agreement between Australia and a foreign country, relating to reciprocity in social security matters and the text of the agreement is set out in a Schedule to the Act.

Schedule 3 contains an agreement between Australia and Italy. Article 16 of the agreement, entitled 'Determination of Claims', provides in art. 16(4) that one of the contracting parties (Australia or Italy) may request the other party to pay any arrears of pension, owing by the other party to a pensioner, to the first party so as to allow the first party to recover from the arrears any overpayment of pension made by the first party to the pensioner.

The AAT's decision

The AAT agreed with the DSS that Pellone's Italian pension was 'income' for the purposes of the *Social Security Act*, even though Pellone had received none of the pension by June 1993 and it was not known when she would receive the arrears of pension (owing from 1 August 1989). The Federal Court's decision in *Inguanti* (1988) 15 ALD 348; 44 SSR 568 required the pension to be treated as income because, even though it had not yet been received, it had been derived by Pellone.

However, the AAT said, art. 16(4) of the relevant agreement gave the DSS power to recover any overpayment of age pension made to Pellone while she was waiting for the payment of her Italian pension to commence; and the article should be used to avoid the harsh result which would follow from treating as income moneys not yet received. The AAT rejected an argument advanced by DSS that art. 16 only applied where a claim for pension had not yet been determined; and said:

'15. The purpose of the Agreement between the two countries is to co-ordinate the operation of their respective social security systems, and to enhance the equitable access by people who move between Australia and Italy. An element of that co-ordination is to ensure that "double-dipping" does not occur, and that each Government is able to recover overpayment of benefit from lump sum arrears of the other Government's benefit.

16. Social security legislation is beneficial in nature and should be so construed, unless it appears by clear words that such was not the intention of the legislation. In my view, as a matter of ordinary language, there are no such words which preclude a construction that avoids the harsh and inequitable effect for which the Department contends.

17. It seems contrary to the spirit and the stated intent of the Agreement, to provide equitable access to benefit; that a person in the respondent's position, through no fault of her own, should be so disadvantaged. Article 16 contemplates the possibility of overpayment of benefit, and recovery of such overpayment by means of the Italian authorities paying lump sum arrears of Italian pension to the Australian Government, which may deduct any excess amount of the benefit paid by it, and shall pay any balance remaining to the beneficiary . . .'

The AAT said that it was satisfied that the provisions of art. 16 of the Agreement with Italy should prevail.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Assets test: constructive trust?

KIDNER AND SECRETARY TO
DSS
(No. 8844)

Decided: 19 July 1993 by D.P. Breen.

George Kidner was the owner of several areas of land used in connection with his logging and earthmoving business. In 1982, Kidner agreed with his 3 sons that they would take over the business from him and he would retire.

Kidner and his sons entered into an oral agreement, under which the sons would buy the properties. The sons then ran the business and improved the properties. However, the oral agreement was not completed - the agreed purchase price remained unpaid and the properties remained in Kidner's name.

Kidner was granted an age pension in October 1991. The DSS subsequently decided that the value of Kidner's assets, including the subject properties, was too high and cancelled his pension.