FEDERAL COURT DECISIONS

Sole parent pension: AAT applied wrong legislation

CADMAN v SECRETARY TO DSS
(Federal Court of Australia)
Decided: 3 December 1993 by Neaves J.

Margaret Cadman was paid Class A widow's pension and sole parent pension from March 1980 to April 1989, when the DSS cancelled her pension and decided that Cadman had been overpaid $42,604.40 because she had not been a single person throughout the period when she received her pension payments.

The AAT affirmed the DSS decision. Cadman appealed to the Federal Court under s. 44(1) of the *AAT Act*.

Applying the wrong legislation

In its Reasons for Decision, the AAT had apparently applied ss. 3A and 43A(6) of the *Social Security Act* 1947, provisions which took effect from 1 January 1990.

The AAT had said that the question to be decided was whether Cadman was living in a marriage-like relationship during the 9 years in question. The AAT had said that, in deciding that question, it would pay particular regard to the factors listed in s.3A. The AAT had then examined the evidence and concluded 'that the weight of evidence before us does not support the formation of an opinion that [the applicant] was not living in a marriage-like relationship with [Mr P] (ss.3A and 43A(6)).'

Neaves J said that the AAT had mistakenly expressed the question before it as whether Cadman was living in a marriage-like relationship. But that concept was introduced only from 1 January 1990, after the end of the relevant period. The question, as posed by the legislation in force before 1 January 1990, should have been whether Cadman was living with a man as his wife on a bona fide domestic basis.

Neaves J said that neither that error nor the AAT's references to the factors in s.3A was the type of error of law which would justify the Federal Court's intervention. The s.3A factors were undoubtedly relevant to the issue which the AAT had to decide, Neaves J said; and the AAT's reference to those factors rather than to the principles laid down by the Federal Court in *Lambe* (1981) 4 *SSR* 43 was of no significance.

However, the AAT's reliance on s.43A(6) in reaching its decision had involved an error of law, Neaves J said. In effect, the use of s.43A(6) had imposed a 'reverse onus' of proof on Cadman: because the AAT could not decide conclusively that she was *not* living in a marriage-like relationship, the AAT had decided that she was living in such a relationship and was therefore ineligible for pension payments. As s.43A(6) was not in force during the period of disputed eligibility for pension, this was an error of law which justified allowing Cadman's appeal.

Refusal to waive overpayment

After deciding that Cadman had received an overpayment of pension, the AAT had refused to waive recovery of the overpayment because the circumstances of the case did not fall within the Minister's Determination of 8 July 1991 which, the AAT had said, restricted the waiver power conferred by s.1237(1) of the 1991 Act.

Neaves J noted that the Federal Court had decided, in *Riddell* (1993) 73 *SSR* 1067, that the Minister's Determination was invalid. Accordingly, the AAT's reliance on that Determination in refusing to waive recovery from Cadman provided a second ground for allowing Cadman's appeal.

Formal decision

The Federal Court allowed the appeal, set aside the AAT's decision and remitted the matter to the AAT for determination according to law.

[P.H.]

Overpayments: conspiracy to defraud the DSS

KALWY v SECRETARY TO DSS (No. 2)
(Federal Court of Australia)
Decided: 22 December 1993 by Beazley J.

Kalwy was an employee of the DSS. A number of people, including Kalwy, allegedly conspired to defraud the DSS by arranging for payments of unemployment benefits to bank accounts under fictitious names. Those people were charged with various criminal offences; Kalwy was discharged at the end of the committal proceedings; and others were convicted.

The DSS then decided that Kalwy was indebted to the Commonwealth under s.246(1) of the *Social Security Act* 1947, because moneys had been paid out in consequence of false statements. The AAT affirmed that decision: *Kalwy* (1992) 67 *SSR* 950. On appeal, the Federal Court set aside the AAT's decision: *Kalwy* (1992) 70 *SSR* 996. The Federal Court held that s.246(1) could only operate to create a debt in a person who had received the moneys in question; noted that this had not been established in the present case; and remitted the matter to the AAT for re-determination.

The AAT then decided that Kalwy had been a party to the conspiracy; that, in consequence of that conspiracy, Kalwy had received at least one half of the amounts paid to four fictitious names, namely $27,099.99; and that the Secretary could recover that amount from Kalwy under s.246(1) of the 1947 Act: *Kalwy (No. 2)* (1993) 74 *SSR* 1078.

Kalwy then appealed to the Federal Court, claiming that the AAT had made several errors of law.

No evidence to support finding?

Beazley J rejected the argument raised on behalf of Kalwy that there had been no evidence before the AAT capable of supporting the AAT's decision. Beazley J noted that the evidence included a conversation between other participants in the conspiracy, identifying Kalwy as a recipient of part of the moneys paid out by the DSS, and a rapid increase in Kalwy's bank accounts at about the time of the conspiracy.

Beazley J re-stated the limits of an appeal under s.44 of the AAT Act:

- A wrong finding of fact does not constitute an error of law – *Waterford v Commonwealth* (1987) 163 CLR 54 at 77.
- Want of logic in the drawing of inferences is not an error of law – *R*