# Administrative Appeals Tribunal decisions

## Jurisdiction to reopen a case and vary an AAT decision

**JAMES and SECRETARY TO DSS (No. 9517)**
**Decided**: 2 June 1994 by D.W.Muller, G.S.Urquart and A.M.Brennan.

**The facts**
The facts of this application lie in its history. Mr James was granted sickness benefit from 19 June 1979. He applied for an invalid pension on 6 October 1981 and was granted on and from 10 August 1983. (It appears that the delay in grant occurred because he refused to sign a release of hospital records of treatment he had received.)

On 3 February 1987 James was awarded workers' compensation of $48,080. for the period 19 June 1979 to 9 April 1985. The DSS decided that James should refund the total amount of sickness he was paid, $23,233. Under the provisions of the *Social Security Act* 1947 invalid pension payments were not refundable, so that if James had been granted an invalid pension from an earlier date, a lesser sum would have been repayable.

**Background**
James applied to the SSAT which decided, on 11 November 1987, that there were no special circumstances to warrant waiver of the right of the Commonwealth to recovery of the debt. James then sought a review of that decision by the AAT.

On 7 October 1988 Deputy President Breen decided that there were special circumstances in James' case to warrant relieving James of the liability to repay the amount of sickness benefit paid to him from October 1981, the date that the DSS initially refused his claim for an invalid pension. James received a refund of $9,279.

James reapplied to the SSAT on 2 November 1990 claiming that he should not have any sickness benefit payments deducted from his workers' compensation. The SSAT told him that it had no jurisdiction to review the matter because there had been a determination made by the AAT. On 30 January 1991 he lodged another application to the SSAT and was again told that the SSAT could not review the same decision.

James reapplied to the SSAT on 5 March 1993. The SSAT heard the matter and decided, on 7 October 1993, that it did not have jurisdiction to review the application in respect of recovery of sickness benefits, nor did it have jurisdiction to review the application in respect of the date of commencement of invalid pension.

On 14 October 1993 James applied to the AAT for review of the SSAT decision. Counsel for James submitted that the claim for sickness benefit made in 1979 should now be treated as a claim for invalid pension; that James would have qualified for invalid pension in June 1979 if his medical problems had been correctly diagnosed; that the AAT should award the invalid pension retrospectively to 19 June 1979 with the effect that the DSS would have to refund the balance of the amount it recovered; and these were not matters that were adjudicated on by D.P.Breen in 1988.

**Could the AAT re-open its previous decision?**
The AAT rejected the submissions for James, stating that, in its view, the submissions amounted to an attempt to re-open the case for special circumstances put to D.P. Breen by putting new evidence of special circumstances before the Tribunal. It stated that this could not be done because:

- a tribunal or a court cannot re-open a case in which a final judgment or decision had been made. This has to be done by way of appeal to the next court above in the hierarchy of courts or tribunals.
- the AAT cannot review a decision of the AAT.

The AAT added that even if the AAT were able to do so, it would not have allowed James to re-open his case nor exercised any discretion in his favour because:

- James had received a double benefit that he would not be entitled to receive under the present legislation;
- he had refused to allow the DSS's doctors to see the records of his treating doctors; and
- he had not applied for invalid pension until 6 October 1981.

The AAT stated that the SSAT was correct in deciding that it had no jurisdiction to deal with the matter.

**Formal decision**
1. The AAT affirmed the decision of the SSAT of 8 October 1993 that it did not have jurisdiction to vary a decision of the AAT.
2. It rejected the application to re-open James' case.
3. It had no jurisdiction to review a decision of the AAT.

**[B.W.]**

## Application for reinstatement

**MANOLI and SECRETARY TO DSS (No. 9505)**
**Decided:** 9 May 1994 by H. Hallowes.

Manoli applied to the AAT in July 1993 for review of an SSAT decision of June 1993 affirming a decision of an authorised review officer (ARO) that he was not qualified for disability support pension (DSP) under s.94 of the Act.

Manoli was sent a notice advising that a conference had been set down in October 1993. He failed to appear at the conference. A letter was then sent to him advising that the matter would be listed for another conference, and by a later notice he was given a date for that conference in February 1994. When he failed to appear at the conference in February 1994, the AAT made a decision under s.42A(2)(a) of the *AAT Act* and s.1294 of the *Social Security Act 1991* to dismiss the application without proceeding to review the decision.

Manoli represented himself at the hearing and stated that he had forgotten to attend the October 1993 conference. Although he stated that he had later phoned theAAT, there was no record of that. However, there was a record of a call from him on the date of the February conference, at which time the file note indicated that he was advised that the matter had been dismissed, and that he would have to make an application to have it reinstated.

Some days later, he lodged an application for the matter to be reinstated, advising that he had not received any advice with respect to the time and date of the conference held on 14 February 1994. The DSS opposed

the application for reinstatement, suggesting instead that he should lodge a new claim for DSP.

The DSS referred to a decision of O'Connor J in *Re Mulheron and Australian Telecommunications Corporation* (1991) 23 ALD 309 where she set out the principles to be applied in considering an application for an extension of time. The matters canvassed included whether the person had rested on his rights; prejudice that would be caused to the respondent; wider prejudice to the general public; the merits of the application; and the fairness as between the applicant and other persons in a like position if an extension of time is granted. The advocate for the DSS further argued that there was little merit in Manoli's case under s.94. An appeal would have to consider his qualification for DSP as at the time of his application (November 1992) or during a period of 3 months immediately from that date (s.100(3)).

The AAT then went on to consider s.42A, as recently amended, and canvassed other decisions in which the issue of reinstatement of the matter to the list were considered.

The AAT concluded that Manoli had received appropriate notice of the 2 conferences and that he had forgotten to attend both. The AAT was not satisfied that he had given a reasonable explanation of his failure to appear, and considered that he had had a reasonable opportunity to present his case. Nor had he provided any further evidence with respect to his qualification for DSP, indicating that the likelihood of his success in his application was remote. The AAT also pointed out that it was open to him to lodge a fresh claim for DSP.

**Formal decision**

The AAT rejected the application for reinstatement under s.42A of the *AAT Act*.

**[R.G.]**

# Stay application

**SECRETARY TO DSS and HERON (No. 9521)**

**Decided:** 23 May 1994 by H.E. Hallowes.

The DSS applied for review of a decision of the SSAT setting aside decisions of 2 authorised review officers of DEET which cancelled Heron's newstart allowance and imposed a 2-week non-payment period. The DSS also asked for an order staying the effect of the SSAT decision under s.41 of the *AAT Act*.

**The legislation**

Section 41 provides that an application to the AAT for a review of a decision does not, subject to this section, affect the operation of the decision. However, the AAT may stay the operation or implementation of a decision if it considers it appropriate.

The AAT attempted to inform Heron of the application and the orders sought, but he did not appear when it was first listed for hearing. The matter was then adjourned and a new address was found for him. A further letter of advice was sent to him but the two listings notices and the further letter were returned to the Tribunal by Australia Post as unclaimed. Finally, a new address was obtained again and he was advised of a hearing date of 23 May 1994 There was still no appearance but the departmental officer explained that she had arranged for a hand-delivered copy of the DSS's statement of issues to be given to him before the time of the hearing. On this basis, the AAT was satisfied on the balance of probabilities that Heron was aware of the date and time of the hearing.

After considering s.37 of the Act, the AAT went on to consider the arguments for the stay. It was noted that the amount involved was $527.40 and the DSS argued that if the SSAT decision was implemented an issue arose as to recoverability of the amount if the AAT set aside the SSAT decision. The AAT then considered the decision in *Wan and Secretary to DSS* (1992) 72 *SSR* 1035 which was also concerned with the issue or whether or not a person had failed to attend an interview which could be characterised as a 'course', and noted the complexities of these issues. After considering other relevant cases, the AAT decided to stay the decision and was satisfied that Heron was in receipt of some financial support even though he did not provide any evidence on this to the AAT.

**Formal decision**

The AAT stayed the operation of the SSAT decision.

**[R.G.]**

# Overpayment: income from a family trust

**KING and SECRETARY TO DSS (No. 9481)**

**Decided**: 19 May 1994 by J.R. Dwyer, I.L.G. Campbell, W.G. McLean.

The SSAT affirmed a decision of the DSS to cancel payment of newstart allowance to King from 12 May 1993, and to raise an overpayment of $17,713.63 being social security payments made between 15 August 1990 and 11 May 1993 (including tax payments).

King was granted unemployment benefits from 15 August 1990. On 14 April 1993 the DSS wrote to King and advised that a data-matching exercise with the Tax Office had revealed that King had an income of $13,666 for the financial year 1991-92. The amount did not accord with the income advised to the DSS for the same period. King told the DSS that, although he had received $13,666 from the King family trust, he did not know that he had received the money as he was not aware that he was a beneficiary under the trust. He had never actually received the money. King stated that he did not read the tax returns prepared by his father's accountant on his behalf, and did not understand that he money declared was his income. He came to an arrangement with his father, that his father would pay him the tax refund which would have been payable from the Tax Office. King told the AAT that the money (the trust distribution) was not his as it really belonged to his father.

King's father, L. King, told the AAT that money had been distributed to his son under the trust, but that the distribution was on paper only. He stated that this arrangement was 'a way of minimising the tax as far as I was concerned': Reasons, para.21. A letter from the trust's accountant states that King had received a distribution from the trust, but pursuant to an agreement between King and his father this money had been loaned back to the trust for 5 years interest free, in consideration for L. King providing free lodging to his son. Both King and his father denied this agreement. The AAT was given copies of King's tax returns which revealed a distribution from the trust in each year that he had received a social security benefit, except for the year 1992-93.