Federal Court decisions

Wife pension: claimant overseas

SRPCANSKI v SECRETARY, DSS
(Federal Court of Australia)
Decided: 15 July 1994 by Burchett J.

Srpcanski left Australia with her husband to live in Macedonia. Her wife pension was terminated about 2 July 1991. On 8 August 1992 Srpcanski returned to Australia and lodged a claim for wife pension two days later. This was granted and Srpcanski left Australia again on 5 September 1992. Srpcanski left Australia on a return ticket which she had always intended to use. She has not returned to Australia since that date.

The issue was whether s.1220 applied. The Federal Court was concerned with the interaction of ss.1217 and 1220 of the *Social Security Act*. Section 1217 provides that if an overseas person is disqualified for the pension, the person remains disqualified until the person returns to Australia. A temporary return to Australia is sufficient to remove that disqualification. Section 1220 provides that where a person who has returned to Australia after ceasing to be an Australian resident lodges a claim for certain pensions within 12 months of becoming an Australian resident again, the pension is not payable to the person if the person leaves Australia again within 12 months, unless the person had special reason for leaving.

Srpcanski submitted that her right to receive wife pension had been suspended in July 1992, and when she returned to Australia that suspension was lifted, as she once again became qualified to receive wife pension. Therefore she did not need to lodge a claim when she returned to Australia. The Court rejected that submission stating that the general operation of the Act requires a person to lodge a claim before a pension is payable. Srpcanski's wife pension had been cancelled. She needed to lodge a claim before such a pension could be payable again.

In passing, the Court referred to the definition of 'resident of Australia' in s.7(2) and (3), but stated, as this issue had not been fully argued, the Court would make no finding. Section 7(3)(f) refers to whether an applicant intends to remain permanently in Australia as one of the factors to be looked at when deciding whether that person is a resident of Australia. The Court stated that it would be necessary to have regard to that requirement, but that that requirement could never be determinative of the issue. The Court decided that there are many instances where a person could return to Australia temporarily and make a claim for a pension which would be successful. Therefore ss.1217 and 1220 can operate together without one cancelling out the other.

On the distinction between qualification and payability, the Court noted 'once the pension ceased to be payable, although the disqualification was, as the evidence showed, for a period which could be brought to an end, a fresh application was required in order to reinstate the pension once the period of disqualification did come to an end'.

[C.H.]

[**Editor's note:** The AAT's decision is reported in (1994) 78 *SSR* 1140.]

Waiver of debts: which law applies?

SECRETARY TO DSS v KRATOCHVIL
(Federal Court)
Decided: 27 September 1994 by O'Laughlin J.

Kratchovil had signed an assurance of support, undertaking to assume liability to repay any special benefit that might be paid to her mother. The DSS had decided that it would recover from Kratochvil the sum of $10,725 being part of the moneys that the DSS had paid to her mother as special benefit. On 25 February 1994 the AAT decided, under s.1237 of the *Social Security Act 1991*, that the debt should be partly waived. The DSS had notified Kratochvil when it commenced to pay special benefits to her mother, but had not notified her when the rate of benefit paid increased. Because of this failure to notify, the AAT determined that her liability to pay the increase should be waived ((1994) 79 *SSR* 1146).

Section 1237 was repealed by the *Social Security (Budget and Other Measures) Amendment Act* (No. 121 of 1993) which came into force on 24 December 1993, being a date after the AAT had completed its hearing but before it had given its decision. The DSS appealed to the Federal Court, claiming that the AAT erred in failing to apply the law as amended. Under the amendments, the new s.1237 and s.1237A set out the power of waiver of the whole or part of a debt respectively, but in each case the power was to be exercised in accordance with guidelines set out in the relevant section. Section 1236A stated that ss.1237 and 1237A were to apply to all debts, whenever incurred, whether arising under the 1991 Act or the 1947 Act.

The AAT was aware of the amendment and referred to it in its reasons for decision. But it considered, on the authority of *Esber* v *Commonwealth* (1992) 174 CLR 430 at 440, that the right of a party to seek review by the AAT had been exercised at the time of the making of the application for review. The DSS had an accrued right to have the decision reviewed in accordance with the law that was in force at the time of the making of the application. This right was preserved by s.8 of the *Acts Interpretation Act 1901*, which provides that the repeal of an Act shall not, unless the contrary intention appears, affect a right accrued under the repealed Act. The AAT found nothing in the amending Act to indicate such a contrary intention.

O'Laughlin J said that the AAT had erred in concluding that its decision was not to be affected by the 1993 amendments. It was necessary to examine the provisions of the amending Act to see whether it was to be construed as having retrospective effect, and the AAT had paid insufficient attention to the intention to be found there.

He referred to two trade mark cases in which the High Court had found in the terms of amending statutes an intention that s.8 of the *Acts Interpretation Act* should not apply to pending applications for registration: *G F Heublein & Bro Incorporated v Continental Liqueurs Pty Ltd* (1962)

109 CLR 153 and *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1964-65) 113 CLR 520.

The history of the amendments indicated that they were intended to apply retrospectively. The guidelines for the exercise of the waiver power had been inserted in the principal Act following the decision of the Federal Court in *Riddell* (1993) 73 *SSR* 1067. The Court in *Riddell* held that administrative guidelines to similar effect issued by the Minister were an invalid fetter on the discretion conferred by the old s.1237. The purpose of inserting the guidelines in the Act itself was to achieve the objective that had earlier failed, and was therefore unlikely to have been intended to apply only to applications made after the amendments commenced

This interpretation was confirmed by reference to the explanatory memorandum which accompanied the amendments, which said that the amendments were required to overcome the effect of the *Riddell* decision.

The Court remitted the matter to the AAT to determine in accordance with law as set out in the Court's reasons.

[P.O'C.]

AAT's jurisdiction to review unauthorised decision

SECRETARY TO DSS v ALVARO
(Federal Court of Australia)
Decided: 27 May 1994 by Spender, French and Von Doussa J.

The SSAT decided, on the application of Alvaro, to affirm a decision made by an officer of the DSS (and affirmed by a review officer) that Alvaro owed a debt to the Commonwealth under s.1224 of the *Social Security Act 1991*; and that recovery of the debt should not be waived. Alvaro appealed to the AAT.

The AAT then decided that it had no jurisdiction to entertain Alvaro's application for review: *Alvaro* (1993) 77 *SSR* 1123.

The AAT said it was not satisfied that the decision in question was a valid decision under the *Social Security Act 1991*, because it was not satisfied that either the officer who had decided to recover the overpayment or the review officer who confirmed that decision held valid delegations from the Secretary.

The Secretary appealed to the Federal Court under s.44(1) of the *AAT Act*. The Court was constituted as a Full Court.

The AAT's review jurisdiction

Von Doussa J delivered the judgment of the Full Court. He noted that s.25 of the *AAT Act* gave the AAT 'power to review any decision in respect of which application is made to it under any enactment'; and s.1283(1) of the *Social Security Act 1991* provided that an application could be made to the AAT for review of a decision that had been reviewed by the SSAT.

Von Doussa J said that the AAT had taken the narrowest view possible as to the meaning of the term 'decision', as used in those provisions, namely that there must be a decision which was a legally effective exercise of power conferred by the *Social Security Act*. On this interpretation, there would be no 'decision' within s.1283 if a purported decision lacked legal effect.

The AAT's interpretation, Von Doussa J said, was contrary to the Full Court's decision in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1:

> 'where it was held that a decision made by an administrator in purported or assumed pursuance of a relevant statutory provision is reviewable under the AAT Act even if the administrative decision is legally ineffective or void.'

(Reasons, pp. 11-12)

The *Brian Lawlor* decision had been applied by another Full Federal Court in *The Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing and Community Services* (1992) 16 AAR 566.

Von Doussa J noted that the word 'decision' in s.1283(1) of the *Social Security Act* was not qualified by any words referring to an exercise of powers conferred by the Act: in that provision, even on a literal reading, there was no reason why 'decision' should be narrowly construed.

The reasons of convenience given by Brennan J in *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (above) and by the Full Court on appeal applied to require the rejection of the AAT's narrow interpretation of 'decision' in s.1283(1). 'To hold otherwise', Von Doussa J said, 'would defeat the purposed of the review procedures established under the Act': Reasons, p.12.

Von Doussa J continued:

> 'The right of review by the AAT of a decision of the SSAT given by s.1283(1) arises where an administrative decision made in purported exercise of powers conferred by the Act has, as a matter of fact, been reviewed by the SSAT. That right exists whether or not the decision reviewed by the SSAT, or the decision of the SSAT itself, was legally effective. A similar construction should also be accorded to 'decision' in ss.1239 and 1247 which respectively provide for internal review of decisions by the Secretary, and the review of decisions by the SSAT . . .
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> 'In the hierarchy of reviews from original decision-maker to the AAT it was not necessary that there be at the outset an original decision that was in all respects validly made, and at each level of review thereafter another decision that was in all respects validly made. The person or tribunal to whom application for each of the reviews was made had jurisdiction to undertake that review so long as the preceding decision-maker had made what purported to be a decision in exercise of powers conferred by the Act affecting the interests of the person seeking review. It mattered not whether the ground of complaint made about the preceding decision was merely that it is wrong on the merits, or that in law it was not an effective decision because it was made by someone without authority, or in excess of authority, or for improper purposes, or was vitiated through procedural irregularity such as a failure to accord natural justice.'

(Reasons, pp. 12-14)

Von Doussa J said that the AAT would have jurisdiction and power to substitute its own decision if it concluded that an earlier decision-maker in the decision-making process had acted in excess of authority; and he cited *Secretary to DSS v Hodgson* (1992) 322 ALR at 330.

Authority to decide under the Social Security Act

The Court went on to consider the question whether the decisions under review by the AAT were in fact valid or authorised decisions under the *Social Security Act*.

Section 1224(1) of the *Social Security Act* provides that, if an amount has been paid to a recipient by way of pension, benefit or allowance under the Act because of a false statement or a failure or omission to comply with the Act, and the amount has not been recovered by deductions from on-going entitlements, the amount so paid is a debt due by the recipient to the Commonwealth.

Speaking on behalf of the Court, Von Doussa J said that a 'decision' to