

of paragraph (a) of the definition of "income" ... It is enough that the payments come within one of the paragraphs of the definition in order to be regarded as income for the purposes of the Act.'

(Reasons, para. 28)

The Tribunal considered that none of the exemptions listed in s.8 were relevant to Dewhirst's scholarship. In particular s.8(8)(zj) could not apply as Dewhirst's scholarship was not an approved scholarship nor could it be under s.24A.

The final point addressed by the Tribunal was whether the full amount received under the scholarship should be regarded as income. The Tribunal referred at length to comments made in *Marsh* on this issue. It concluded that although it was expected by the institution granting the scholarship that a large proportion of the scholarship would go toward research expenses, this was not relevant in calculating the rate of sole parent pension payable to Dewhirst. Scholarship payments 'are regarded as income because they are periodical payments in the nature of an allowance. Their gross amount must be taken into account without deduction': Reasons: para. 33.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Disability support pension: portability to New Zealand

SECRETARY TO THE DSS and
FARR
(No. 11852)

Decided: 12 May 1997 by
S.M.Bullock.

Background

Farr came to Australia in 1986. He was granted disability support pension (DSP) in March 1994. In September 1995, Farr and his wife attended a DSS office to advise that they needed to travel to New Zealand to visit Farr's sick mother. They were advised that their pension would be reviewed 6 months after their departure. Farr's mother died one week after they arrived in New Zealand. Payment of the DSP was stopped 4 weeks after the Farr's left Australia. Farr returned to Australia in November and sought review of the

decision not to pay him for 2 paydays in November 1995. The SSAT set aside the DSS decision and as a result Farr was paid arrears of the pension in May 1996.

Issue

How long could Farr remain in New Zealand without affecting payment of his DSP?

The legislation

Section 1208(1) of the *Social Security Act 1991* (the Act) states that the provisions of a scheduled international social security agreement have effect despite anything in the Act. Schedule 4 of the Act contains an agreement between Australia and New Zealand. Article 8 of Schedule 4 deals with eligibility for Australian benefits by former residents of New Zealand and stated at the relevant time:

'A person who is present, but not ordinarily resident, in New Zealand shall not be eligible for an Australian portable benefit after a period which exceeds the period of temporary absence allowable for the corresponding New Zealand benefit under the legislation of New Zealand.'

The corresponding relevant New Zealand legislation is s.77(2) of the *Social Security Act 1964* which states that a benefit shall be payable only for the first 4 weeks of any absence.

Department's advice

The DSS conceded that Farr had been advised by a departmental officer that his pension would be reviewed after 6 month's absence, despite the fact that counter staff should routinely advise clients that DSP was only portable to New Zealand for 4 weeks. The FARRs followed the departmental advice. The DSS acknowledged that the FARRs could have returned to Australia earlier if they had known that payment of the pension would cease after 4 weeks. However, the DSS submitted that the International Agreement applied to a person whether or not the person receives the pension under the Act or under the Agreement. It was not relevant how the person gets approved for DSP but only that the person is in receipt of DSP. Consequently s.1208(1) of the Act and the relevant New Zealand provisions applied. They argued that this section overrides s.1218 which deals with the payment of a pension for up to 6 months after a person's departure from Australia.

The Tribunal found that s.1208(1) overrides any other section of the Act and gives force to the Agreement between Australia and New Zealand. This is irrespective of whether 'the recipient of a disability support pension became eligible for that pension under the Act or the Agreement': Reasons, para. 37.

'The Tribunal finds that the effect of the Article 3.1 and Article 8.5 of the Schedule 4 Agreement in combination with s.77(2) of the New Zealand Social Security Act did apply to Mr and Mrs Farr with the effect that the disability support pension could only be paid to them for a period of up to but no more than 4 weeks absence from Australia.'

(Reasons, para. 38)

The DSS indicated at the hearing that if it was successful, it intended to recover the payments made to Farr as a consequence of the SSAT's decision. The Tribunal noted that Farr was honest and had followed departmental advice. The Tribunal commented that although no formal decision had been made about recovery of a debt, the Tribunal's view was that Farr should not be penalised for following departmental advice.

Formal decision

The Tribunal set aside the decision under review and determined that Farr was ineligible for the DSP for the pension paydays of 2 November 1995 and 16 November 1995.

[M.A.N.]

Overpayment: risk of suicide; whether special circumstances

SECRETARY TO THE DSS v
ANDERSON
(No. 11920)

Decided: 30 May 1997 by J. Handley
and C. Re.

Background

On 15 June 1994 Anderson suffered severe back injury during the course of his employment. For a short time after that he received weekly payments of compensation. He then received sickness allowance and later disability support pension.

On 29 May 1996 he settled a County Court action against his employer for the sum of \$100,000. The terms of the settlement stated that the sum of \$95,000 was paid for 'non pecuniary pain and suffering damages' and the sum of \$5000 was paid for 'future lost earnings and lost earning capacity'.

On 5 June 1996 the DSS wrote to the compensation insurer seeking recovery of the sum of \$14,232.14, being benefits paid to Anderson for the period 27 August 1994 to 10 May 1996. Because the DSS had failed to notify the insurer prior