

Administrative Appeals Tribunal decisions

Jurisdiction of SSAT: reviewable decision, gender of transsexual

'VZG' and SECRETARY TO THE DfaCS
(No. 19990298)

Decided: 7 May 1999 by J. Dwyer.

Background

VZG applied for review of an SSAT decision that it had no jurisdiction to hear VZG's appeal. The SSAT found that as there was no reviewable decision, it had no jurisdiction. It said the issue had already been determined in an earlier decision.

VZG was a male to female transsexual. VZG's first name is that of a female and he received newstart allowance (NA). On 23 October 1997 he signed a statement saying 'I consider myself female. I could obtain documentary evidence that I have had gender reassignment, if requested. I live with a male.'

On 3 January 1998, his NA was suspended on the grounds that he was living in a 'marriage-like relationship' as defined by the *Social Security Act 1991* (the Act). This was affirmed by an authorised review officer (ARO) but set aside by the SSAT on the grounds that he was not in a marriage-like relationship. His NA was reinstated.

VZG was not happy with this decision, particularly its finding that there was no marriage-like relationship as the person he allegedly lived with was 'a fictitious person'. He applied to the AAT for review of the SSAT decision of 13 February 1998. On 28 April 1998, the AAT dismissed this application for want of jurisdiction. VZG was not granted leave to appeal to the Federal Court as his appeal was lodged out of time. He unsuccessfully applied for an extension of time.

In the case before the AAT on this occasion, VZG's appeal relates to a letter he sent to Centrelink on 25 September 1998. He requested he be addressed as 'Mr' in future correspondence and that a change of gender be recorded. A staff member of Centrelink agreed to address him as 'Mr' in correspondence but declined to record a change of gender. A letter from

Centrelink stated 'your gender remains recorded as female. This is because you have previously sought to be considered female following your having undergone gender re-assignment surgery'. The letter informed VZG he had a right of review by an ARO and then a right of appeal to the SSAT.

On 30 October 1998, VZG requested an ARO review of the decision that 'your gender remains recorded as female'. The ARO declined to make a further decision as the earlier SSAT decision of February 1998 had accepted that VZG was female. VZG appealed to the SSAT. The SSAT decided on 5 February 1999 that it had no jurisdiction, the only reviewable decision having already been determined by the SSAT in February 1998. The SSAT found that as the decision about VZG's gender was not 'a determinative or substantive decision', it was not reviewable under the Act. The earlier SSAT decision had accepted that VZG was female. The SSAT declared: 'The SSAT in this matter is *functus officio*. That is, it has discharged its duty in respect of the decision in question and I have no jurisdiction to further review it.'

VZG sought review of this SSAT decision.

The issue

The issue before the AAT was whether there was a reviewable decision. Did the SSAT have jurisdiction to review a Centrelink decision to continue to regard VZG as female? Centrelink submitted that the SSAT had no jurisdiction, as there was no reviewable decision.

The legislative meaning of decision

Section 23 of the *Social Security Act 1991* defines decision as having the same meaning as in the *Administrative Appeals Tribunal Act 1975*. Section 3(3) of that Act provides a very broad definition of decision, including:

- making suspending, revoking or refusing to make an order or determination;
- giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- doing or refusing to do any other act or thing.

Judicial definition of 'decision'

The AAT cited the High Court case *Australian Broadcasting Tribunal v Bond*

and *Others* (1990) 94 ALR 11, particularly the judgment of Mason CJ. When considering the nature of a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), Mason CJ said:

'A reviewable "decision" is one for which provision is made by or under statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision.' [at 23]

Mason CJ added that to extend the ambit of the meaning of 'decision' would entail

'a greater risk that the efficient administration of government would be impaired ... To interpret 'decision' in a way that would involve a departure from the quality of finality would lead to a fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process.' [at 23]

Judicial meaning of decision narrower than the legislative definition

The AAT applied a meaning of 'decision' that was markedly narrower than the relevant legislative definition. However, in doing so, it followed the High Court case of *Australian Broadcasting Tribunal v Bond and Others* (1990) 94 ALR 11.

Jurisdiction of the AAT

The AAT was satisfied it had jurisdiction to review the SSAT decision. The AAT cited *Crompton v Repatriation Commission* (1993) 30 ALD 45. The Full Court of the Federal Court held that the AAT had power to determine the question of its jurisdiction, notwithstanding that the Board or Tribunal it was reviewing had decided it lacked jurisdiction. The Full Court said:

'having the power to determine and redetermine questions of jurisdiction is essential to the process of determining questions of law and fact ... Where a board or tribunal determines a question of law during its own proceedings, that question must be open to redetermination by a superior tribunal.' [at 49-50]

The AAT concluded that the SSAT decision was correct. The decision to retain the record of VZG's gender as female was not reviewable by the SSAT. The AAT commented that it was unfortunate that correspondence from both

Centrelink and the SSAT advised VZG he could review both decisions.

The AAT decision

The SSAT decision was affirmed. The decision as to VZG's gender was not a reviewable decision. The SSAT had no jurisdiction.

[H.B.]

[Writer's note: I refer to VGZ as a male as 'he' argues in his submission that he should be regarded as a male. This seems contradictory at first. However, although he identifies as female, he argues he is a male.]

Overpayment and waiver: special circumstances, 'knowingly' making a false statement, wrong advice

JAZAZIEVSKA and SECRETARY TO THE DFACS
(No. 19990296)

Decided: 23 April 1999 by E.K. Christie.

The background: three overpayments

Jazazievaska was overpaid 3 separate amounts by Centrelink:

- She was overpaid \$1124 in additional family payments for the period 5 January to 17 August 1995.
- On 27 March, she was overpaid \$2065 in basic family payments which was a duplicate payment for 3 April 1994 to 21 December 1995.
- Jazazievaska was overpaid \$2039 in family payments for the period from 17 July to 18 December 1997.

On 31 January 1995, Jazazievaska received a redundancy payout for \$20,944 having accepted a redundancy package after working for the Commonwealth government for 15 years. It included amounts for sick leave and long service leave as well as a redundancy payment. At around this time, she also gave birth to a daughter. Medical complications following the birth left her unable to work for 4 months, as she required frequent check-ups and medical care.

Jazazievaska told the AAT of her frustrations with Centrelink, particularly her difficulties in dealing with uncooperative staff.

The issue

The issue to be determined by the AAT was whether the 3 debts could be waived due to either administrative error or the existence of special circumstances.

The legislation

Section 1237A(1) of the *Social Security Act 1991* (the Act) provided that the Secretary must waive the recovery of a debt that is attributable solely to an administrative error of the Commonwealth, if the debtor received the amount in good faith. However, this does not apply where there is a combination of factors such as administrative error together with an error by the debtor.

Section 1237AAD of the Act provides that the Secretary may waive a debt

- if satisfied that the debt did not wholly or partly arise from the debtor or another knowingly making a false statement or representation, or failing to comply with the Act, and
- there were special circumstances (other than financial hardship alone) which warrant a waiver rather than a write-off of the debt.

The first overpayment

The AAT affirmed the findings of fact made by the SSAT. In late 1994, Jazazievaska provided an estimate of her taxable income for 1994/95 at \$23,544. On this basis, she was paid additional family payment. Her actual taxable income for 1994/95 was \$35,784. On 20 January, 28 April and 2 June 1995, she received notices requiring her to notify Centrelink if her combined taxable income was likely to exceed \$27,905.

The AAT found that this overpayment could not be waived. It was not due solely to an administrative error by Centrelink. Jazazievaska had contributed to the error by not complying with her clear obligation under the Act to notify the Department of any change in her circumstances. The AAT held that Jazazievaska had contributed to the administrative error that led to the overpayment. The AAT said it would not have been unreasonable for her to query the effect of her redundancy package with Centrelink. The AAT has consistently found that redundancy packages form part of taxable income.

There were no special circumstances warranting a waiver of the debt as there was no evidence of any circumstances that were 'uncommon' 'unusual' or

'exceptional' as required by *Beadle* (1985) 26 SSR 321.

The second overpayment

The AAT made the following findings of fact: on 27 March 1996, due to an error by Centrelink, Jazazievaska's account was credited with \$2650.60. There was no letter of explanation from Centrelink. She queried the payment with her bank but not Centrelink. The amount duplicated her basic family payments for the period from 3 April 1994 to 21 December 1995.

The AAT found that this duplicate payment could not be waived due to administrative error as the payment was not received in 'good faith'. The AAT expressly said this finding was no reflection on Jazazievaska's honesty, as it found her to be 'an honest, truthful witness': Reasons, para. 19.

The AAT referred to *Secretary, Department of Education, Employment, Training and Youth Affairs and Prince* (1998) 3(3) SSR 37. In relation to the meaning of 'good faith', Finn J said:

'Its concern is with the state of mind concerning the receipt: if that person knows or has reason to know they are not entitled to the money.'

In this case, the AAT found that the receipt of such a large sum without any explanation warranted some query on her part to Centrelink. However, she only queried the matter with her bank. There were no special circumstances warranting a waiver of the debt.

The third overpayment

The AAT adopted the findings of fact made by the SSAT. On 17 July 1997, Jazazievaska lodged details of her income and assets in which she indicated that her 1995/96 taxable income as \$23,730. Her actual taxable income for 1995/96 was \$33,437. On 22 July 1997, she was sent a notice showing that her rate of family payment was based on her reported taxable income of \$23,730.

The AAT accepted Jazazievaska's evidence that she had provided extensive documentation to Centrelink in June and July 1997. It also accepted that she had relied on the advice of Centrelink staff and that there was confusion surrounding this advice.

'Knowingly' making a false statement

The AAT decided that this overpayment should be waived, as there were special circumstances within the criteria of the Act. It found that the overpayment did not arise from Jazazievaska 'knowingly' making a false statement or representation. The AAT relied on the case of