dinary decent people, must at least be relevant to whether she acted in 'good faith'.

(Reasons, para. 90)

Pledger believed that she was entitled to receive some social security payment throughout the period she received the carer pension. It is not enough to establish lack of good faith to simply find that the person knew they were not entitled in law to a specific pension. It was not clear whether Pledger knew that she would receive a greater amount if she stayed on the carer pension and this together with Pledger's repeated attempts to rectify the Department's error, meant that establishing good faith was far more complex than the AAT realised.

> Assuming that one accepts as true the applicant's account of her state of mind, I consider that there is a serious question as to whether ordinary, decent members of the community would regard what she did as 'dishonest'. I am not dissuaded from that view by the AAT's finding that she was 'aware' that she was being paid carer pension when 'no longer eligible'.

(Reasons, para. 93)

It was understandable that Pledger might genuinely be of the view that as she had done all she could to correct the Department's error, if the Department chose to call the pension it paid her a carer pension, then that was up to the Department. Weinberg J concluded by saying:

> The expression 'received in good faith' in s.1237A(1) encompasses such a wide variety of circumstances that it is not helpful to seek to define them exhaustively. Instead, in each case there are considerations of degree, involving an assessment of the importance of a particular aspect of the state of mind of the recipient of the payment. Paradoxically, in an Act which is replete with highly technical language, and which defines some terms in a manner which is almost unintelligible, the expression 'good faith' is left undefined. Regrettably, on this occasion commendable legislative restraint has not produced clarity.
>
> ...
>
> the words 'good faith', which are inherently open textured, are not used in any special sense in the Act. They are therefore to be accorded their ordinary and natural meaning. The words themselves are normative, and not descriptive. In other words, they are value laden, and the values which they reflect must be the values of ordinary, decent members of the community.

(Reasons, para. 102 and 103)

The Court rejected the submission by the Department that Pledger's efforts to rectify the Department's error were irrelevant and that she was obliged to leave the funds in the bank. Pledger had no other income between 1993 and 1997. She could not be expected not to use the money in her bank account until the Department finally realised its error.

Weinberg remitted the matter back to the AAT and observed that the AAT would need to make specific findings including whether Pledger genuinely believed that she was entitled to some form of social security pension or benefit which was similar in amount to the one she was paid. Critical to this question was Pledger's state of mind throughout the period and what she believed, not what a reasonable person might have believed. An unreasonable belief is less likely to be accepted as being genuinely held.

Formal decision

The Federal Court set aside the decision of the AAT and remitted the matter back to the AAT differently constituted to be determined according to law.

[C.H.]

Disability support pension: confinement in a psychiatric institution; rehabilitation

SECRETARY TO THE DFaCS v FRANKS

(Full Federal Court of Australia)

Decided: 20 December 2002 by Spender, Drummond and Marshall JJ.

The Secretary appealed against the Administrative Appeals Tribunal (AAT) decision that Franks was undergoing a course of rehabilitation whilst detained as a restricted patient and thus entitled to receive a disability support pension.

The facts

Franks was receiving the disability support pension when he was charged with an indictable offence. He was referred to the Queensland Mental Health Tribunal to decide whether he was able to stand trial. Franks was found to be not fit to stand trial and he was detained as a restricted patient in a hospital under the Queensland Mental Health Act.

Whilst detained in hospital Franks participated in rehabilitation programs as part of his treatment. He was given restricted leave to visit sporting activities and art classes. Franks' period of detention was uncertain. He was monitored by the Patient Review Tribunal who would decide when he could be released. He continued to participate in rehabilitation programs while he was detained. Franks' pension was suspended on 13 April 2000 as he was regarded as undergoing psychiatric confinement because he had been charged with an offence.

The law

Section 1158 of the Social Security Act 1991 (the Act) provides:

> 1158. An instalment of a social security pension, a social security benefit, a parenting payment or a pensioner education supplement is not payable to a person in respect of a day on which the person is:
>
> (a) in gaol; or
>
> (b) undergoing psychiatric confinement because the person has been charged with an offence.

'Psychiatric confinement' is defined in s.23(8) as including confinement in a psychiatric section of a hospital. Section 23(9) states:

> 23.(9) The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.

The AAT decision

The AAT decided that Franks was not undergoing psychiatric confinement because he was undergoing a course of rehabilitation. According to the AAT s.23(9) distinguished being confined in a psychiatric institution from being confined in a psychiatric institution to undertake a course of rehabilitation. The AAT narrowed the issue to whether there was a difference between a course of rehabilitation for a defined period and a course for an indefinite period. The AAT followed a previous AAT decision of Pardo and Secretary to the Department of Family and Community Services (2000) 4(7) *SSR* 84 deciding that 'during a period' in s.23(9) was to be construed as requiring a temporal connection between the confinement and the program of rehabilitation. Providing the confinement and rehabilitation are undertaken contemporaneously s.23(9) will apply.

The decision of Cooper J

On appeal to the Federal Court, Cooper J at first instance found it unnecessary to deal with the primary point raised, that is what constituted a 'course of rehabilitation' for the purposes of determining entitlement to disability support pension under the Act.

Cooper J noted that under the Mental Health Act a person was detained as a restricted patient while criminal proceedings were pending. That is, the person was detained because they had been charged with an offence until it was decided whether the person was fit to stand trial. It was an error of law by the AAT to restrict the issue in its consideration to the proper construction of s.23(9), which could only be considered in the context of s.1158. Cooper J held that as a matter of construction of the relevant provisions, s.23(9) had no relevant operation where a person was undergoing psychiatric confinement because they had been charged with an offence, for so long as that reason remained operative. This meant Franks was not entitled to disability support pension while confined as a restricted patient, even if he was undergoing a course of rehabilitation.

The relationship between s.1158(1)(a)(ii) and s.23(9)

The Full Federal Court considered that Cooper J had erred in his construction of the relevant provisions. The Court stated:

> If a person is in psychiatric confinement and it is no part of the reasons for his confinement that he has been charged with committing an offence, s.1158(1)(a)(ii) is, by its own terms, inapplicable to the person and does not bar entitlement to pension. If the Legislature intended that s.1158(1)(a)(ii) was to bar a psychiatrically confined person's entitlement to a pension unless the existence of the criminal charge was entirely irrelevant to the reason for the confinement, it would have achieved that by declaring that s.23(9) had no application to s.1158(1)(a)(ii). It did the opposite: by Note 3 to the section, it expressly applied s.23(9) to s.1158(1)(a)(ii)...
>
> Whether s.23(9) be characterised as a definition clause (as the learned primary judge did) or whether it be characterised as an exception to the bar in s.1158(1)(a)(ii) (as it readily can be), the legislative intent is, in our opinion, clear. The bar in s.1158(1)(a)(ii) against the payment of a pension to a person undergoing psychiatric confinement because the person has been charged with an offence is not to apply during a period when that person is undertaking a course of rehabilitation.

(Reasons, paras 19, 20)

Course of rehabilitation

The Secretary argued that the AAT had wrongly concluded rehabilitation per se fell within s.23(9) and that it failed to recognise the distinction between rehabilitation and a course of rehabilitation, which had to have a structure and be for a defined period. Franks argued that the AAT had found he was undertaking structured activities which could amount to a course of rehabilitation, and therefore there was no material error of law.

The Court was of the view that it was clear the AAT had identified the need to distinguish between rehabilitation per se and a course of rehabilitation. Further there was no justification for narrowly construing the phrase 'course of rehabilitation', which was not defined in the Act. Although the term 'rehabilitation program' was defined, this was of limited assistance in construing the phrase in s.23(9). The phrase had no particular technical meaning, and had to be given its ordinary English meaning. The Court said:

> There is nothing in the ordinary meaning of the phrase or in the context in which it appears in the Social Security Act 1991 to suggest that this expression is used in the Act to mean a rehabilitation program with a duration precisely, though provisionally, defined. Nor is there anything to suggest that the phrase in the Act is only satisfied by rehabilitation activities structured by reference to identified milestones towards achieving a precise goal. The boundaries of the activities capable in the circumstances of the particular case of constituting a 'course of rehabilitation' within s.23(9) as applied to s.1158(b) are thus wide.
>
> An appeal lies to this Court from the AAT only on an error of law. Where a statute uses words according to their ordinary meaning and the question is whether the facts as found fall within those words, that question is one of fact only, so long as it is reasonably open to hold that they do, ie, that different conclusions are reasonably open as to whether the facts of the particular case do or do not come within the particular statutory provision: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 288.
>
> Provided it is open to the decision-maker on the evidence to conclude that the person in question is undertaking rehabilitation activities that are not merely engaged in by him on an ad hoc basis, but which form part of what can be said to be a planned series of activities that may include medical and other treatments directed towards improving the person's physical, mental and/or social functioning, then, depending on the circumstances of the particular case, it is open to the decision-maker to hold that such activities do constitute 'a course of rehabilitation' for the purposes of s.23(9).
>
> In its reasons, the AAT found, at par [12]:
>
> He is at the Baillie Henderson hospital formally for the purpose of psychiatric assessment but he has also participated in a rehabilitation program. The program includes a wide range of rehabilitation activities suited to the respondent and designed to assist his long term prospects. Improvements have been noted in short and long term memory function and organisational ability.
>
> So long as the AAT recognised, as it did, that merely to engage in rehabilitation activities did not mean that Mr Franks was undertaking a 'course of rehabilitation' and, so long as it was entitled to find that the rehabilitation activities he engaged in could be said to be 'a rehabilitation program ... suited to the respondent and designed to assist his long-term prospects', it cannot be said that the AAT made any error of law in concluding that Mr Franks was not undergoing 'psychiatric confinement' within s.1158(b) because he was undertaking a 'course of rehabilitation' within s.23(9).
>
> It was not suggested that there was no evidence before the AAT to support the finding it made in par [12] of its reasons. Nor was it suggested that this finding was erroneous in law because it was unreasonable in the Wednesbury sense. Given what we have said about the proper approach to construing the phrase 'course of rehabilitation', the AAT did not, in arriving at its conclusion, ignore any relevant considerations. Having made this finding of fact and there being no basis for thinking it was tainted with any error of law, it follows, in our opinion, that the AAT's conclusion that Mr Franks was undertaking a 'course of rehabilitation' for the purposes of s.23(9) as applied to s.1158(b) cannot be overturned in an appeal to this Court under s 44 the Administrative Appeals Tribunal Act.

(Reasons, paras 48 to 53)

Formal decision

The Full Federal Court allowed the appeal and set aside the decision of Cooper J. It dismissed the Secretary's appeal against the decision of the AAT, so that the AAT decision was thus given full force and effect. No order was made as to costs.

[A.T.]