Overpayment: amnesty

OGSTON and SECRETARY TO DSS (No. N86/893)
Decided: 11 September 1987 by R.A. Hayes.

The AAT *affirmed* a DSS decision not to extend an amnesty in respect of an overpayment to the applicant.

The DSS had announced an amnesty for people who reported their overpayments to the DSS during the period 12 February 1986 to 31 May 1986. Ogston contacted the DSS on 20 February 1986, and said that he had concealed his wife's income while he was receiving unemployment benefit over the preceding two years.

Ogston told the AAT that he had initially concealed his wife's income because he had expected to be on unemployment benefit only for a short period; and that he had thought that disclosure of his wife's income 'would jeopardise their financial security'.

The legislation incorporating the amnesty, s.45 of the *Social Security Act*, was introduced on 3 June 1986 - that is, 3 days after the end of the amnesty period. Sub-section 45(2) provided that a person, who had made a false statement to the DSS and had been overpaid, would not be guilty of an offence and would not be liable to repay the overpayment so long as -

> (c) the person had not known that the statement was false at the time of making it; and
> (d) the person had voluntarily informed the DSS of the false statement during the amnesty period.

The AAT said that it was clear that Ogston could not meet the requirements of s.45(2)(c): 'Whatever his motivation, it is clear that in filling out the claim form, he deliberately concealed the fact of his wife's employment': Reasons, p.7.

Assets test: hardship

ROCHE and SECRETARY TO DSS (No. N86/651)
Decided: 16 October 1987 by J.O. Ballard.

Mr and Mrs Roche were age pensioners. Their pension had been cancelled because of the value of their assets, including a farming property, which was being worked by their son.

Mr and Mrs Roche asked the DSS to disregard the value of the farm under the hardship provisions. The DSS refused to do this because Mr Roche had life insurance policies with a surrender value of $12 924. Mr and Mrs Roche asked the AAT to review that decision.

The legislation
At the time of the decision under review, s.6AD(1) of the *Social Security Act* provided that property should be excluded from the value of a pensioner's assets where it was not reasonable to expect the pensioner to realize the property or use it as security for borrowing, and where the pensioner would suffer 'severe financial hardship' if the value of the property were taken into account.

The DSS had adopted a policy guideline that a married couple would not be regarded as being in 'severe financial hardship' where they had more than $10 000 in readily available money.

Are life policies immune?
It was agreed between Mr and Mrs Roche and the DSS that s.6AD(1) applied to their farming property - apart from the question whether they would be in 'severe financial hardship' if their property were taken into account.

The dispute focused on the question whether the surrender value of the life policies was relevant in deciding whether there would be 'severe financial hardship'.

The AAT noted that, in cases such as *Doyle* (1986) 33 *SSR* 414, the AAT had accepted the DSS policy 'and applied a limit of $10 000 to readily available funds'. Earlier decisions had also taken insurance policies into account: *Lumsden* (1986) 34 *SSR* 430; *Pardew* (5 December 1986).

The AAT said that the insurance policies on Mr Roche's life had no 'special features . . . militating against sale or realisation'. There was 'no difference in principle between insurance policies, stocks and shares or money in the bank': Reasons, para.15.

The AAT concluded:

> 'The consequence is, applying the $10 000 criteria [*sic*] accepted in *Doyle's* case, that the surrender value of any insurance policies must be contained within that amount.'

(Reasons, para.16)

Formal decision
The AAT affirmed the decision under review.

Family allowance: late claim

RICH and SECRETARY TO DSS (No. N87/88)
Decided: 11 September 1987 by R.A. Hayes.

Donna Rich gave birth to her son, B, in August 1967. She was granted family allowance for B.

When B turned 16, the DSS ceased paying the family allowance to Rich. However, as the allowance had been paid into a rarely-used bank account, she did not notice the cessation until January 1985. She then re-applied for the allowance and for payment for the period from August 1983 to January 1985.

The DSS accepted that that Rich was entitled to family allowance for B because he was a full-time student; but refused to pay allowance for the period from August 1983 to January 1985.

Rich asked the AAT to review that decision.

The legislation
At the time of the decision under review, s.103(1)(f) of the *Social Security Act* provided that family allowance ceased to be payable when a child turned 16, unless the Director-General was satisfied, within 3 months of the child turning 16, that the child was a full-time student.

(In *Ozcagli* (1986) 34 *SSR* 439, the Federal Court had decided that this provision terminated entitlement to family allowance when a child turned 16 unless the parent satisfied the Secretary, within the 3-month period, that the child was a student child.)

At the time when Rich claimed arrears of the allowance, s.102(1)(a) permitted backdating of the allowance where the claim was lodged within 6 months of eligibility or 'in special circumstances'.

From July 1987, s.102(1)(a) was amended to provide that family allowance is now payable only from the 'family allowance period' during which the claim is lodged. (A 'family allowance period' is a calendar month, commencing on the 15th of each month.)

Amendment not retrospective
The AAT noted that the new s.102(1)(a) removed the ability of the Secretary to backdate the grant of family allowance in special circumstances. However, when Rich claimed arrears, there was a discretion to backdate claims. When Rich lodged a new claim and sought payment of arrears, the Secretary was bound to deal with this according to s.102(1)(a) as it then stood.

No 'special circumstances'
The AAT referred to *Beadle* (1984) 20 *SSR* 210; and said:

> 'The question is not one of whether an applicant is a deserving one, because of the special circumstances which exist in her life, thereby justifying payment of an allowance earlier than a date from which it would ordinarily be paid, but whether special circumstances prevented, or contributed to an applicant being prevented from lodging the application in time.'

(Reasons, pp.8-9)

The mistaken belief of Rich that the allowance was still being paid did 'not have that "particular quality of unusualness" necessary to establish special circumstances', the AAT said: Reasons, p.9.

Formal decision
The AAT affirmed the decision under review.

Invalid pension: applicable eligibility criteria

PHILLIPS and SECRETARY TO DSS (No. S86/169)
Decided: 23 September 1987 by J.A. Kiosoglous, J.T.B. Linn and B.C. Lock

John Phillips had been refused invalid pension by the DSS and applied to the AAT for review of that decision. The applicant suffered from a minor back problem which had resulted in him perceiving himself as an invalid. He was resitant to treatment as a result of this negative perception. He had not worked since 1984.

The relevant legislation
The Tribunal first had to determine the applicable legislation for the determination of the claim. The applicant had first applied for invalid pension on 11 July 1985. The DSS decided to uphold the SSAT decision to dismiss his appeal on 16 May 1986. This was the decision from which the applicant appealed to the AAT.

After the hearing of the matter the eligibility criteria affecting invalid pension were amended. The amendment came into operation on 1 July 1987. The effective change in the criteria was that to be eligible for invalid pension the applicant must not only be permanently incapacitated for work to a degree not less than 85%, but must now have at least 50% of that permanent incapacity directly caused by a physical or mental impairment. [s.27 *Social Security Act]*

The question for the AAT was whether it must look at the legislation on the date the claim was made or on the date of the handing down of its decision.

Under *Administrative Appeals Tribunal Act* 1975, s.43(6) a decision of the AAT varying a decision under review has effect from the day upon which the decision under review had effect unless the Tribunal specifically orders otherwise. Thus, to apply the new law existing at the date of its decision would be to give that law retrospective effect.

Did the applicant have an accrued right?
Section 8 of the *Acts Interpretation Act* 1901 provides:

> 'Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not -
> ...
> (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or
> ...
> (e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid, and any such investigation legal proceeding or remedy may be instituted continued or enforced...as if the repealing Act had not been passed.'

The Tribunal referred to the discussion of what constitutes a 'right' in *Free Lanke Insurance Co Ltd v. Ranasinghe* (1964) *AC* 541 and summarised in *Mathieson v. Burton* (1970-1971) 124 *CLR* 1 by Gibbs,J. as not including a power to take advantage of an enactment or a hope or expectation that a right will be created. What was included in this context were those rights of a specific nature 'given to an individual upon the happening of one or other of the events specified in the statute.' But as was pointed out in *Robertson v. City of Nunawading* [1973] *VR* 819 the mere taking of a procedural step towards asserting the right does not create the right.

Thus the issue became whether the applicant in applying for invalid pension was taking a procedural step or was asserting a statutory right. The AAT thought that it was the latter. Once the Tribunal was satisfied that the criteria was met then there was no discretion not to grant an invalid pension. The role of the Tribunal was to 'discover' the right, not to create it.

Thus an accrued right is acquired when a claim for invalid pension is made and that right cannot be removed by amending legislation.

Finally, there was no intention in evidence in the amending Act that it should apply retrospectively. The AAT could therefore conclude that any person who claimed the pension prior to 1 July 1987 must have the old eligibility criteria applied to them until the date of the Tribunal's decision. Of course, after that decision the DSS may review the elgibility of such a person under the new section and make a separate determination from that time.

The AAT then considered the applicant's eligibility in the light of the old criteria and found on the evidence that the applicant was qualified to receive invalid pension.

Formal decision
The AAT set aside the decision under review.

Invalid pension: permanent incapacity

BAILEY AND SECRETARY TO DSS (No. N87/205)
Decided: 18 September 1987 by A.P.Renouf

The AAT *set aside* a DSS decision to refuse an invalid pension to Mary Bailey. The applicant had slight physical impairment and mild mental retardation. The Tribunal gave considerable weight to non-medical factors in determining the applicant's eligibility.

The AAT said that the question was

> '...whether a person like Mrs Bailey in all her circumstances can attract an employer. I consider that her chances of doing so are remote and were she able to do so, the chances of her holding down full-time remunerated employment are more remote. Firstly, she is a a person whois less competent than about 98% of the population and at work, this would speedily become apparent. There are less employment opportunities for such persons. Secondly, Mrs Bailey is 42 years of age. This does not mean that she is elderly but an employer would be even more reserved than normal in taking on a person of such limited intelligence of that age than a similar person who was younger. Thirdly, the applicant has really no marketable skills except for process work. Finally, she has been out of the workforce for 9 years, a lengthy time.'

(Reasons, para.14)

While the case was borderline, the AAT found that on the balance of probabilities the applicant was eligible for invalid pension.