Invalid pension: did incapacity develop in Australia?

SECRETARY TO DSS and DELMACZYNSKI

(No. 8072)

Decided: 1 July 1992 by S.A. Forgie.

Zdzislaw Delmaczynski was born in 1926 in Poland. He worked there for 30 years. He came to Australia on a 2-month visitor's visa in 1986 and was injured in a motor vehicle accident. Within 3 weeks, Delmaczynski had married and returned to Poland, where he underwent an operation and gave up his job as an inspector of forests because of the consequences of his Australian accident.

In 1988, Delmaczynski was allowed to migrate to Australia following a medical examination by Australian immigration authorities in November 1987.

In July 1989, Delmaczynski claimed an invalid pension. The DSS rejected his claim on the basis that, if he was at least 85% permanently incapacitated for work, he had become incapacitated at a time when he was not an Australian resident.

Delmaczynski appealed to the SSAT, which set aside the DSS decision. The Secretary then applied to the AAT for review of the SSAT's decision.

The legislation

At the time of Delmaczynski's claim for invalid pension, s.30(1) of the *Social Security Act* 1947 prevented the grant of an invalid pension to a claimant unless the claimant became permanently incapacitated for work or permanently blind while an Australian resident.

Section 27 provided that a person was permanently incapacitated for work if the degree of the person's incapacity for work was not less than 85% and at least half of that incapacity was directly caused by a permanent physical or mental impairment of the person.

Section 3(1) defined 'Australian resident' as a person who resided in Australia, and who was an Australian citizen, the holder of a permanent entry permit or a return endorsement or return visa, or an exempt non-citizen.

Delmaczynski first met the requirements of this definition on 1 June 1988, when he was granted a permanent entry permit and began to reside in Australia.

The AAT's consideration

The AAT noted that incapacity for work in the *Social Security Act* referred not merely to a medical condition but to the effects of a medical condition on a person's ability to engage in paid work: *Panke* (1981) 2 *SSR* 9; 4 ALD 179. A permanent incapacity was one which was likely to last indefinitely: *McDonald* (1984) 11 *SSR* 114; 8 ALD 520.

In the present case, the AAT could not conclude that Delmaczynski's condition was particularly serious immediately after his accident in 1986: he was able to marry a few days later and return to Poland within a few weeks.

Although Delmaczynski had given up his job after returning to Poland, this was not sufficient to persuade the AAT that he was 85% incapacitated for work or that the incapacity was permanent.

There was no reason to suppose that the November 1987 medical examination, conducted on behalf of the Australian immigration authorities, was superficial or that Delmaczynski downplayed his symptoms. The fact that Delmaczynski had been cleared for immigration (when one of the criteria for medical assessment was that the person not be suffering from defects which prevented employment) left the AAT unsatisfied that Delmaczynski's incapacity for work at that time was permanent.

Nor was the AAT satisfied that, on his arrival in Australia, Delmaczynski was unable to perform reasonably available work because of his medical condition and other factors. It was only with the deterioration of Delmaczynski's health after his arrival in Australia that he could be said to have become permanently incapacitated for work: at that time he was an Australian resident and, accordingly, s.30(1) did not prevent the grant of an invalid pension.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Age pension: replacement cheques

BAZZACCO and SECRETARY TO DSS

(No. 8129)

Decided: 28 July 1992 by J. Handley.

Palmira Bazzacco asked the AAT to reconsider a DSS decision, affirmed by the SSAT, not to issue 2 cheques to replace 2 age pension payments alleged not to have been received by her in December 1990 and January 1991. While the appeal was in her name only, the decision under review also affected her husband and he was treated by the AAT as if he was a party.

Basically, Mrs Bazzacco argued that the cheques for 20 December 1990 and 3 January 1991 did not arrive and that, accordingly, she and her husband were entitled to replacement cheques. By contrast, the DSS case was that the cheques had been received and presented to Mrs Bazzacco's bank and therefore, value was received for them by her and her husband.

Mrs Bazzacco stated that it was her usual practice to take the cheques issued to herself and to her husband to the bank, sign them both (she signed her husband's as well) and then cash them and use the cash for their living expenses. This time, she claimed, the cheques did not arrive. In effect, while she did not dispute the fact that the cheques had been issued, her case was that, as they were not received or cashed by her, she had not received value for them. However, the DSS argued that she had received them and signed them and that all the cheques had been cashed at her branch. Therefore, it was argued, the DSS was under no obligation to make any further payment.

Was there a reviewable decision?

The AAT noted that the Ministry of Finance had delegated the authority to DSS officers to re-issue cheques which were issued but subsequently lost, misplaced or stolen. The AAT was also satisfied that 'officers' of the Department, within the meaning of s.1245 of the *Social Security Act* 1991, had authority to re-issue cheques (as well as authority to refuse to do so). Therefore, the AAT concluded that the refusal to re-issue a cheque constitutes a reviewable 'decision'.

The AAT then considered the merits of the application and relied on a report tendered by the DSS from two forensic experts with experience in handwriting analysis, who concluded that the signatures on the cheques were consistent with Mrs Bazzacco's signature (which is very different from Mr Bazzacco's signature).

The AAT found that all 4 cheques were presented to the Bazzaccos' bank account, signed and cashed and found, after examination of other signatures of Mrs Bazzacco, that the cheques had been signed by her. The AAT also held that, in view of the practice of Mrs Bazzacco signing and negotiating cheques on behalf of her husband, and the use of the money for day-to-day living expenses, Mr Bazzacco had received value for the cheques as well, even though the money was received by his wife.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Special benefit: residence requirement

ETHEREDGE and SECRETARY TO DSS

(No. 8237)

HEMPEL and SECRETARY TO DSS

(No. 8236)

Decided: 9 September 1992 by T.E. Barnett.

Applications by the two applicants were heard concurrently and identical reasons for decision were delivered by the AAT on the two applications.

The facts

The applicants held temporary permits with the right to work pending determination of their applications for permanent residency status. They had for a time received unemployment benefits, which were then available for eligible persons who were 'resident in Australia'. On re-entry into Australia, they re-applied for unemployment benefits on 4 February 1991.

Their applications were refused, as the *Social Security Act* 1947 had been amended so that applicants for unemployment benefit then had to satisfy the test that they were 'Australian residents'. On review the SSAT agreed with the decision to refuse unemployment benefits but also considered whether the applicants were entitled to special benefits. The applicants applied to the AAT for review of the decision of the SSAT to refuse special benefits.

The legislation

At the time of the applications, s.129(1) of the 1947 Act provided that the Secretary could in his discretion grant a special benefit to a person who was not in receipt of specified pensions or allowances, to whom unemployment benefit or sickness benefit was not payable, and who 'by reason of age, physical or mental disability or domestic circumstances, or for any other reason, . . . is unable to earn a sufficient livelihood . . .'

Although the applicants received sufficient food and support from the religious community to which they belonged, the AAT concluded that they were, by reason of their inability to obtain work, 'unable to earn a sufficient livelihood'. However there was a more fundamental obstacle to the grant of special benefit.

The *Social Security Legislation Amendment Act* 1990 (Act No. 6 of 1991) amended s.129 of the 1947 Act with effect from 1 August 1990, adding a requirement that an applicant for special benefit be an 'Australian resident'. The term 'Australian resident' was defined by s.3(1) of the *Migration Legislation Amendment Act* 1989. The only category in the definition that could possibly apply to the applicants was para. (b) 'a person who is, within the meaning of the *Migration Act* 1958, the holder of a valid permanent entry permit'.

The applicants had, some 3 months previously, obtained from the Federal Court a declaration that they were entitled to have their applications for permanent residency status determined in accordance with the provisions of the *Migration Act* 1958 as it stood immediately before 19 December 1989. This meant that, if permanent residency was granted, it could date from 12 June 1989, prior to their application for benefits. However, no decision had been made; and the AAT considered that it would not be proper to further delay its decision on the applicants' claims for special benefits.

Formal decisions

The AAT decided to affirm the decisions under review because the applicants did not possess the required residential qualification at the time of their application for special benefits.

The AAT added that, if permanent residency status were subsequently granted with retrospective effect, then the applicants' entitlements to unemployment and special benefits should be reconsidered from the date that their permanent residency status took effect. The AAT did not reserve liberty to apply or otherwise indicate any procedure for the reconsideration.

[P.O'C.]

Income test: accruing return investment

NATALE and SECRETARY TO DSS

(No. 8208)

Decided: 31 August 1992 by D.W. Muller, G.S. Urquhart and E.T. Keane.

Ugo Natale and Rosina Natale asked the AAT to review a DSS decision not to pay arrears of their invalid pension for the period 22 June 1989 to August 1990. The DSS had reduced their rate of pension for this period because of an anticipated interest payment.

The facts

On 7 April 1989 Mr Natale sold his farm for $180 000. He agreed to accept $50 000 as deposit and part payment with the balance of $130 000 to be paid on 26 May 1990 with an additional interest payment of 12% per annum secured by a mortgage in favour of Mr Natale. The DSS was advised of this sale and, on the basis of the expected interest payment, the Natales' pension was reduced.

In October 1989, Mr Natale told the DSS that he was not receiving payment under this mortgage arrangement; but it was not until 18 June 1990 that he made a written statement to the DSS that, as the purchaser had defaulted and left the State he would not be receiving any interest. The DSS advised him that as he was still entitled to the payment, his pension rate would not be recalculated. Mr Natale stressed his shortage of funds and the lengthy time that court