Administrative Appeals Tribunal decisions

Assets test: financial hardship

BOORD and SECRETARY TO DSS (No. V85/431)
Decided: 22 August 1986 by I.R. Thompson.

Eileen Boordwas a 78-year-old age pensioner. Her husband owned 1500 hectares of land which he operated as a farm in partnership with his son and Mrs Boord. Mrs Boord, who was infirm, lived in a house some distance from the farm so that she could receive regular medical treatment but her husband lived on the farm.

The total value of the property of Mr and Mrs Boord, excluding the value of the house in which Mrs Boord lived, had been assessed at $245 000. This included the value of the farming property ($175 000), a share of the partnership assets, depreciated for income tax purposes ($32 000) and bank accounts and investments ($31 000).

The DSS decided that, because of the value of Mr and Mrs Boord's property, her age pension should be reduced. She asked the AAT to review that decision.

The legislation

Section 28(2) of the *Social Security Act* provides for the rate of a person's age pension to be reduced where the value of the person's property exceeds a certain amount.

Section 6AD provides that the value of a person's property is to be disregarded if the property in question cannot be sold or realised or used as security for borrowing (or if it would be unreasonable to expect the property to be sold or realised or used as security for borrowing) and if the Secretary is satisfied that the person would suffer severe financial hardship if the property were taken into account for the purpose of the assets test.

Reasonable to sell?

The AAT said that, because the farming property in question was used by Mr Boord as the source of his livelihood, he could not reasonably be expected to sell it. Nor, the AAT said, could Mr and Mrs Boord reasonably be expected to sell their share of the farming plant and stock, which were required for the family business, which provided Mr Boord's livelihood.

There was some doubt, the AAT said, whether the property might be used as security for borrowing; but it was unnecessary to decide this question because Mrs Boord did not meet the other requirements of s.6AD.

Severe financial hardship?

The AAT noted that Mr and Mrs Boord had between them bank accounts and investments of which $23 000 would be available to them during 1986.

Mr Boord had told the AAT that, although the farm did not show a profit for taxation purposes, it was well established and there was no immediate need to replace any of the farm plant. He did not anticipate any call on his or his wife's financial reserves. The AAT referred to what it had said in *Doyle* (noted in this issue of the *Reporter*) and, in particular, to the intention of Parliament when it introduced the assets test that persons with money readily available should support themselves. The AAT concluded:

> '21. On the facts which I have found to exist in the present case it is impossible to be satisfied that the applicant would suffer severe financial hardship to such a degree that it could be called severe while she and her husband have available to them in the bank and on loans due to mature at the end of this year an amount of money totalling over $23 000.'

Valuation

The AAT noted that, in calculating the value of Mrs Boord's property, the DSS had taken the value of her share of the partnership assets as depreciated for income tax purposes. The AAT said that for the purposes of the *Social Security Act*, 'the real value must be taken into account, not the written down value for taxation purposes': Reasons, para.26.

The AAT said that, in the present case, it had no doubt that the real value of the farm plant and equipment was not less than its written down value for taxation purposes. Accordingly, the total value of Mrs Boord's property was no less than the value attributed to it by the DSS.

Formal decision

The AAT affirmed the decision under review.

DOYLE and SECRETARY TO DSS (No. V85/433)
Decided: 22 August 1986 by I.R. Thompson.

Mr and Mrs Doyle had been granted age pensions in 1977. When the assets test for pensions was introduced on 28 March 1985 the DSS cancelled their pensions because of the value of their property which included a farm. The DSS later varied that decision, following a revaluation of the farm, to a decision which reduced the amount of their age pensions. Mr and Mrs Doyle asked the AAT to review that decision.

The legislation

Section 28(2) of the *Social Security Act* provides that the rate of a person's age pension is to be reduced where the value of that person's property exceeds a specified amount.

Section 6AD provides that the value of a person's property is to be disregarded if the property cannot be sold, realised or used as security for borrowing (or could not reasonably be expected to be sold, realised or used as security for borrowing) and -

> 'The Secretary is satisfied that the person would suffer severe financial hardship if this section did not apply in relation to the person . . .'

The DSS conceded that because Mr and Mrs Doyle's son was living on the farm, it was not reasonable to expect them to sell it; and, because the farm was producing a very small income, they could not reasonably be expected to use it as security for borrowing.

'Severe financial hardship'?

The critical question was whether Mr and Mrs Doyle would suffer severe financial hardship if the value of the farming property ($116 000) were taken into account.

Mr and Mrs Doyle had $894 in a bank account, $2350 on investment which was available on short notice and just over $22 000 on investment which would become available over a period of one to three years. Their current income from their reduced age pensions and their investments totalled $132.30 a week, well below the standard rate of age pension payable to a married couple.

The DSS had developed guidelines for assessing the question of 'severe financial hardship' under s.6AD. These guidelines indicated that a married couple could be accepted as suffering 'severe financial hardship' if they had readily available money totalling no more than $10 000.

The AAT said that it had been the intention of Parliament, when it introduced the assets test,

> 'that persons who had money readily available with which they might support themselves should use some of it for that purpose and should not receive benefits under the Act until the amount of the money readily available had been reduced to the point at which it would cause severe financial hardship to require them to use any more of it for that purpose. That point can, I consider, be regarded as having been reached when any further depletion of the amount of readily available money would reduce it to less than a reasonably prudent person would keep in reserve to meet emergencies of the sorts which in his particular circumstances he might reasonably be expected to guard against by

keeping a reserve of readily available money.'

(Reasons, para.8)

The DSS guidelines, the AAT said, had been drawn up on that basis. The AAT continued:

'As with all such guidelines, they must be applied with flexibility. That has been done by the Department; on occasions, where unusual circumstances have existed in which a reasonably prudent person would have kept a reserve of more than $10 000, the Department has accepted that a higher figure should be applied.'

(Reasons, para.8)

In the present case, the AAT said, the amount of money readily available to Mr and Mrs Doyle was more than they required to keep as a reserve to meet any emergencies. Accordingly, it was not possible for the AAT to be satisfied that they would suffer severe financial hardship if the value of their farm were taken into account in determining the value of their assets for the purposes of the assets test. It followed that s.6AD did not apply in relation to that property.

The AAT said that the low level of Mr and Mrs Doyle's current income from their reduced age pension and investments was not relevant to the question whether the application to them of the assets test would cause them severe financial hardship:

'The applicants have readily available cash assets which they can use to supplement their income from their pensions and investments to bring them above the poverty line. That is what the legislature clearly intended should happen.

(Reasons, para. 11)

Formal decision

The AAT affirmed the decision under review.

DAVEY and SECRETARY TO DSS (No. W86/47)

Decided: 2 September 1986 by R.D. Nicholson, N. Marinovich and K.J. Taylor.

Walter Davey was an age pensioner who owned a large farming property. The DSS decided that Davey had a 'deemed income' of $6000 a year, in accordance with s.6AD(3) of the *Social Security Act* and that his age pension should be reduced accordingly. Davey asked the AAT to review that decision.

The legislation

Section 28(2) of the *Social Security Act* provides that the rate of a pension is to be reduced where the pensioner's property has a value exceeding a specified amount.

Under s.6AD(1), the total value of a pensioner's property is not to include any property which cannot be sold, realised or used as security for borrowing (or which it is unreasonable to expect to be sold, realised or used as security for borrowing), if the pensioner would suffer severe financial hardship were the property to be taken into account.

However, s.6AD(3) provides that, where any property has been excluded through the operation of s.6AD(1), the DSS may reduce the person's pension, 'having regard to the annual rate of income that could reasonably be expected to be derived from [that] property'.

Reasonable to expect payment of rent?

The property in question was a farming property of 929 hectares of which 534 hectares were arable. However, it was affected by salt encroachment and by a noxious weed. In order to contain these problems it was necessary to spend some $7000 a year.

The farm had been worked by Davey's son for the past 18 years. He had not been paid any wages in the expectation that the farm would pass to him in due course. However, his son received a share of the profits from the farm. These had amounted to some $9400 in 1985 and $2700 in 1986.

According to the DSS, Davey could lease the arable 534 hectares for $5340 less rates and taxes of $2171 - a nett lease fee of $3169 (not $6000 as the DSS had first calculated).

However, Davey and his son said that it would not be possible to lease only the arable areas and that it was unrealistic to expect any lessee to take on the obligation of dealing with the salt and noxious week. The AAT accepted that evidence and said that leasing the land would not be an economic use of the property. Nor was it reasonable to expect Davey's son to pay rent for the farm because

'the property in question now belongs, in all but registered title, to his son. The wages foregone by the son are the consideration for the deemed transfer. The son is not in the position of a tenant - he is farming what is now his property in all but registered title.'

(Reasons, p.8)

The AAT therefore concluded that s.6AD(3) did not operate so as to bring any 'deemed income' from the farm into account in the calculation of Davey's pension.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary to recalculate Davey's pension without regard to any deemed income from the farm.

Recovery of overpayment

ATKINSON and SECRETARY TO DSS (No. N86/60)

Decided: 6 August 1986 by R.A. Hayes, H.M. Pavlin and M.T. Lewis.

Stephen Atkinson had been paid unemployment benefit from 1979 to April 1984 at the married rate, having stated that he was living with his wife. In May 1983 he claimed additional benefit for a child born in 5 September 1982.

In April 1984 the DSS discovered that Atkinson's wife had been receiving unemployment benefit at the single rate from 1977 to 1983 and had been granted supporting parent's benefit in October 1983, following the birth of her first child in September 1983.

Atkinson then told the DSS that he had been separated from his wife and living with another woman who had a young child between 1977 and 1984.

Atkinson maintained that, during the whole of the period from 1979 to 1984, he had been qualified for unemployment benefit at the married rate, plus additional benefit for a dependent child, because he had been living in a *de facto* relationship.

In November 1984, the DSS decided that Atkinson had not been qualified for unemployment benefit at the married rate and calculated that he had been overpaid $3516. He asked the AAT to review that decision.

The legislation

Section 140(1) of the *Social Security Act* provides that an amount of benefit which has been paid following a false statement is a debt due to the Commonwealth.

Section 140(2) provides that where an amount of benefit has been paid which should not have been paid for any reason, the amount of the overpayment is to be deducted from any current benefit which the person is receiving.

Evidence before the Tribunal

Atkinson told the AAT that he and his wife had separated in 1976 and he had entered a *de facto* relationship which lasted until the end of 1982. Because his *de facto* wife had a young son, he had felt justified in claiming for a dependent wife and child, even though under a fictitious name.

The applicant refused to reveal the name of his former *de facto* wife, as he did not wish to destroy her privacy, although the AAT offered to prohibit publication of her name.

Atkinson's DSS file contained a report from a DSS officer, who knew Atkinson, that he and his wife had never separated.