Assets test: disposition of property

PISANO & PISANO and SECRETARY TO DSS (NO. W85/210)

Decided: 2 December 1986 by J.D. Davies, R.D. Nicholson and J.G. Billings.

Mr and Mrs Pisano had been in receipt of an invalid pension and a wife's pension respectively since December 1984. In November 1984 Mr Pisano had informed the DSS that he had transferred a house in which he was still living to a Company as trustee for the Pisano Family Trust 'as a gift'. In February 1985 he advised the DSS that he given five properties worth $165 280 and earning $354 in weekly rental to that same company. He stated that it was his intention to give the properties to his children. The beneficiaries of the trust included the applicants and their children. The directors and the shareholders of the trustee company were the applicants.

The DSS had decided to cancel the applicants' pensions on the grounds that after inclusion of an amount calculated under s.6AC of the *Social Security Act* they failed the assets test. The applicants applied to the AAT for review of that decision.

The legislation

Section 6AC(4) provides that where a married person has disposed of income on or after 1 June 1984, 50% of the amount shall be included in the income of the person and the income of their spouse.

Section 6AC(11) provides:

> For the purpose of this section, a person shall be taken to have disposed of income of the person if the person engages in a course of conduct (not being a course of conduct under which the person ceases employment or ceases to engage in a business or profession or reduces the extent to which the person is employed or the extent to which the person engages in a business or profession) that diminishes, directly or indirectly, the rate of income of the person where-
> (a) the person receives no consideration, or inadequate consideration, in money or money's worth; or
> (b) ...
> and the amount of that disposition of income shall be taken to be the amount hat, in the opinion of the Secretary, is the annual rate of that diminution reduced by such percentage of the consideration (if any) received by the person in respect of that disposition as the Secretary determines in writing to be fair and reasonable in all circumstances

'Course of conduct'

The AAT considered that the dispositions made by the applicants came within the meaning of the words 'course of conduct' in s.6AC(11). It did not come within the exclusionary words in the brackets, nor did the fact that it was made as a gift prevent it from being so regarded (see s.6AC(11)(a)). The direct result of that course of conduct was to reduce their rate of income.

Disposition of property

Attention was also drawn at the hearing to s.6AC(8). That sub-section provides that where a person disposes of property by a course of conduct that also constitutes a disposition of income then, subject to various adjustments being made, the amount of disposition of income is to be taken into account in determining the rate of pension ('disposition of property' is defined in sub-section 6AC(10) in similar terms to 'disposition of income').

The AAT concluded that the applicants satisfied this sub-section. The course of conduct led to the diminution of the value of the applicants' property. The disposition of property also constituted a disposition of income and therefore it was appropriate to take into account the income of the applicants from the properties in calculating their pensions. -

Suspension more appropriate

It was submitted by the DSS that cancellation rather than suspension of pension was the administrative step taken where a person is unlikely to qualify within a reasonable time.

The AAT observed that having regard to s.6AC(3), which allows for a 10% annual depreciation of the value of the property disposed of by a pensioner when calculating his/her assets, it was likely that the applicants would become entitled to the pension within a reasonable time. Also the applicants told the Tribunal that their hard work since emigrating to Australia did not justify cancellation and they would not reapply for the pensions. In those circumstances the AAT considered that suspension and not cancellation was the appropriate step to take.

Formal decision

The Tribunal set aside the decision under review and decided that the payment of the applicants' pensions be suspended until the application of the provisions of s.6AC permits the payment of the pensions to them.

Unemployment benefit: student

PERAZA and SECRETARY TO DSS (No. N/584)

Decided: 29 September 1986 by R.A. Hayes, G.P. Nicholls and M.T. Lewis.

Eugenio Peraza's unemployment benefit had been cancelled under s.135TJ of the *Social Security Act* on the grounds that he was not unemployed and that he had not taken reasonable steps to obtain work as required by s.107(1)(c) of the Act. He applied to the AAT for review of that decision.

The facts

Peraza had been in receipt of unemployment benefit when he commenced a course of study in electronics at a technical college. The DSS decided that he had a greater commitment to study than to obtain work and therefore failed the work test in s.107(1)(c). Benefit was stopped two days before the applicant gave up the course at the end of the first semester in August 1985. He reapplied for unemployment benefit in October 1985 and was successful.

The issue to be decided was whether the cancellation was valid and therefore whether the applicant should have been in receipt of the benefit at all relevant times.

The DSS stated that the benefit was stopped because the applicant had not kept in touch with the Department. He failed to respond to a request to contact the DSS about his benefit just before it was cancelled. In earlier communications with the DSS the applicant had indicated that he was noncommittal as to whether he would give up his course if suitable work came along.

The AAT concluded on the evidence that the applicant's primary commitment during his period of enrolment in the electronics course was to study and not to gaining work. The demands of that course would have prevented him from seeking full-time work and he was not serious in pursuing such work in that period. The course was designed to improve his job prospects in the electronics field. During the period from the end of his study until his new application for unemployment benefit the applicant was in a stressful position which prevented him from making any real attempt to seek work.

The legislation

Section 107(1)(c) provides that to qualify for unemployment benefit the person must be unemployed, capable of undertaking and willing to undertake paid work suitable to be undertaken by that person and must take reasonable steps to obtain such work.

Section 135TJ(1) allows the Secretary

to cancel a benefit where a person has failed to comply with a provision of the Act.

Full-time study

The Tribunal referred to the decision in *Long (1986)* 29 *SSR* 360 which summarised the factors to be considered when assessing the eligibility of an applicant engaged in study. Those factors include the applicant's intentions at the relevant time, the nature of the course, the amount of time required in attending the course, the applicant's commitment to the course and the applicant's willingness to obtain work. Applying those factors to this case the AAT concluded that the applicant was not eligible for unemployment benefit when engaged in the course of study.

As for the period between the end of his period of study and the new application for benefit, the AAT concluded the matter on the basis of the applicant's own statement that he did not actually begin to look for work until the 1985-1986 summer holidays. This would have been at the time of the new application. The Tribunal therefore found that he was not eligible for unemployment benefit until the date of his new claim.

Formal decision

The Tribunal affirmed the decision under review.

Recovery of overpayment

SADDINGTON and SECRETARY to DSS
(No. V86/91)

Decided: 27 August 1986 by J.R. Dwyer, G. Brewer and L.S. Rodopoulos.

Cynthia Saddington asked the AAT to review a decision by the DSS to recover an overpayment of $3000 in widow's pension. (The actual overpayment calculated was $6100.70 but the DSS had decided to waive recovery, under s.146 of the *Social Security Act*, of all but $3000). The DSS alleged that the overpayment was in consequence of the applicant's failure to advise the DSS of maintenance payments she received as well as income she derived from part-time employment over a period of several years.

Recovery was apparently under s.140(2) as the DSS had decided to recover the amount by withholding $5 per week from the applicant's pension. However, by the date of the hearing the applicant was earning an income which precluded her from receiving the pension. Thus at that date recovery was sought under s.140(1) which provides that the overpayment is a debt due to the Commonwealth.

Cause of overpayment

It was contended for the applicant that Departmental error contributed to the overpayment. The DSS had not acted on a copy of a custody and maintenance order obtained by the Department in 1980 to ascertain whether she was still in receipt of maintenance. The DSS also did not act on a letter written by the applicant in August 1981 which advised that she was accepting more part-time work. No attempt was made at that stage to ascertain her earnings.

However, the Tribunal found that administrative error played only a small part in the overpayment. The majority of the overpayment arose because of the failure of the applicant to advise the DSS of her increase in income. She was frequently advised by the DSS of this statutory obligation.

The discretion

The AAT considered that the decision to waive recovery of over $3000 was generous in the circumstances. The DSS had substantially overlooked the applicant's breaches of the Act over periods when they had been the major or contributory cause of the overpayment.

The applicant submitted that she would suffer hardship if the $3000 that had not been waived was recovered. The AAT did not agree. There were no compassionate circumstances in this case which would suggest hardship if the applicant was required to repay the overpayment at the rate of $5 or $10 per week (see Ward (1985) 24 *SSR* 289). She was now working as a Secretary earning $350 per week and had no unusual major expenses. The AAT compared her to those who relied solely on social security benefits, noting that the maximum weekly rate of widow's pension for an adult with one dependent child was in the vicinity of $130.

The Tribunal referred to Reynolds (1986) 32 *SSR* 404 where in relation to the test of 'severe financial hardship' in relation to the operation of the assets test the AAT observed that that form of hardship was 'more likely to be demonstrated by a person whose income is materially less than the current maximum pension'. The Tribunal noted:

> Although it is not necessary for the exercise of the discretion to waive an overpayment [under s.146] that 'severe financial hardship' be emonstrated, we do suggest that it is unlikely that a finding of hardship relevant to the administration of the Act will bw made where a person's income is substantially more than the current maximum pension unless there are unusual features to the case.

(Reasons, para. 35)

The AAT considered that the factors that arose from the decision of the Federal Court in *Hales* (1983) 13 *SSR* 136 which should be considered were:

> (1) the fact that the applicant has received public moneys to which she was not entitled;
> (2) the way in which the overpayment arose whether as a result of innocent mistake or fraud;
> (3) the financial circumstances of the prospective defendant;
> (4) the prospect of recovery;
> (5) whether a compromise is offered;
> (6) whether recovery should be delayed if there is a prospect that the proposed defendant's circumstances may improve or that the person may again become a beneficiary so that section 140(2) would be come applicable;
> (7) compassionate considerations and the fact that the Act is social welfare legislation and the Secretary should have regard, inter alia, to any financial hardship which may result from an action for recovery.

(Reasons, para.37)

The AAT, having considered these factors, concluded that the amount not waived should be recovered.

Discount for period pension not paid?

The AAT was told that the applicant had requested that her pension be cancelled in July 1985. She reapplied for, and was granted, the pension in October 1985. There was no evidence as to her earnings during that period. The AAT considered whether some allowance should be made for this period.

However, after considering the generous exercise of the discretion to waive recovery of a substantial part of the overpayment, the AAT decided that there should be no further reduction of the amount to be recovered.

Formal decision

The AAT affirmed the decision to raise the overpayment of $6110.70, to waive recovery of $3110.70, to recover the balance of $3000 and recommended that so long as regular instalments are made, recovery at the rate of $5 per week be accepted.

THICK and SECRETARY TO DSS
(No. W85/209)

Decided: 19 August 1986 by R.D. Nicholson, J.G. Billings and N. Marinovich.

Mr Thick applied to the AAT to review a decision to recover $2,957.34 overpayment in unemployment benefit. The applicant had understated the income of his wife on his continuation of benefit form over an eight month period. The actual overpayment was not contested by the applicant but he argued that the