Administrative Appeals Tribunal decisions

Escaped prisoner: ineligible for benefits

Re DAVIS and SECRETARY TO DSS

(No. 7862)

Decided: 31 March 1991 by P.W. Johnston, K.J. Taylor and S.D. Hotop.

Ashley Davis claimed and received unemployment benefits at various times between July 1984 and January 1986. He made the claims under a false name and did not disclose that he was then 'on the run', having escaped from prison in January 1984.

In early 1986, Davis was recaptured and returned to prison. He was charged with 47 counts of imposing on the Commonwealth under s.29B of the *Crimes Act* 1914, to which he pleaded guilty. The DSS then decided that the payments of benefit made to Davis were recoverable as a debt due to the Commonwealth under the former s.140(1) of the *Social Security Act* 1947, later renumbered as s.246(1).

In 1987 (before it had decision-making powers), the SSAT recommended that this decision be set aside. The DSS did not accept that recommendation and decided to recover the debt at $20 a fortnight. On appeal, the SSAT decided that the rate of recovery should be $10 a fortnight.

Davis applied to the AAT for review of the DSS decision that he had owed a debt to the Commonwealth and of the SSAT decision that the debt should be recovered at $10 a fortnight.

At the time the appeal came on for hearing, Davis was serving a sentence of imprisonment.

The legislation

Section 140(1) of the 1947 Act provided that, where a benefit was paid to a person in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of the Act, and the benefit would not have been paid but for the false statement, representation, failure or omission, then the amount paid is a debt due to the Commonwealth.

At the time of the payments to Davis, s.107(1) prescribed the qualifications for unemployment benefit. These included that the person be 'unemployed and . . . capable of undertaking . . . paid work': s.107(1)(c)(i).

Until August 1984, s.133 and, from August 1984, s.135THA provided that benefit was not payable to a person during any period while the person 'is imprisoned' following conviction for an offence.

Convictions not conclusive

The AAT followed the approach taken in *Mariot* (1992) 66 *SSR* 937 and held that Davis's convictions did not prove conclusively that he had received payments of benefit to which he was not entitled in consequence of false statements so as to give rise to a debt due to the Commonwealth. The tribunal had to determine this question on the evidence available to it.

Not eligible for benefits

The AAT decided that a person was to be treated as imprisoned when the person was *'de jure*, or constructively, imprisoned in the sense that he or she, although in fact at liberty, is not lawfully at liberty', as well as during any period when the person was *de facto* imprisoned: Reasons, para. 35.

This approach, the AAT said, achieved the purpose of s.133 and s.135THA. The disqualification should be understood against a background that a person lawfully complying with a sentence of imprisonment is not in need of, and therefore should not be given, social welfare support: Reasons, para. 30.

Moreover, the AAT said, it strained the concept of unemployment to describe a person on the run from lawful authority and without paid work as 'unemployed': Reasons, para. 38. And the fact that such a person was likely to be returned to prison at any stage restricted the person's legal capacity to undertake paid work.

It followed that Davis was not eligible for benefits during the period that he was an escaped prisoner, both because he was covered by ss.133 and 135THA and because he could not meet s.107(1)(c)(i).

Failure to comply with Act

The AAT said that the provision of a false name by Davis had been a false statement on his part.

The AAT also decided that Davis's failure to reveal his status as an escaped prisoner when claiming benefits had been an omission on his part to provide information relevant to his eligibility.

The claim forms completed by Davis had contained a general question, 'Is there anything you must tell us?' Although this question did not 'operate at large', Davis's failure to tell the DSS that he was an escaped prisoner was a failure to answer this question:

> '. . . it seems a fair interpretation of the question that any factor that could possibly be relevant to the determination should have been disclosed. To that extent the class of verifying statements is closed.'

(Reasons, para. 24)

The AAT was satisfied that, if the DSS had known of Davis's status at the time of the payment of benefits, the DSS would not have made those payments. Accordingly, the benefits would not have been paid 'but for' his false statements and omissions; and the payments were made in consequence of those false statements and omissions.

Recovery of overpayment

Davis was currently serving a sentence of imprisonment. The AAT acknowledged that immediate recovery of the debt (some $6539) was not practicable, and that Davis would face difficulty in repaying the amount when he was released, because personality and psychological problems would reduce his employment prospects.

The AAT said that s.1237 of the *Social Security Act 1991* controlled the question of recovery of the overpayment from Davis, as decided in *VXR* (1992) 65 *SSR* 914.

Applying the Ministerial Direction issued under s.1237(3), the AAT could not find sufficient 'unusual, uncommon or exceptional' circumstances within para. (g) of the Direction to support waiver of the debt.

However, because a realistic assessment of Davis's capacity to repay the debt would have to wait until his release from prison, the AAT decided to direct the DSS to defer a decision on recovery or waiver of the debt until 3 months after Davis's release.

Formal decision

The AAT affirmed the SSAT's that Davis was indebted to the Commonwealth in the sum of $6538.53; and

directed the DSS to defer its decision on recovery or waiver of the debt from Davis until 3 months after Davis's release.

[P.H.]

Assets test: valuation

PETERS and SECRETARY TO DSS

(No. 7797)

Decided: 4 March 1992 by J.A. Kiosoglou.

Roy Peters appealed against a decision of the SSAT affirming a DSS decision to pay him a reduced rate of age pension because of the value of his assets. The only matter in dispute concerned the value attributed to Peters' land, as he accepted the valuation of livestock, plant and equipment etc.

The land in question was 457 acres in the Freeling area, north of Gawler in South Australia. It was described by Peters and conceded by the DSS to be the worst piece of land in the district. It had a very high level of sodium and was used only for grazing sheep rather than growing crops.

The property had been valued by several organisations and individuals. Peters thought the correct value was $145 000; it had been valued at $162 000 by an independent valuer and at $216 000, later reduced to $200 000, by the Australian Valuation Office (AVO). The DSS accepted this last figure and had agreed to pay Peters' arrears of pension.

For the purposes of s.4 of the *Social Security Act* 1947, the AAT accepted that the correct value was the market value. The AAT preferred the valuation of the AVO, as the valuer had arrived at his valuation by taking into account the value of neighbouring land sold in recent times.

The AAT accepted the evidence of the AVO valuer that he had reduced the value of Peters' land below that of neighbouring holdings because of the poorer quality of the land. The AAT did not accept the independent valuer's report as it was lower than that of the District Council which, in the AAT's view, was usually accepted as being on the low side.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

HUGHES and SECRETARY TO DSS

(No. W91/82)

Decided: 17 February 1992 by T.E. Barnett, J.G. Billings and R.D. Fayle.

This application concerned the review of a DSS decision to value a debt owed to the applicant from a family trust at $73 267.

The facts

On 31 March 1983, Hughes and his wife were made joint trustees for the Hughes Family Trust (HFT). The beneficiaries were Hughes, his wife and their children.

On 31 May 1983, Hughes transferred to the HFT the beneficial ownership in 51 944 units in a trust known as the Fertal Unit Trust (FUT), the trustee being Fertal Holdings Pty Ltd. Each of these units had a face value of $1 and Hughes had subscribed to these units sometime in 1979.

The transfer of the units to the HFT was for a consideration of $51 944, which was not paid by the HFT trustees and remained a debt owing by the trustees to Hughes at all material times.

The FUT carried on the business of manufacturing in the fertilizer industry and, after some initial successes, the business declined drastically after 1989 to the point that, by May 1990, the FUT was insolvent.

The AAT found as a fact that the HFT's beneficial interest in these shares was essentially valueless given the state of the FUT, there being no prospective purchasers for the units in FUT.

Before dealing with the substantive issues of the proper method of valuing the debt as part of Hughes' assets, the AAT noted that the DSS had miscalculated the debt insofar as it had double-counted a component of the debt. There was no contest on this point and an initial deduction of some $26 000 was allowed.

The legislation

At the time the decision under review was taken, the *Social Security Act* 1947 was still in force and the relevant provision for the purposes of this case was s.4(11), which provided:

> 'Where a person lends an amount after the commencement of this subsection, the value of the property of the person for the purposes of this Act shall include so much of that amount as remains unpaid but shall not include any amount payable by way of interest under the loan.'

Section 4(11) commenced on 27 October 1986.

The issues

The first issue for the AAT was the proper method of valuing the debt owed to Hughes from the HFT, given that the only assets of the HFT were the units held in FUT which were essentially valueless.

A further issue for the Tribunal was the effect of s.4(11) on the valuation of assets for pension periods falling after 27 October 1986 and whether a commercial approach should be adopted which took account of the lack of capacity of the FUT to repay the debt (*Lenthall* (1988) 41 *SSR* 524 and *King and Repatriation Commission* (1991) 62 *SSR* 861) or whether the effect of s.4(11) was that the debt must be valued at its full face value irrespective of the capacity of the HFT to repay the debt.

The AAT's decision

The Tribunal dealt with the decision in two parts.

First in relation to the valuation of the debts for pension periods before 27 October 1986, the AAT accepted that a commercial valuation was the appropriate method and that such a commercial valuation must have regard to the capacity of the HFT to repay the debt (*Lenthall* and *King*, above).

In relation to the pension periods falling after 27 October 1986, the AAT held that the effect of s.4(11) (which is now reproduced in s.1122 of the 1991 Act) was that the debt must be valued at its full face value without account being taken of the capacity of the HFT to repay. Accordingly, the debt represented an asset in Hughes' hands of the full face value of the loan, after allowance for the miscalculation referred to above.

The AAT noted the unfairness of this approach and said as follows:

> 'The Tribunal is in no doubt that the respondent should succeed in its contention in relation to the valuation of loans made to the Family Trust since the commencement of the sub-section to the extent that those amounts remain unpaid. In passing, the tribunal also noted the