Administrative Appeals Tribunal decisions

Unemployment benefit: income from rent

SECRETARY TO DSS and JENSEN

(No. 8371)

Decided: 13 November 1992 by J.A. Kiosoglous.

The Secretary to DSS asked the AAT to review a decision of the SSAT which had set aside a departmental decision as to the assessment of rental income (and a related overpayment) in calculating Jensen's entitlement to unemployment benefit.

Jensen had been in receipt of unemployment benefit from 10 March 1987 and did not notify the DSS that he was receiving rent from a property in Blayney. On 27 February 1990, the Family Court ordered him to pay to his wife 5/8 of the proceeds of the sale of the house; but, until the house was sold, the order required him to pay his wife one half of any rent received. After the DSS was notified, an overpayment was raised.

The issue

The issue for the AAT was whether the DSS had been correct in calculating the overpayment as two-thirds of the total rent received during the period 10 March 1987 to 26 February 1990, or whether the amount should have been two thirds of half the rent received.

In answering this question, the AAT considered s.3(1) of the *Social Security Act* 1947, which defined income very broadly as 'personal earnings, moneys, valuable consideration or profits, . . . earned, derived or received by that person for the person's own use or benefit by any means from any source whatsoever . . . '. There followed a long list of exemptions but the AAT noted that none of those listed applied to this situation.

The AAT further noted that the 'two-thirds' was a reference to a Departmental policy allowing one third of the rent received to be deducted in the case of rental income, for expenses incurred (e.g. rates, insurance etc). The AAT agreed that this policy was appropriate and neither party disagreed with that approach.

Jensen stated that he had offered his wife half the rent but she had refused in the hope that this would bolster her case when the property settlement occurred. Jensen argued that, if she had accepted payment of half the rent when he offered it, there would have been no need for the property proceedings.

The SSAT's reasoning

The SSAT had decided that, although Jensen had used the disputed part of the rent for his own purposes (and therefore, the amount was received 'for his own use or benefit' within s.3), this was not the purpose for which he received the money. The money was received by him with a legal obligation to account for it to the house's co-owner: his ex-wife. That obligation, according to the SSAT, had been eventually discharged when the Family Court took it into account in awarding the wife the larger share of the property.

On this basis, the SSAT had concluded that half the rent received by Jensen did not fall within the definition of 'income'. Moreover, the SSAT had concluded that the disputed half of the rent would be treated as Jensen's ex-wife's income, on which basis it could not simultaneously be treated as his income.

The AAT's decision

The AAT found, relying on the definition of income in s.3(1) of the 1947 Act as moneys etc 'earned, derived or received . . . for the person's own use or benefit', that Jensen had a legal entitlement to only half of the rental income, with entitlement to the other half in his wife. They jointly owned the property for which rent was being received and therefore only half of the income was for Jensen's 'own use or benefit'. He received the other half with the legal obligation to account for it to the co-owner of the house.

While noting that the decision relied on by the SSAT, *Gregory* (1988) 45 *SSR* 585, was not directly on point, the AAT cited with approval the AAT's comment in *Gregory* that a payment for another person's use or benefit (such as money given to a pensioner in trust for someone else) could not constitute income of that person under s.3(1).

Finally, the AAT commented on the DSS reliance on the decision of the Family Court (the Department's case had been based on its reading of the judgment of the Court) and noted that 'Family Court decisions can not alter the statutory rights . . . conferred by the Act'.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Newstart allowance: 'unemployed'?

SECRETARY TO DSS and REGAN

(No. 8377)

Decided: 16 November 1991 by P.W. Johnston, R.D. Fayle and S.D. Hotop.

The DSS appealed against an SSAT decision which set aside a Departmental decision to cancel Newstart allowance and raise an overpayment of $3559.24, covering the period 19 August 1991 to 5 February 1992.

During the relevant period Regan had been in receipt of job search allowance or Newstart allowance. The Department argued that, between August 1991 and February 1992, Regan was not unemployed as required by ss.513(1) and 593(1) of the *Social Security Act* 1991, nor did he satisfy the activity test. (See ss.522(1) and 601(1): these generally provide that a person must be actively seeking and willing to undertake suitable paid employment.)

In the third week of August 1991, Regan had entered into a franchise agreement in a business called 'Dial-A-Mower'. The business involved the hire and delivery of lawn mowers and other gardening equipment to customers for use by them for a period of up to 2 hours.

Under the terms of the franchise agreement, Regan agreed to keep the equipment in good working condition and to have enough labour and equipment to be able to deliver the required equipment within 2 hours of a request being received.