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.

Regan was also able to sub-franchise part of the business to someone else, and he agreed to make a series of progressive payments to the proprietors amounting to approximately $25 000 over the 5 years of the agreement.

Regan told the Tribunal that he was originally able to keep up with demand but, as the weather improved, he had organised for a friend to be responsible for the delivery and collection of the equipment, while he carried out the maintenance and repairs. This latter activity took no more than 2 days a week and he was available for full-time work on the other days, stating that he had no problems with working a 7-day week. According to the profit and loss statement for the period September 1991 to January 1992, the profit was $916.02.

During the relevant period, Regan had other interests which he hoped would generate income in the future, including a hobby farm where he had planted native flowers, and the making of limestone products for use in landscape gardening. He also had an interest in a limestone block-cutting machine. In a statement made to the Department in February 1992 he said that these projects took up 'the majority of [his] time' and that he was prepared to forego any of the projects, except 'Dial-A-Mower', to take up full time employment.

Regan had always described himself as 'self-employed' on his job search forms, but not on his Newstart allowance forms. He had submitted profit and loss forms for the mower business to the DSS in September and October 1991.

'Unemployed'

The AAT noted that the term 'unemployed' is not defined in the 1991 Act and then reviewed a series of Federal Court and AAT decisions which have considered the meaning of the term under the 1947 Act (where it was similarly undefined).

For example, in *McKenna* (1981) 3 ALD 219; 2 *SSR* 13, the Tribunal decided that unemployed meant 'not being engaged in work of a remunerative nature'. This definition needed some modification, the AAT said in the present matter, in the light of the fact that beneficiaries were allowed to earn some income, and the situation where, although someone was not earning income, they were committed to some other activities, e.g. study or domestic work which 'demonstrates a preference for that activity rather than employment'.

The AAT also referred to a series of cases dealing with self-employed people which 'established that lack of profit or remuneration earned by a person from an enterprise or work is not determinative of the question whether that person is "unemployed"' and that 'to be under-employed is not the equivalent to being unemployed': Reasons, para. 17.

The AAT concluded that, given Regan's description of himself as a self-employed sub-contractor, the amount of money required to be paid under the franchise agreement, and the obligations he undertook under that agreement, he could not be considered to be 'unemployed' during the period under review.

The fact that Regan had organised someone else to do some of the work, thereby making himself available for work on 5 days, did not mean that he was 'unemployed' for the purposes of the *Social Security Act*. The AAT also noted the extent of Regan's obligations under the franchise agreement which, whilst they could be delegated, he retained ultimate responsibility which made them doubt whether he was available to do other work.

Given this conclusion, the AAT said that it did not need to decide whether Regan fulfilled the activity test, but given the extent of his other activities, the Tribunal doubted that this was the case.

An overpayment?

The AAT then considered whether there had been an overpayment under s.1223.

Section 1223(1)(b) provides that, where an amount has been paid to a person and the recipient was not qualified and the amount was not payable, then the amount so paid is a debt due to the Commonwealth.

The AAT said:

> 'On a literal interpretation of s.1223(1), however, it appears that the amount paid to the recipient by way of job search allowance and Newstart allowance during the period under review is a debt due to the Commonwealth and is recoverable by the Commonwealth because, as the Tribunal has already decided in this case, the respondent was not qualified for job search allowance or Newstart allowance and the relevant amount was not payable to him . . .'

(Reasons, para. 26)

Although the DSS had, when the decision was reviewed by an ARO, relied on s.1224 of the Act, it emphasised s.1223 in the AAT proceedings.

The Tribunal said it was unnecessary to decide the question but expressed its opinion that an overpayment had not arisen under s.1224(1) of the Act. This section provides that, where an amount has be paid because the recipient made a false statement or representation or failed to comply with a provision of the Act, there is a debt due to the Commonwealth. Although Regan made no specific reference to 'Dial-A-Mower' on his fortnightly review forms, he had provided the DSS with a profit and loss statement which was enough to make the DSS aware of the general nature of the respondent's business, or to allow them to seek further information if required.

Although the issue of waiver had not been addressed in argument, the AAT decided that there were no 'extremely unusual, uncommon or exceptional circumstances' in this case which, according to the 5 May 1992 determination of the Minister, were necessary before a debt could be waived.

Formal decision

The Tribunal set aside the decision under review and substituted for it a decision that Regan was not qualified for job search allowance or Newstart allowance during the period from 19 August 1991 to 5 February 1992 and that the amount of $3559.24 paid to Regan during that period was a debt due to the Commonwealth and recoverable by it.

[J.M.]

Job search allowance: engaged in course on full-time basis

SECRETARY TO DSS and CHEARY

(No. 8490)

Decided: 23 January 1993 by I.R. Thompson.

The DSS appealed against an SSAT decision that job search allowance (JSA) was payable to Andrew Cheary. The issue in dispute was whether Cheary was precluded by s.531(1). This