Administrative Appeals Tribunal decisions

Age pension: deprivation of assets

SECRETARY TO DSS and EDWARDS (No. 8768)

Decided: 11 June 1993 by D.W. Muller.

Cecil Edwards applied for the age pension on 25 June 1992 when he was 75 years of age. On 3 August 1992 he was advised that he was granted the pension at a reduced rate because the DSS considered that he had deprived himself of the sum of $81,000 by disposing of that amount, without any or adequate consideration, to his son Phillip Edwards.

After deducting the allowable 'disposal limit' of $10,000 the amount of $71,000 of this sum was treated as part of Cecil Edward's assets and his income was calculated having regard to a deemed rate of interest on that amount. The SSAT set aside the decision and the Secretary appealed to the AAT.

Circumstances of the payment

The $81,000 was paid from the proceeds of Cecil Edwards' sugar cane farm in the Mackay area of Queensland, which he sold for $235,000 in March 1992. Phillip Edwards had worked on the farm for 35 years, as a farm labourer and from 1977 as the farm manager. During those years he was paid award wages but worked long hours for no additional pay, pursuant to an arrangement with his father that he would work for reduced wages in return for an eventual share in the ownership of the farm.

Ownership of the farm was not transferred to Phillip prior to the sale because there was a prospect that Phillip would be subject to a claim by way of matrimonial proceedings, and because a deterioration in his health made it unlikely that he would be able to continue to work as a cane farmer.

The payment to Phillip of $81,000 was based upon a calculation by an accountant of the amount reasonably required to compensate Phillip for the unpaid work done by him over the years. The settlement was embodied in a deed executed by Cecil and Phillip dated 1 June 1992, in which Phillip agreed to accept the sum in consideration for unrecompensed work on the farm.

Legislation

The issue was whether the payment of $81,000 in June 1992 constituted a disposal of an asset within s.1123 of the *Social Security Act* 1991. A person is taken to dispose of assets if the person directly or indirectly diminishes the value of the person's property for no consideration, inadequate consideration or for the dominant purpose of obtaining a social security advantage.

It was not suggested by the DSS that Cecil Edwards gave the $81,000 to his son for the purpose of obtaining a social security advantage, but only that he received no consideration or no adequate consideration for the payment.

Other farming family cases distinguished

The AAT considered three cases involving transactions within farming families, namely *McClelland and Secretary to DSS* (1988) 44 *SSR* 567, *Wachtel and Repatriation Commission* (1986) 11 ALN N213 and *Follone and Secretary to DSS* (1987) 11 ALD 477. In each of these cases the transactions were held to involve the disposal of assets for no consideration or no adequate consideration. The AAT found that the present case was distinguishable from each of them. *McClelland* involved a partnership rather than an employer-employee relationship. In *Wachtel* an initial employment relationship was superseded by a partnership, with the eventual property transfer being by way of unconditional gift. *Follone* was of little assistance as it was determined on questions of sufficiency of evidence and credibility.

The AAT concluded:

> 'The one factor which sets Mr Edward's case apart from those quoted above is that at all times during Phillip's time on the farm he was an employee of his father. He was never a partner. Both Cecil and Phillip knew that Phillip was receiving far less than award wages and that the balance would be redressed at some point in time. Cecil paid the $81,000 to Phillip for various reasons including the following:
>
> (a) he owed at least that amount to Phillip (and much more in my view) for wages underpaid over the years;
>
> (b) he did not entirely trust his daughter-in-law and he wanted to extract from Phillip a legally binding promise that Phillip would not in the future attempt to sue him for a large amount in relation to back wages; and
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> (c) he wanted to be satisfied that Phillip would not challenge his will on his death.
>
> To these ends he had the deed prepared . . . In my view Cecil Edwards has received consideration which is by no means inadequate in return for the payment of the $81,000.'

Formal decision

The AAT affirmed the decision under review.

[P. O'C.]

[Editor's note: The AAT did not indicate precisely what was the consideration for the payment: the provision of inadequately paid labour by Phillip, or the surrender by Phillip of any rights that he might have had to sue his father or his father's estate for further recompense for the services. In either case, it was necessary to consider whether Phillip had any legally enforceable rights against his father arising from his work on the farm.

In *Frendo v Secretary to DSS* (1987) 41 *SSR* 527 Woodward J held that the word 'consideration', as used in the assets test provisions of the 1947 Act, bore its technical legal meaning of a forbearance or promise sufficient to establish the existence of a binding contract. A mere expectation or understanding within a family will not suffice if there is no intention to create a legally enforceable agreement. In *Edwards* a deed was executed, indicating that legal relations were intended, but this occurred some months after the farm was sold and Phillip had ceased to provide services to his father.

As Woodward J said in *Frendo*, the consideration received by the pensioner must consist of an immediate benefit or an enforceable future right. A past benefit is not good consideration because it does not form part of an agreement comprising an exchange of promises. Thus in *Tokolyi and Secretary to DSS* (1992) 66 *SSR* 930 a transfer of property in recompense for past services was held to be a disposition for inadequate consideration.

These principles were not discussed in *Edwards*. The DSS has not appealed the decision.]

Assets test: valuation of shares in private company

BROWN and SECRETARY TO DSS (No. 8886)

Decided: 14 August 1993 by B.M. Forrest, B.W. Davis and B.H. Pascoe.

The AAT affirmed a decision of the SSAT which had in turn affirmed a decision of a delegate of the Secretary to reject Brown's claim for job search allowance (JSA).

The claim was rejected on the ground that the value of Brown's assets exceeded the then applicable limit of $157,500 for payment of JSA. The sole issue in the application was the valuation of shares held by Brown in W Coogan & Co Pty Ltd, a small retail home furnishing company in which all shares were held by