Administrative Appeals Tribunal decisions

Jurisdiction of AAT: reviewable decision

KUMURKAN and SECRETARY TO DSS
(No. 9651)
Decided: 5 August 1994 by M.T.E. Shotter.

Kumurkan asked the AAT to review a decision of the SSAT that it had no jurisdiction because the DSS had not made a decision.

The facts

Kumurkan came to Australia in 1972 and left in 1978 following her husband's death. She had lived in Turkey with her 2 children ever since. She was initially granted widow's pension, and was later transferred to sole parent pension.

In a letter dated 9 July 1990, Kumurkan was advised that her pension would be cancelled when her youngest child turned 16 in 1993. Kumurkan questioned this advice in a telephone call to the DSS in 1992, and then in a letter to the SSAT. She explained that the DSS had told her that she would receive the pension for the rest of her life, and she had no other source of income.

In reply, the DSS wrote to Kumurkan and advised that her pension would be cancelled when her youngest child turned 16, because having a dependant child (a child under the age of 16) was a basic qualification for the sole parent pension. In a further letter the DSS advised that the decision to cancel her pension had not yet been made.

Jurisdiction

In its submission to the SSAT, the DSS stated that Kumurkan had appealed against the 'intent to cancel': Reasons, para. 4. The AAT observed that right to appeal a DSS decision was found in ss.1240 and 1243 (authorised review officer), s.1247 (SSAT) and s.1283 (AAT) of the *Social Security Act 1991*. The AAT's power arises if a decision has been reviewed by the SSAT and either affirmed, varied or set aside. In this case:

> 'the SSAT has not either affirmed, varied or set aside a decision because it decided that it had no jurisdiction in this matter as it considered that no decision had been made by an officer of the Department.'

(Reasons, para. 8).

The AAT considered it had no alternative but to decide it also had no jurisdiction.

Was there a decision?

The AAT went on to discuss whether the DSS had made a decision, even though the AAT did not consider it had the jurisdiction to decide this issue. The AAT stated that the advice in the letter of July 1990 that the pension would be cancelled, could be considered a decision. This was an unequivocal statement by the DSS, as was the the statement in the later letter of July 1992. The last letter from the DSS which said that Kumurkan's pension would be cancelled, but the decision to cancel the pension had not yet been made, was confusing according to the AAT. This confusion was passed on to the SSAT. However the DSS advice that the pension would be cancelled was correct on the law.

Formal decision

The AAT affirmed the decision under review.

[C.H]

[Editor's note: The AAT did not refer to an earlier decision of the AAT, *Anderson* (1992) 70 *SSR* 998, which had decided that a decision of the SSAT that it had no jurisdiction, was a nullity which could not prevent the AAT from reviewing the original decision. The AAT in *Anderson* had referred to a number of earlier decisions in support of its conclusion.]

Stay of decisions

SECRETARY TO DSS and GLANVILLE
(No. 9645)
Decided: 20 July 1994 by H.E. Hallowes.

Background

The DSS asked the AAT to review a decision made by the Social Security Appeals Tribunal (SSAT) and to stay the operation or implementation of the SSAT decision under s.41 of the *Administrative Appeals Tribunal Act (AAT Act)*. The SSAT's decision would, unless stayed, involve paying Glanville $994.00 and the DSS contended that this amount was not payable under the Act. The substantive issue in dispute in the appeal concerned which tax year the respondent's rate of family payment ought to be calculated by reference to. If the decision under review was set aside, then the DSS argued that money would have been paid to the Glanville, which would then be a debt under s.1223AB of the 1991 Act following an amendment which came into effect on 19 May 1994.

Glanville was receiving family payment at the maximum rate, and her counsel submitted that she was suffering from significant financial hardship. She had a number of outstanding accounts and was awaiting a hospital bed to undergo an operation.

The issue became whether or not, if the DSS succeeded in its review, a debt would be created in respect of any amount paid to Glanville by reference to the SSAT decision.

Section 1223AB

Section 1223AB provides:

> 'if a person applies to the AAT for review and a stay order is made and as a result of the order, the amount that has in fact been paid to the person by way of social security payment is greater than the amount that was payable to the person the difference between the amount that was in fact paid to the person and the amount that was payable to the person is a debt due to the Commonwealth and recoverable by the Commonwealth . . .'

In determining the meaning of this section, the AAT turned to the Explanatory Memorandum. The AAT noted that the new category of debt arises where the DSS has paid money to a person appealing to the AAT, the money being paid because the AAT has stayed the SSAT decision against which the person has appealed. It was noted under the heading 'Background' in the Explanatory Memorandum that the previous list of recoverable debts (prior to the amendment) did not include a debt arising because of social security payments made pursuant to an AAT stay order granted at the DSS client's request where the client ultimately loses at the AAT and, with hindsight, it was clear that the money was not payable.

The AAT noted that most requests for stay orders are made by the Secretary rather than by a claimant. If an order were made staying the effect of the SSAT decision, then no amount would be paid to the claimant until the

AAT finally determined the matter. Thus no debt would be due to the Commonwealth.

The AAT referred to *Kingston v Deprose Pty Ltd* (1987) 11 NSWLR 404 which endorsed a purposive rather than literal approach to statutory interpretation and considered that it was appropriate for the AAT to construe s.1223AB in a way which would promote the purpose of the section. Having considered the Explanatory Memorandum, the AAT decided that the purpose of the section is to provide for those circumstances in which money has been paid 'to a person appealing'. On this basis, the AAT held that s.1223AB has no relevance to the circumstances of this matter as the person appealing here was the Secretary. Whatever the AAT did, no money would be paid 'to the person appealing' before the Tribunal had heard and determined the application. Therefore, the application came to be determined generally by reference to s.41(2) of the *AAT Act*.

In exercising its discretion the AAT took into account the fact that the DSS may not be able to recover the sum. After noting that the DSS had an arguable case, the AAT decided, taking into account the interests of the parties, that no order should be made staying the operation of the decision of the SSAT.

Decision

The AAT decided not to make an order staying the operation or implementation of the decision of the SSAT.

[R.G]

Job search allowance: disposal of assets to family trust

GALEA and SECRETARY, DSS
(No. 9576)
Decided: 30 June 1994 by J.R. Dwyer

Mrs Galea applied to the AAT for review of the SSAT's decision that job search allowance (JSA) was not payable to her because of the level of her assessable assets.

The assets in question included an amount of $188,734.78 which was held in a Commonwealth Bank account in the name of 'Antonia Galea in Trust for the Galea Family Trust'. The DSS had determined that Mrs Galea had disposed of her assets totalling that amount by transfer of payments to the Trust without receiving consideration for the amounts, and therefore the amount in excess of the disposal limit of $10,000, namely $178,734, was included in Mrs Galea's assessable assets for the purpose of determining her entitlement to JSA. As the assets limit for a single homeowner was $112,500, the amount, together with her other assets, precluded JSA being paid to Mrs Galea and her claim had been rejected.

Mrs Galea asserted that the amounts deposited in the Trust were not all her property. She produced a number of bank books including one which showed that some of the money paid into the Trust came from National Australia Bank accounts in the name of Mrs Galea as trustee for her children. The substantive issue for determination was whether those amounts were Mrs Galea's money or money which was already held by Mrs Galea on trust for her children. After consideration of a number of authorities on whether there had been a declaration of, and communication of the intention to create, a trust, the Tribunal concluded that establishing a trustee bank account was not an unambiguous declaration of trust, and Mrs Galea had not established 'the expression and communication of the necessary intention' to show the establishment of the trust.

The Tribunal found, on balance, taking into account:

- Mrs Galea's lack of understanding of the concept of a trust and the obligations of a trustee;
- the lack of any declaration of a trust beyond the designation of the account;
- Mrs Galea's failure to keep any records of withdrawals from the account;
- the lack of communication by her to her children or to any other person of the fact that she had established the account as a trust account for their benefit; and
- the fact that she included the interest on the account in her own tax return and no trust tax returns were lodged;

that the mere placing of money in an account in the name of herself as trustee for her children, did not constitute Mrs Galea a trustee for the money. Thus the money deposited from the account to the Galea Family Trust was Mrs Galea's money and not money subject to trust, and the transfer of the money constituted a disposal of assets within ss.1123-1125A of the *Social Security Act 1991*.

The Tribunal then looked at whether the disposition could be disregarded under s.1127.

It noted there was a disparity between paragraphs (a) and (b) of s.1127 in relation to whether it applied to 'benefits' (including JSA) and suggested that some clarification of the legislation was required. However, as Mrs Galea would attain 60 years of age within 5 years of the disposition of the amount in issue, and expected to be sustained by some social security payment, including age pension, the Tribunal concluded that there was no basis for applying s.1127(b) even if it could be used in a case of a disposition of assets by a person claiming a 'social security benefit'.

Formal decision

The AAT affirmed the decision that Mrs Galea disposed of assets totalling $188,734.78 and that disposal was properly taken into account in determining that she had no entitlement to JSA .

[B.W.]

Age pension: calculation of income from managed investment

VAN GEEST and SECRETARY, DSS
(No. 9579)
Decided: 28 June 1994 by D.J. Grimes.

Mr and Mrs Van Geest were granted age pensions in 1990. At the time of their claims for the pension they held 9740 units, acquired between May 1987 and July 1988, in an investment in Advance Property Fund No 5 (APF5). They purchased a further 20,355 units in Advance Split Property Fund (ASPF) on 23 August 1990 and another 1228 units in Advance Property Fund (APF) on 3 June 1993.

On 1 April 1992 the investments underwent restructuring: APF5 was merged with ASPF and restructured as APF. The units held by the Van Geests' were redeemed by the trustee of APF5