The issues

The AAT looked at the nature of the relationship between Grozdanovska and Petreski in the context of ss.4 and 249 of the *Social Security Act 1991*. Section 4 of the Act contains the relevant definition of 'member of a couple', whereas s.249 of the Act provides, *inter alia,* that a person is not entitled to receipt of sole parent pension if a person is a member of a couple.

Member of a couple

The AAT chose to consider this matter by comparing Grozdanovska's circumstances with each of the matters contained in s.4(2).

The AAT found at the outset that Grozdanovska and Petreski had been living in the same residence since January 1992.

Financial aspects of the relationship

The evidence before the Tribunal from both Grozdanovska and Petreski was that there was no intermingling of finances within the household. Further they both gave evidence that household costs were not shared. The AAT found that there was an ambiguous loan arrangement between Petreski, Grozdanovska and Grozdanovska's father to the apparent effect that Grozdanovska had an equitable interest in the house in which she lived.

The AAT also found that Grozdanovska and Grozdanovska's father had loaned Petreski money with which to purchase the house, but that the loan would not need to be repaid if Grozdanovska and Petreski were married.

The nature of the household

The evidence before the AAT indicated that Grozdanovska had complete care and control of the children and that household chores were not shared. The AAT found that much of the evidence given by Grozdanovska was inconsistent.

The social aspects of the relationship

The evidence given was that Grozdanovska and Petreski did not socialise at all. The AAT found this evidence was also inconsistent.

Sexual relationship

The AAT found that this evidence was also inconsistent. It found that both Grozdanovska and Petreski had made inconsistment statements about the nature of their sexual relationship.

Commitment to each other

The AAT heard evidence that Grozdanovska and Petreski did not see their relationship as marriage-like. They did not rule out marriage and both accepted that their present living arrangments would continue.

The law

The AAT looked at the decision of *Secretary, Department of Social Security and Le-Huray* (1995) 36 ALD 682 which considered s.4(3) of the Act. In *Le-Huray*, the AAT had reflected on the cases of *Staunton-Smith v Secretary, Department of Social Security* (1991) 25 ALD 27 and *Tang and Director-General of Social Services* (1981) 3 ALN N83. The AAT acknowledged that there needed to be a consideration of all relevant material before the Tribunal, so that 'the respondent may know, at the end of the day, in full and complete detail, the reasoning process that guided the Tribunal to its ultimate conclusion': Reasons, para. 20.

Conclusion

The AAT found that the evidence of both Grozdanovska and Petreski was:

> 'extremely inconsistent. The evidence of their household arrangements, sexual relationship, the loan arrangement, and the relationship between Mr Petreski and Ms Grozdanovska was often inconsistent, contradictory, and difficult to follow.'

(Reasons, para. 21)

Following on from this, the AAT found that it was unable to accept much of the evidence given by Grozdanovska and Petreski about their relationship, and that there were clearly instances of their written statements in evidence contradicting their oral evidence. The AAT referred to *Petty and Davis and Director-General of Social Security* (1982) 4 ALN N214

> 'Where applicants make an untruthful and misleading statement concerning their relationship, they must realise that the inference is likely to be drawn against them, that they are endeavouring to conceal the true nature of their relationship.'

(Reasons, para. 22)

The AAT found that there were elements which indicated that the relationship was marriage-like, and that evidence given by Grozdanovska and Petreski lacked credibility.

Formal decision

The AAT affirmed the decision under review.

[B.M.]

Superannuation fund transfer: allocated pension

SMITH and SECRETARY TO DSS (No. 10617)

Decided: 20 December 1995 by S.A. Forgie.

Background

When Smith retired in May 1992, he received a lump sum payment of superannuation. He invested the entire sum of $216,885 in the form of an allocated pension with Excelsior Managed Superannuation Plan. From 22 March 1994 Smith also received the mature age allowance. During 1994, Smith became worried about his investment. Acting on the advice of his financial advisor, he removed his money from Excelsior and placed it with LifeTrack Superannuation Fund. He completed the relevant documents on 19 April 1994.

The issues

Was the LifeTrack superannuation pension an allocated pension? If so, was the pension purchased before 1 July 1992?

The legislation

The issues relate to the rate of payment of Smith's mature age allowance. In order to use the pension rate calculator at the end of s.1064 of the *Social Security Act 1991*, the first step is to ascertain the value of the person's assets. Usually asset means property (see s.11(1)). But s.1118(1) of the Act states that certain property is to be disregarded.

Prior to 1 July 1994, s.1118(1)(d) said that the value of any superannuation pension was included among the property to be disregarded. The *Social Security Legislation Amendment Act (No. 2) 1994* amended that provision. From 1 July 1994 among the property to be disregarded was:

> 'The value of any superannuation pension of the person that is not an allocated pension.'

'Allocated pension' is defined in s.9(8) as:

> 'A pension or annuity is an allocated one if:
>
> (a) the pension or annuity was purchased on or after 1 July 1992; and
>
> (b) either:
>
> (i) the rate of payment of the pension or annuity; or
>
> (ii) the basis for variations in the rate of payment of the pension or annuity:
>
> is not fully defined in the relevant trust deed or contract.'

Allocated pension

Smith conceded and the Tribunal agreed that the LifeTrack pension satisfied paragraph (b) of the definition of an allocated pension in s.9(8). Neither the Trust Deed nor the contract contained detail of the rate of payment of the pension or the basis on which the variations in the rate would be made.

The remaining issue was whether the LifeTrack pension was purchased before 1 July 1992. The pension from Excelsior was purchased before 1 July 1992 and these funds were clearly transferred after 1 July 1992. The Tribunal considered whether the transfer of moneys between the two Funds amounted to a purchase of the pension with LifeTrack?

Smith argued that he received the same pension from LifeTrack as he did from Excelsior, and that the transfer had no practical effect on him on a day to day basis. He argued that change in the source of the pension was irrelevant.

The Tribunal looked in detail at the definition of 'purchase' and various judicial interpretations of 'purchase'.

It concluded that 'there would seem to be no reason why the word 'purchase' should not be given its ordinary meaning of 'to acquire by the payment of money or to buy': Reasons, para. 33. To do otherwise would not fit in with other provisions in the Act.

The Tribunal considered that when Smith transferred his funds from one fund to another, he realised his investment with Excelsior according to s.9(10). This impacts on the interpretation of the word 'purchase'. Although Smith never saw any money, and it never passed through his hands from Excelsior to LifeTrack, the Tribunal found that he realised his investment when he transferred the investment. Accordingly he could only have acquired the LifeTrack pension by the payment of the money he had received from Excelsior in April 1994.

The Tribunal noted that this was an unfortunate result for Smith, as he was only protecting his investment, and had gained nothing. There was 'no way his position may be alleviated under the Act as it now stands': Reasons, para. 45.

Formal decision

The decision under review was affirmed.

[M.A.N.]

Unemployed or self-employed?

OLIVER and SECRETARY TO DSS (No. 10692)

Decided: 29 January 1996 by B.H. Burns, W.H. Eyre and J.Y. Hancock.

While temporarily residing in Sydney, Oliver was granted job search allowance from 22 December 1994. He returned to his home on Thistle Island near Port Lincoln in South Australia on 1 February 1992, and lodged a further claim for job search allowance on 13 April 1995. On 27 April 1995, a delegate of the DSS cancelled his job search allowance on the basis that he was not looking for work. This decision was affirmed by an authorised review officer and then the SSAT. Oliver then sought review by the AAT.

Facts

Oliver had been living on Thistle Island for approximately 3 years. There were only 2 other permanent residents on the island and some holiday homes. Over a 2-year period Oliver attempted to set up a tourism business which he called Thistle Island Holiday Tours, although this was not a registered business name. This involved, initially, making a 15-minute promotional video and making phone calls to 20 different travel agents. Oliver intended to rent out his house and take visitors on four-wheel drive tours of the island. Despite his efforts he had only managed to rent out his house for one short period in February 1995 for $400.

The issues

At the hearing, the DSS contended that Oliver was not unemployed during the period 22 December 1994 to 27 April 1995, but self-employed, albeit under employed. It was argued that as long as a person is committed to running a business, then he or she is self-employed whether or not the business is successful. Further, the DSS argued that Oliver had not satisfied the activity test because he had restricted his work-seeking efforts to Thistle Island, was only looking for work of short duration rather than suitable full-time work, and his enquiries regarding work were limited to his own special area of expertise, that is his intention to form a tourism business.

Unemployed or self-employed?

The Tribunal accepted evidence given by Oliver that at the relevant time his efforts in regard to his business were limited to the making of 2 to 3 telephone calls a week to tourist agents. The Tribunal reviewed a number of relevant decisions regarding the distinction to be drawn between self-employment and unemployment, but concluded on the facts that Thistle Island Holiday Tours was essentially a business idea that had never got off the ground. Although Oliver still hoped the idea would come to fruition it could not be seen in any sense as a business. He was not therefore self-employed, but unemployed.

The activity test

The Tribunal also accepted Oliver's evidence that he had sought work in a wide variety of areas, both on and off the island, and that the work sought was not always of short duration. It therefore accepted that he had been actively seeking and was willing to undertake suitable paid work during the relevant period.

Formal decision

The Tribunal set aside the decision under review and remitted the matter back to the Secretary for reconsideration in accordance with its findings that Oliver was, at the relevant times unemployed within the meaning of s.513(1)(a) of the *Social Security Act 1991*, and also satisfied the activity test in accordance with s.513(1)(b) and s.522(1) of the Act.

[A.T.]

Job search allowance: reduced employment prospects; self-employment

SECRETARY TO DSS AND HARDING (No. 10641)

Decided: 29 December 1995 by M.T. Lewis.

Background

The DSS had cancelled Harding's job search allowance on the basis that he had moved to an area of reduced employment prospects, when he moved from Southport to Port Macquarie on 24 May 1994.

Harding had moved to Port Macquarie to undertake self-employment on an oyster farm. He had previously been an owner/operator of a successful oyster farm for 10 years, but had moved to Queensland in 1988 to return to a career