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