Job search allowance: assets test, excess curtilage

SECRETARY TO DSS and ELSER (No. 10740)

Decided: 11 October 1995 by G. Ettinger.

The DSS requested review by the AAT of an SSAT decision which had set aside a DSS decision. The DSS had refused to grant job search allowance (JSA) to Elser under the hardship provisions of the benefit asset test. The SSAT had remitted the matter back to the DSS directing the DSS to apply the hardship provisions of the benefit asset test.

The facts

Elser claimed JSA for the period 23 February 1994 to 15 August 1994. His claim was rejected under the benefit asset test. Elser owns a 24.28 hectare property where his family resides. He bought the property in 1991 for $470,000. The Australian Valuation Office (AVO) valued the property in 1994 at $470,000 with the excess curtilage being valued at $150,000. The property was re-valued in July 1995 at $465,000, with the excess curtilage being valued at $145,000. Elser told the AAT that the value of the agistment of the excess curtilage was $800. The AVO valued the commercial lease value of the property at $1040 per annum.

There was disagreement between Elser and the AVO on how the excess curtilage was valued. Elser pointed out that the land could not be subdivided under the local council planning policy. This meant that the excess curtilage could not be sold separately.

The hardship provisions

After Elser's claim for JSA had been rejected, he was advised by the DSS to lodge a claim under the hardship provisions. This he did on 2 May 1994.

The AAT noted that s.526(1) of the *Social Security Act 1991* provides that JSA is not payable if a person's assets exceed the person's assets value limit. At the relevant time the asset limit for Mr Elser was $160,500. Because of the value of the curtilage, Elser's assets exceeded that limit.

Pursuant to s.1118(1)(b) of the *Social Security Act 1991*, certain assets, including the principle home, can be disregarded. The principle home includes a curtilage of 2 hectares. Any land in excess will be considered an asset for the purposes of the asset test limit. In Elser's case the excess curtilage was valued at $145,000, based on the AVO valuation. The AAT accepted that this was the correct value of this asset.

Section 11(12) of the *Social Security Act 1991* defines unrealisable assets. An asset is unrealisable if it cannot be sold or realised, and the person cannot use the asset as security for borrowing.

It was submitted by the DSS that because the *Social Security Act 1991* exempted the principle home from the asset test, it did not mean that the principle home was an unrealisable asset. The AAT rejected that argument, stating that the *Social Security Act 1991* was beneficial legislation, and an applicant would not be required to put the family home on the market to receive a benefit.

Elser gave evidence that he had attempted to borrow money from his bank on the property. Because he was not working, his application for a loan was refused. The AAT accepted that Elser could not sell the excess curtilage separately from the family home because of planning restrictions. The AAT concluded that the excess curtilage around Elser's family home was an unrealisable asset.

The application of ss.131(1) and 132(1) of the *Social Security Act 1991* meant that the value of the excess curtilage could be disregarded when applying the asset test for the purposes of eligibility for JSA. If that asset was not included in Elser's assets, his assets did not exceed the asset test limit. Included in Elser's assets were shares in a family company. The AAT noted that the company's bank balance was $15,500 but with tax liabilities. The DSS had determined that the net assets of the company were $3100, and the AAT accepted this valuation.

Finally, the AAT noted that for the financial hardship provisions to apply, the DSS must be satisfied that the person would suffer severe financial hardship (s.1131(1)(g)). Elser gave evidence that he was married with 2 children aged 15 and 4. He had struggled to operate a sandwich bar, but had finally sold it because it was unprofitable. The $20,000 Elser received from the sale of the business was spent on company tax and living expenses. Elser sold his car and bought a cheaper one. The AAT was satisfied that Elser was suffering severe financial hardship at the time he made his claim. Therefore, the AAT was satisfied that the financial hardship provisions applied, and Elser was to be paid JSA between 2 May 1994, when he made his claim under the financial hardship provisions, and mid-August 1994, when he resumed employment.

Formal decision

The AAT affirmed the decision of the SSAT that Elser's claim for JSA pursuant to the financial hardship provisions be allowed.

[C.H.]

Assurance of support debt and waiver

HAYKAL and SECRETARY, DSS (No. 10895)

Decided: 29 April 1996 by J.R. Dwyer.

Haykal sought review of a decision of the SSAT to raise and recover an assurance of support debt of $5,209.31, representing the amount of special benefit paid to Haykal's mother-in-law from 3 September 1991 to 1 August 1993.

Background

Haykal signed an assurance of support covering his mother-in-law, Mrs Nadime Haykal, on 4 March 1991 in which he agreed to support Mrs Haykal for a period of five years. Mrs Haykal was granted permission to remain in Australia as a resident on 2 August 1991. She subsequently claimed and was paid special benefits between 3 September 1991 and 5 July 1994. However, recovery of the amount paid was limited to those payments made from 3 September 1991 to 1 August 1993 because of amendments to the Migration Regulations. Regulation 5.3 of the Migration (1993) Regulations provides that an assurance of support given before 20 December 1991, which had been in force for less than two years as at 19 December 1991, ceases to have effect at the end of two years from the grant of the relevant entry permit, in this case 2 August 1991.

The issue

The AAT was satisfied that under the Migration Regulations, Haykal had incurred a debt to the Commonwealth, while s.1227(1) of the *Social Security Act 1991* provided for recovery of that debt. The remaining issue was whether any part of the debt should be waived or written off.

Waiver

Haykal argued that he should not have to repay the debt because nobody from the DSS had visited him to tell him of his

obligation to refund special benefit paid to his mother-in-law. The AAT considered that there was no obligation on the DSS to visit or advise him of the fact that special benefit was being paid to his mother-in-law, and there was therefore no basis for waiver on the grounds of administrative error. In any event, the AAT, following *Re Secretary, DSS and Kratochvil (No. 2)* (1995) 84 *SSR* 1230, held that waiver on the grounds of administrative error pursuant to s.1237A(1) could not apply to an assurance of support debt because in those cases it is not 'the debtor' who has received the payment as required by that section. The only possible basis for waiver was pursuant to s.1237AAD of the *Social Security Act 1991* which applies where there are special circumstances.

Special circumstances

The AAT suggested that special circumstances might exist if it was satisfied that Haykal had:

- not known that his mother-in-law was being paid special benefit; or
- been supporting his mother-in-law even while she was receiving special benefit.

However, on the evidence before it, the AAT was not satisfied that either of these circumstances existed in Haykal's case, and as a result found that there were no special circumstances which made it desirable to waive the debt.

Neither was the AAT of the view that Haykal would suffer financial hardship if obliged to repay the debt, and there was therefore no reason to write off the debt.

Formal decision

The AAT affirmed the decision under review.

[A.T.]

Health care card: disadvantaged person

KNAPE and SECRETARY TO DSS (No: 10933)

Decided: 15 May 1996 by J.R. Dwyer.

Knape requested review by the AAT of an SSAT decision which had affirmed the DSS decision to reject Knape's claim for a health care card. The basis of that rejection was that her combined taxable income exceeded the prescribed limits.

The facts

The facts were not in issue before the Tribunal. Knape lodged a claim for a health care card on 7 February 1995. In her claim she indicated that her husband's gross weekly income was $535.00, but that his net income after deductions for tax and superannuation, etc. was far less. In a 4-week period his 'take-home' pay was $1596.20. Knape has 2 dependent children, and the allowable income limit for her would appear to be $1640. Therefore, if her husband's take-home pay was taken into account Knape argued, she would be entitled to the health care card.

Gross income or net income

Knape argued that the DSS should take into account her net income when assessing her eligibility for a health care card, because this was the income she actually received and the money available to support her family.

The AAT noted that the law which appeared to be applicable in this case was s.5B(2) and (12) of the *Health Insurance Act 1973*. In s.5B(2) it was stated that the Secretary to the DSS had to be satisfied that the applicant's ascertained income for the prescribed period was less than the amount of the allowable income for the same period. If that provision was satisfied, then the person would be declared a 'disadvantaged person'. Section 5B(12) defined income as ordinary income under the *Social Security Act 1991*. The prescribed period was defined as 4 weeks.

'Income' is defined in s.8 of the *Social Security Act 1991* as an income amount which is earned, derived or received by the person for the person's own use or benefit. Section 1072A(3) of the *Social Security Act* provides that a person's ordinary income is the person's gross ordinary income without reduction. The AAT referred to earlier decisions of the Federal Court which had discussed the meaning of income, but concluded that s.1072A(3) meant that the ordinary income of a person was their gross income. Therefore, the income to be taken into account when deciding whether or not a person would be declared a disadvantaged person, was the person's gross income. In Knape's case this would be her husband's gross income.

The AAT's power to review the decision

The AAT had some reservations about whether it had the power to review a decision of the Secretary not to grant a health care card. It noted that the term health care card was not defined in either the *Health Insurance Act* or the *Social Security Act*. However, the second reading speech in relation to *the Health Insurance Act* indicated that it was a benefit intended to be provided to needy families. The AAT concluded that this was insufficient for it to decide whether or not it had the power to grant a health care card. There was no relevant legislative provision which allows for the grant of such a card.

The AAT then considered whether it had the power to decide whether or not a person was a 'disadvantaged person'. Section 5F of the *Health Insurance Act* allowed for review of decisions made under s.5B. Section 1240(1)(b) of the *SSA* allowed for review of a decision under s.5B of the *Health Insurance Act*. Further provisions of the *Social Security Act* enabled the SSAT and the AAT to review that decision. The AAT concluded that it had the power to decide whether or not Knape was a disadvantaged person pursuant to s.5B of the *Health Insurance Act*.

Formal decision

The AAT varied the decision of the SSAT and decided that Knape was not a disadvantaged person within the meaning of that term in s.5B of the *Health Insurance Act* 1973.

[C.H.]

[Editor's Note: Surprisingly, the AAT did not consider whether Knape's husband's income could be taken into account as part of Knape's income. The definition of income in s.5B(12) states that income is ordinary income of the person for the purposes of the *Social Security Act 1991*. 'Ordinary income' is defined in the *Social Security Act* as income received by the person for the person's own use or benefit. It could be argued that Knape does not receive her husband's income, he does.]