Rent assistance: retirement village resident, meaning of 'rent'

SECRETARY TO THE DSS v MONTGOMERY
(Federal Court of Australia)

Decided: 24 February 1997 by Nicholson J.

Background

Montgomery and her husband began residing in a retirement village unit in August 1994 under a licence agreement with the Australian Pensioners' League which granted them 'exclusive licence ...to occupy and use' the unit. The licence required them to pay ongoing operating costs of $27 a week and an 'ingoing sum' of $69,000. Upon determination of the licence the League covenanted to repay to the resident an amount calculated in accordance with a formula which subtracted from the ingoing sum, a 'yearly sum' of $4700 multiplied by the number of years of residence.

When her husband moved to a nursing home in early 1995, Montgomery was granted age pension on the basis that she was a member of an illness-separated couple. On 24 July 1995 she applied for rent assistance. The application was rejected on the basis that the $27 a week paid in maintenance fees was below the 'rent threshold rate' of $32.20 a week. The DSS regarded the annual fee of $4700 as an annual reduction of the initial entry fee, which was maintained as an asset. The AAT subsequently affirmed a decision of the SSAT which set aside the decision of the DSS, and substituted a new decision that Montgomery was entitled to rent assistance. The AAT regarded the 'yearly sum' of $4700 as an amount payable as a condition of occupancy, by way of annual deductions from the 'ingoing sum' of $69,000. It therefore considered that the 'yearly sum' was rent within the definition set out in s.13(2) of the *Social Security Act 1991*. The DSS appealed to the Federal Court on the basis that this amounted to an error of law.

The legislation

The relevant part of s.13(2) provides:

> '13.(2) Amounts are rent in relation to the person if:
>
> (a) the amounts are payable by the person:
>
> (i) as a condition of occupancy of premises, or of a part of premises, occupied by the person as the person's principal home; or
>
> (ii) for services provided in a retirement village that is the person's principal home ...
>
> and
>
> (b) either:
>
> (i) the amounts are payable every 3 months or more frequently; or
>
> (ii) the amounts are payable at regular intervals (greater than 3 months) and the Secretary is satisfied that the amounts should be treated as rent for the purposes of this Act.

Were the annual deductions amounts that were 'payable'?

The Court agreed with a submission made by the DSS that the annual deductions were not 'payable' as required by s.13(2)(a).

The Court noted firstly, that no annual deductions were in fact made under the licence agreement. The formula set out in the agreement only applied upon the determination of the licence. The League had the right to deal with the whole of the ingoing sum as it saw fit, subject to its obligation upon determination to make payment to the resident in accordance with the formula. Therefore, it was difficult to see how it could be said that there were annual deductions which fell to be considered as amounts 'payable'. However, in argument before the Court, it was accepted by both parties that the matter should proceed on the basis that there were such annual deductions from the ingoing sum.

The issue before the Court was, therefore, whether such annual deductions properly fell within the word 'payable'. The court concluded that they did not, because the ingoing sum was an amount that had already been paid by Montgomery to the League. When the annual deduction was made, the League was in fact dealing with its own funds. Nothing passed from the resident to the League to constitute a payment and there was no obligation on the resident. Montgomery's obligation had been discharged upon payment of the ingoing sum. The use of the word 'payable' posits that there is payment yet to be made. It was the resident to whom a sum was in fact payable upon the determination of the licence.

The Court distinguished the decision of *Secretary to the DSS v Knight* (1996) 2(8) *SSR* 117, in which Knight paid an entry contribution of $30,000, by way of a lump payment of $15,000, followed by regular monthly instalments over 10 years. In that case the Federal Court concluded that there was a nexus between the ongoing obligation to make monthly payments and occupancy of the retirement village premises and the monthly payments were properly characterised as rent. However, in Montgomery's case, there was no ongoing obligation to make periodic payments and there was no nexus between the annual deduction and ongoing occupancy. The AAT therefore, erred in concluding that the assumed annual deduction could constitute an amount that was 'payable' within s.13(2) of the Act.

Formal decision

The appeal was allowed. The decision of the AAT was set aside and substituted with a decision that the decision of the authorised review officer of the DSS be affirmed.

[A.T.]

Newstart allowance: Case Management Activity Agreement

SECRETARY TO THE DEETYA v O'CONNELL
(Federal Court of Australia)

Decided: 15 May 1997 by Mansfield J.

O'Connell was sent two letters requiring her to attend an interview at which a Case Management Activity Agreement (CMAA) was to be completed. She failed to attend either interview and the AAT found that she had unreasonably delayed entering into a CMAA. However, the DSS had not issued to O'Connell a notice under s.44 of the *Employment Services Act 1994* (the Act). In those circumstances the SSAT had concluded that there could be no failure on O'Connell's part to have entered into a CMAA. On appeal, however, the AAT directed that the DEETYA comply with ss.44(3) and (4) of the Act and, upon compliance, the decision to terminate O'Connell's newstart allowance for unreasonably delaying entering into a CMAA would be upheld.

The issue and legislation

The DEETYA appealed the decision on the basis that it was entitled to cancel the newstart allowance under s.45 of the Act rather than having to act under s.44. The relevant provisions are as follows:

> '44.(1) This section applies if:
>
> (a) a person has been given notice under subsection 38(5) of a requirement to enter into a Case Management Activity Agreement; and