activity of the business. The Departmental Policy Manual also stated :

> 'The 50% discount does not apply to business/farm assets in the form of:
>
> - rental and investments, property, other investments
> - assets not used for the principal activity of the business/farm (for example, assets leased out to others unless leasing is a major activity).'

The AAT pointed out that the Regulations do not refer to assets having to be used for the principal activity of the business/farm. The DEETYA argued that the principal activity of AGAZO International was product distribution, that the leasing of the 3 properties was merely a form of investment and therefore could not properly be considered as business assets. The AAT indicated that it was not necessary to determine whether the renting of the properties was properly to be considered as a business, as regulation 19 required only that the leasing be a major activity of the business. Although it did not need to be the larger activity if there were a number of activities undertaken by a business, the AAT considered that rental management of 3 properties was something that would require modest time involvement, and when compared with the greater activity of product distribution, leasing could not be said to be the major activity. The only activity which could be said to be major in the case of AGAZO International was the product distribution. This meant that the 50% discount could not apply to Mr and Mrs Ovari's interest in the 3 rental properties.

The AAT also said that even if the leasing activity were to be regarded as a separate business, neither Mr, Mrs or Zoltan Ovari were wholly or mainly engaged in such business, and therefore their interest could not be discounted.

The AAT then went on to consider the value of all assets owned by the Ovaris and concluded that their total assets amounted to $400,613.31.

Formal decision

Neither Attila nor Zoltan Ovari were entitled to AUSTUDY in 1996 as the family's assets exceeded $393,750.

[A.T.]

Federal Court

Garnishee action: power of SSAT, requirement to afford natural justice

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

Decided: 3 July 1997 by Burchett, Drummond and Mansfield JJ.

History of appeal

Walker had an existing debt to the DSS of $20,287 being moneys fraudulently obtained during the years 1984 to 1987. In 1988, he applied for sickness benefits but was rejected. On appeal it was determined that Walker was entitled to sickness benefits for the period October 1988 to April 1989 of $2134.40. On 5 April 1995 this amount was paid into Walker's bank account. On the same date, the DSS issued to Walker's bank a garnishee notice under s.1233(1) of the *Social Security Act 1991* (the Act), in order to recover this sum toward repayment of the debt Walker owed to the DSS. Walker sought review of the decision to issue the garnishee notice.

After an unsuccessful review by an authorised review officer, Walker applied to the SSAT complaining that he had been denied natural justice because the DSS had failed to notify him of its intention to issue the notice before doing so, thereby depriving him of the opportunity to address the DSS on a matter relevant to its decision to take garnishee action, namely, his financial situation. The SSAT considered that it had 'no power to direct that garnishee action proceed in a manner different from that manner in which the DSS proceeded to take' that action, and affirmed the decision to recover the sum of $2134.40. Subsequently the AAT took the view that neither the SSAT nor the AAT had power to review the decision to recover the debt by way of garnishee action and also affirmed the decision.

Walker appealed to a single judge of the Federal Court. The primary judge accepted that the AAT had fallen into error in failing to recognise that the SSAT had limited jurisdiction to review the decision to garnishee, but that the AAT was correct in holding that the SSAT 'had no power or any discretion to enable it to change' that decision because of the limitations placed on the SSAT by s.1253(4)(f). There was thus no point in remitting the matter back to the AAT because the limitations placed by s.1253(4) on the SSAT's power prevented it and the AAT from correcting any error complained of by Walker.

The issues

Walker then appealed to the Full Court. He again argued that he had been denied natural justice and that the DSS had failed to take into account relevant considerations. The appeal raised a question as to the power of the SSAT in reviewing decisions of the Secretary to the DSS relating to matters falling within s.1253 of the Act. That section provides in part:

> '1253.(1) If a person applies to the Social Security Appeals Tribunal (SSAT) for review of a decision (other than a decision referred to in subsection (7)), the Tribunal must:
>
> (a) affirm the decision; or
>
> (b) vary the decision; or
>
> (c) set the decision aside and:
>
> (i) substitute a new decision; or
>
> (ii) send the matter back to the Secretary for reconsideration in accordance with any directions or recommendations of the Tribunal.
>
> 1253.(3) Subject to subsection (4), the Social Security Appeals Tribunal may, for the purposes of reviewing a decision under this Act, exercise all the powers and discretions that are conferred by this Act on the Secretary.
>
> 1253.(4) The reference in subsection (3) to powers and discretions conferred by this Act does not include a reference to powers and discretions conferred by . . .
>
> (f) section 1233 (garnishee notice); or . . .'

The power of the SSAT in reviewing a DSS decision to issue a garnishee notice

The majority of the Court read s.1254(4):

> 'as permitting the SSAT to review decisions within s.1253(4) for any error of fact or law, but preventing the SSAT, even where it identifies error in such a decision, from making any decision of its own on the merits. That is the sole province of the Secretary. But that the SSAT cannot do more than set aside an erroneous DSS decision within s.1253(4) and remit it to the DSS for reconsideration does not absolve the SSAT from examining the DSS decision for error. It follows that the only orders the SSAT may make on the review it can conduct of decisions within s.1253(4) are either to affirm the decision or to set it aside and, if it sets the decision aside to remit the decision for recon-

sideration, with or without non-binding recommendations.'

(Reasons, p.12)

Pursuant to s.1283(1) and (2) of the Act, which limit the AAT's authority to the review of a DSS decision as dealt with by the SSAT, the AAT could not therefore:

'conduct a merit review itself of the DSS decision and was confined to determining whether the DSS decision as dealt with by the SSAT was erroneous in fact or law.'

(Reasons, p.12)

The primary judge was therefore in error in failing to recognise that, notwithstanding s.1253(4), the AAT was bound to consider whether Walker's complaints about the DSS decision were made out.

Was there denial of natural justice by DSS?

The majority did not consider that s.1233 should be construed as requiring the Secretary to comply with the rules of natural justice in deciding whether to serve a garnishee notice under that section. They looked to the tax jurisdiction where it has been determined that similar provisions should not be so construed because it would put at risk the effectiveness of the remedy. This interpretation was reinforced by s.1233(4) which expressly states that notice is only required to be given to the debtor by the Secretary in respect of the garnishee procedure, after the decision is made and the garnishee notice has been given to the person who owes the money to the debtor.

The majority considered that the circumstances of a particular case may, however, impose an obligation on the Secretary to give a debtor an opportunity to be heard before taking garnishee action under s.1233, but there was nothing in Walker's case sufficient to give rise to a legitimate expectation on his part that he would be given such an opportunity.

In this context, it was noted that there were Departmental Guidelines stating that, in taking garnishee action, a debtor should be left with funds of $1000. The majority said that the mere existence of the guidelines could not, in this case, give rise to a legitimate expectation on Walker's part that he would be given an opportunity to be heard before the DSS departed from those guidelines.

In any event it was considered that Walker had full opportunity to put all relevant matters to the authorised review officer so that denial of natural justice in the making of the original decision became irrelevant.

Was a relevant consideration ignored by the DSS?

The majority rejected Walker's argument that the DSS had failed to take account of his financial circumstances before making the decision to issue a garnishee notice. There was no evidence indicating that there was any material before the original decision maker which might have indicated that the garnishee action would cause Walker significant hardship. It was considered that the discretion in s.1233, to take garnishee action, is in terms unfettered and what the decision-maker must take into account in each case, in order to validly exercise the wide discretionary power, must be governed by the circumstances of the particular case.

The result of the appeal

Despite the error of law identified in the decision of the primary judge, it was concluded that it was not appropriate in Walker's circumstances to give him any further opportunity to pursue his complaints, and the majority declined to remit the matter back to the DSS for reconsideration.

Formal decision

The appeal was dismissed with costs.

[A.T.]

Activity test: meaning of 'actively seeking' paid work

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

Decided: 21 July 1997 by Tamberlin J.

Background

Spencer's jobsearch allowance was cancelled because it was considered that he was not unemployed and was not actively seeking and willing to undertake paid work as required by s.513 and s.522 of the *Social Security Act 1991*. This decision was affirmed by the SSAT but set aside by the AAT. The issue was whether Spencer remained qualified for jobsearch allowance during a period in which he was engaged in campaigning for election to the NSW Parliament. The AAT found that:

- during the relevant period Spencer had been substantially involved in his election campaign, and he would not have been prepared to accept paid employment offered to him if it required him to forego or downgrade his election campaign. He would not have been able to sustain full-time employment while he was running his campaign;
- there was no chance that Spencer would be successful in the election and he realised this was not a realistic goal;
- during the relevant period Spencer was not seeking paid employment other than as a Member of Parliament.

Nevertheless the AAT concluded that Spencer was actively seeking work because he was engaged for long periods each week in his campaign to be elected as a paid Member of Parliament.

The meaning of 'actively seeking'

The DSS argued that the phrase 'actively seeking' work required an assessment of the relevant circumstances to determine whether Spencer took reasonable steps to obtain employment. The requirement is not satisfied by simply proving he spent a lot of time on a single activity when there was not even a slight chance of obtaining that employment.

The Court did not consider that Spencer's conduct in devoting his efforts solely to obtaining a position in an extremely narrow field would in itself disqualify him from being actively engaged in seeking paid work, which could not be said in this case to be unsuitable. However, the AAT had also found that Spencer had no chance of success. In the Court's view:

'the requirement set out in section 522 that a claimant actively seek paid work, calls for a claimant to make a genuine positive effort to secure work in relation to which the claimant has some realistic expectation of success and that there must be some objective prospect of success. The prospect of success need not be such as to support a conclusion that it was likely he would be successful. But it must have some real prospect in the sense that it should be more than fanciful, extremely remote or patently futile. This is especially so where the field of activity is limited to a very narrow field of work.'

(Reasons, p.7)

The totality of the facts in Spencer's case as found by the AAT could not support a conclusion that he was actively seeking work. The AAT had erred in reading s.522 too widely and had in effect misdirected itself as to the law.

Formal decision

The decision of the AAT was set aside and the matter remitted to the AAT for determination in accordance with the law.

[A.T.]