

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.]