Federal Court Decisions

Newstart allowance: CMAA, relevant consideration

WALSH v SECRETARY TO THE DEETYA
(Federal Court)

Decided: 9 April 1998 by Nicholson J.

Walsh appealed the AAT decision that cancelled his newstart allowance (NSA) because he had failed to comply with the provisions of his case management activity agreement (CMAA).

The facts

The AAT decided the application before it on the papers because Walsh failed to appear on two separate occasions. The AAT had found that Walsh had entered into a CMAA on 16 September 1996 in which he agreed to attend a ten-week job club starting on 19 September 1996. Walsh did not attend on 7 days and had a medical certificate to cover 3 days only. Walsh was issued with a notice on one day, and finally was requested to leave because he had arrived late. It was also stated that his performance and attendance were not satisfactory.

The appeal

Walsh argued that the AAT had got the facts wrong, and that he had in fact attended the job club as required. He also submitted that he had a medical certificate to account for his non-appearance on two days. According to Walsh he had given this to the AAT. He argued that the AAT had failed to take into account relevant information.

Relevant considerations

At the hearing it was conceded that the AAT had erred in finding that there was no medical certificate for a further 2 days covering Walsh's failure to attend the job club.

The AAT's findings

The Court noted that Walsh had not argued that there was no evidence on which the AAT could have concluded that he failed to attend the job club. The Court was restricted to deciding questions of law and not whether the AAT had made correct findings on the evidence.

Relevant evidence

Walsh had argued that the AAT had failed to take into account the second medical certificate and this was a relevant consideration. According to Nicholson J this ground of appeal would only be made out if Walsh could show that in the circumstances the decision-maker (the AAT) was bound to take this into account.

> 'It is not sufficient that a consideration be one which may properly be taken into account, or that many persons may have taken into account.'

(Reasons, p.4)

The Court then referred to *Secretary to the DEETYA and Ferguson* (1997) 147 ALR 295 which explained the case management scheme.

Nicholson J emphasised that it was important not to confuse pieces of evidence with relevant considerations. A relevant consideration was sufficient or necessary to establish whether Walsh was taking reasonable steps to comply with his CMAA. Such relevant considerations would be:

- whether a person has failed to comply with the terms of the agreement;
- if there was a failure to comply, whether the reason for failing involved a matter within the person's control;
- if it was not within the person's control, whether the circumstances that prevented the person from complying were reasonably foreseeable;
- whether the person could show that he was taking reasonable steps to comply with the agreement.

The Court concluded that in this case the medical certificate was a piece of evidence and not a relevant consideration. The AAT's decision was clearly open to it as a result of breaches by Walsh apart from his absence for the two days when he had the medical certificate.

Formal decision

The appeal by Walsh was dismissed.

[C.H.]

Age pension: reasonable action to obtain foreign payment

GIDARO v SECRETARY TO THE DSS
(Federal Court)

Decided: 24 April 1998 by Burchett J.

Gidaro appealed against an AAT decision which had affirmed a DSS decision to suspend payment of Gidaro's age pension under s.78AA of the *Social Security Act 1991*.

The facts

Gidaro was born in Italy in 1925. After leaving school Gidaro served between 12 and 18 months in the Italian army and then migrated to Australia in 1953. He became an Australian citizen in 1966 and has never returned to Italy.

In 1980 Gidaro was granted the invalid pension for a depressive illness, and in 1990 he was granted the age pension.

In November 1994 a DSS officer recorded that he had contacted the payment authority in Italy to see if Gidaro might be entitled to an Italian pension. The officer was told that a person who had spent more than 52 weeks in the army before 1953 would probably be entitled to some Italian pension payment. In June 1997 the DSS wrote to Gidaro stating:

> 'There is a possibility that you are entitled to a payment from Italy.'

The letter then stated that Gidaro would be sent application forms to claim an Italian pension in a few days. Gidaro was asked to complete the forms and return them in 42 days. Gidaro did not return any completed forms to the DSS. As a result, in August 1997, Gidaro was advised by letter from the DSS, that his age pension payment had been suspended.

Gidaro requested review of that decision, and the authorised review officer affirmed the original decision on the basis Gidaro had not taken reasonable action to apply for an Italian pension. Sections 69A and 78AA of the Act were referred to. However a finding under s.69A that Gidaro 'would be entitled to a comparable foreign payment' was not referred to.