July 1996 be waived, but that those from July 1996 to May 1997 be not waived, and that deductions from Mrs Mulford's continuing entitlements not exceed $20 a fortnight.

[P.A.S.]

Sole parent pension: separately and apart from husband

SECRETARY TO THE DSS and MCNALLY
(No. 13368)

Decided: 12 October 1998 by D.P. Breen.

Background

In January 1997, the DSS cancelled payment of sole parent pension to McNally and raised an overpayment for the period December 1995 to October 1996.

Issues

Was McNally living with her husband during the relevant period?

Legislation

The AAT did not refer to the legislation in the decision.

Section 249 of the *Social Security Act 1991* (the Act) sets out the criteria for qualification for sole parent pension. Amongst other requirements, to qualify for a sole parent pension, a person must not be a 'member of a couple'.

'Member of a couple' is defined in s.4(2) of the Act. The issues that need to be considered when forming an opinion about whether someone is a 'member of a couple' or not are contained in s.4(3) of the Act. These include the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, the sexual relationship between the people and the nature of the people's commitment to each other.

The 'evidence'

The DSS submitted that the SSAT erred in accepting McNally's subjective evidence of her living arrangements rather than the objective evidence supplied from independent sources.

The DSS sought to rely on the fact that McNally had paid a debt owed to the DSS by her husband. McNally justified this action on the basis that she had received a District Court judgment for damages and:

> 'a substantial amount of the quantum of that judgment was intended as recompense for the person who had cared for her in her period of incapacity which led to the action. That person was her husband.'

(Reasons, para. 9)

The AAT accepted McNally's explanation of why she paid the debt. The AAT did not accept that McNally's action established the nature of the relationship during the relevant period.

The DSS also called evidence of the McNallys' living arrangements during the relevant period.

The AAT accepted the evidence of McNally's daughter and her husband, the McDonalds, that during the relevant period, McNally remained in a property that she and her husband owned and that Mr McNally resided in a 'drift in, drift out' kind of arrangement with the McDonalds.

The AAT noted that throughout the period there was a measure of contact between McNally and her husband. The AAT commented:

> 'That is hardly surprising. They were living in a small country town. They retained a common bond in the form of and in the personae of their children. There was also a measure of support by each for the other; he mowing the lawn . . . and doing some maintenance; she apparently, for at least some of the time, doing his washing and discharging other small functions in his favour. This is not surprising either. It is my experience that people who are not well off financially and who are less than bloody-minded towards each other in the face of domestic conflict, maintain the mutually supportive attitudes reflected in the evidence in this case. In addition, the house at 8 Frederick Street was, as I have said, owned by the McNallys, was the subject of a mortgage and would clearly have been their most valuable asset whilst at the same time being their most demanding commitment. There was a clear need and, flowing from it, a motivation, to preserve its value. His contribution to the preservation of the asset, and thus its value, would in itself motivate her to reciprocate in the small way reflected in the evidence.'

(Reasons, para. 18)

The AAT found that McNally had lived separately and apart throughout the relevant period. 'The facts of the matter and the history of the McNally relationship are such that McNally was entitled to the sole parent pension throughout the period she received it': Reasons, para. 20.

The AAT stated:

> 'I acknowledge that the Administrative Appeals Tribunal does not review the reasons of legal forums and processes below. We decide de novo the issues arising from the decision under review. I would observe, however, having read the reasons for the decision of the Social Security Appeals Tribunal under review in this matter, that whilst on the evidence before that Tribunal I might not have reached the same conclusion, there is nothing so inherently unacceptable in the Tribunal's reasoning as to call for interference by this Tribunal with its fact-findings.'

(Reasons, para. 20)

Formal decision

The AAT affirmed the decision under review.

[M.A.N.]

Age pension income test: employee or carrying on a business?

DAVIDSON and SECRETARY TO THE DSS
(No. 13236)

Decided: 24 August 1998 by D.W. Muller.

Davidson sought review of a decision to disallow as deductions from his gross income, losses, outgoings and depreciation relating to his activities selling real estate, for the purpose of assessing the rate of age pension to which he was entitled. Davidson was an aged pensioner who, in his spare time, sold real estate for Pine City Properties Pty Ltd. The deductions claimed by Davidson related to his car expenses, licence fees and mobile telephone costs. For the first three months of 1997 his gross income from real estate commissions was $1720 and his expenses $1712.68. His expenses had been allowed as deductions by the Australian Taxation Office. The DSS used Davidson's gross income for the purpose of assessing his entitlement to age pension, it having been determined that he was not carrying on a business.

The legislation

Section 1072 of the *Social Security Act 1991* (the Act) requires the calculation of the rate of reduction to pension entitlement to be made on the basis of gross ordinary income from all sources without any reduction, unless a pensioner carries on a business.

If a pensioner carries on a business, the ordinary income from the business is reduced by the factors set out in s.1075 of the Act for the purpose of the income test. Those factors relate to allowable deductions for the purposes of ss.51, 54(1) and 82 AAC(1) of the *Income Tax*

Assessment Act 1936 or section 8-1 and Division 42 of the *Income Tax Assessment Act 1997*.

Employee or carrying on a business?

The AAT stated that as Davidson was a fully qualified estate agent he was able to opt out of the normal employer/employee relationship for sales people. The agreement Davidson had with Pine City Properties amounted to a deletion of all benefits associated with that relationship. The AAT noted the relevant features of Davidson's agreement with Pine City Properties:

- Davidson received no retainer, no minimum wage, no minimum hours worked, no overtime allowance, no allowance of any description, no expenses were paid for him.
- He received commission only for sales made by him. He received 39% of gross commission.
- He supplied his own car and paid for the upkeep and running costs of his car, out of his own resources.
- He paid for his home telephone and for his mobile telephone.
- He was not paid for recreation, sick, family, bereavement or long service leave. He had taken 8 to 10 weeks leave to go overseas and was not paid any holiday leave.
- There was no supervision of Davidson. He could come and go as he pleased. He could conduct his sales pitch in any way that he pleased.
- Davidson did not have to attend weekly sales meetings, although he usually did attend because it was in his interest to do so.
- He did not have to be part of the roster system but he usually participated because it was in his interest to do so.

Pine City Properties provided a number of facilities in return for their take of 61% of the gross commission:

- The conduct of sales campaigns involving advertising and letter box drops.
- Provision of an office as a base, managerial and secretarial staff, and a trust account facility.
- Maintenance of a client register.
- The making of tax payments on behalf of Davidson because it was a requirement of the Australian Tax Office.
- The making of superannuation payments for Davidson because it was required by law.
- The making of public liability insurance and workers' compensation payments to cover staff, including Davidson, because it was inexpensive and took the worry out of potential litigation.

The AAT took the view that the weight of evidence did not favour an employer/employee relationship but that he was carrying on a business. It concluded:

> 'Any similarities between the arrangement with Davidson and Pine City Properties and an employee/employer relationship are either to suit the convenience of Pine City Properties or those forced on them by legislation, relating to the collection of tax or superannuation, in which the relationship may be deemed to be an employee/employer relationship for the purposes of the legislation, even though the relationship is not that of employee/employer.'

(Reasons, para. 16)

Formal decision

The decision under review was set aside.

[A.T.]

Newstart allowance: notification of income

SECRETARY TO THE DSS and MARSHALL (No. 13378)

Decided: 19 October 1998 by G. Ettinger.

Background

When claiming newstart allowance (NSA) in 1994, Marshall had declared the Defence Force Retirement and Death Benefit (DFRDB) pension he was receiving. One of the questions on the continuation forms he later filled in and lodged each fortnight was as follows:

> '9. Did any of the things listed below happen to you between [the relevant dates]?
>
> . . .
>
> you or your partner got any money
>
> . . .'

Marshall answered 'no' to this question on each form. In reply to another question on the forms he understated his earnings from part-time employment.

In 1996 the DSS decided Marshall had been overpaid NSA and job search allowance since 1994. The debt was originally calculated to $16,230.28, but after review by an authorised review officer it was recalculated to be $12,903.88. The SSAT decided there was no debt arising from the receipt of the DFRDB pension, but there was a debt arising from the under declared earnings. The DSS appealed to the AAT.

Evidence

In evidence to the AAT Marshall said he answered 'no' each time to question 9 on the fortnightly forms as he understood the question to mean had he received any money other than the DFRDB he had already declared in his initial application form. He had not advised the DSS of increases in the rate because he was not aware of them, as he did not check his bank statements.

Marshall also said he estimated his earnings when completing the forms and was not aware precisely of his gross salary.

Mrs Marshall [who had been overpaid partner and parenting allowances] estimated the family had $123 left over at the end of each fortnight once all the bills and expenses had been paid.

The DSS had failed to process Marshall's DFRDB pension information.

Reasons

For Marshall it was submitted that the fortnightly forms did not define the word 'other' in question 9, and he had understood the question to mean other than money already declared to the DSS. After referring to *Smitherman* ((1991) 60 *SSR* 818); *Tuncer* ((1988) 43 *SSR* 543); *Lohner* ((1995) 85 *SSR* 1241); and *Allinson* ((1994) 79 *SSR* 1145), the AAT found the question to be ambiguous in that previous applicants had understood 'other' in the sense contended for by the Marshalls.

The AAT said:

> 'However even though Mr Marshall did not knowingly complete the weekly [sic] continuation forms incorrectly over the period 10 December 1994 to 3 January 1996, he and Mrs Marshall were paid social security benefits on the basis of an objectively false statement, thus raising debts pursuant to section 1224(1) of the Act.'

(Reasons, para. 50)

As the debts were not solely attributable to administrative error they could not be waived under s.1237A of the Act. However, s.1237AAD of the Act provides:

> '1237AAD. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:
>
> (a) the debt did not result wholly or partly from the debtor or another person knowingly:
>
> (i) making a false statement or false representation; or
>
> (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
>
> (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
>
> (c) it is more appropriate to waive than to write off the debt or part of the debt.'

The AAT considered the totality of Mr and Mrs Marshall's circumstances to