

issue of specific forms the Department sends to its customers. Thus the issue before the AAT was whether Elliot had failed to comply with s.68 of the Act which provides:

'68.(1) The Secretary may give a person to whom an age pension is being paid a notice that requires the person to inform the Department if:

- (a) a specified event or change of circumstances occurs; or
- (b) the person becomes aware that a specified event or change of circumstances is likely to occur.

68.(5) A person must not, without reasonable excuse, refuse or fail to comply with a notice under subsection (1) to the extent that the person is capable of complying with the notice.

Penalty: Imprisonment for 6 months.'

The consequence of the failure to comply with a provision of the Act is that a debt can then be raised under s.1224(1).

Submissions

It was argued on behalf of Elliot that she did not fail to comply with the notice of 18 July 1996 because no 'event' or 'change in circumstances' occurred. The fact that the Department put an incorrect income figure on the letter could not of itself constitute an event, which involves something 'happening'. It was also submitted that the requirement in the notice to advise if the income maintained was incorrect was ultra vires the power contained in s.68 of the Act.

The Department submitted that the event which occurred was that Elliot was required to notify the Department if her combined income as shown in the letter was incorrect. What 'happened' was that Elliot's income as shown was incorrect and she was therefore required to notify of that event.

Meaning of 'event' or 'change in circumstances'

The AAT considered that the notice of 18 July 1996 was a valid notice under s.68(1) of the Act. The Tribunal went on to say:

'In the present matter, the Tribunal, whilst sympathetic to the position of the applicant, considers that to construe the section so as to mean that notification by a client to the Department was not necessary where a notice was sent and contained a figure which did not in fact represent the combined income would fly contrary to what needs to be reasonably considered of clients of the Department, and contrary to the express purpose of a notice such as the one sent to the applicant. In effect, the notice asks the applicant to inform the Department if the combined income figure is not the actual combined income of the applicant and her partner. In this case, it clearly does not represent the correct figure.

It does not matter therefore as to why the figure is incorrect at that stage. It could be due to administrative error on behalf of the Department, or it could not. The only concern at that stage, is whether or not the figure in the notice is wrong. If it is wrong, then there is an obligation on the part of the applicant to notify the Department.

The Tribunal notes that there are clear similarities between this present case and *Re Donald*. In *Re Donald*, the Tribunal was concerned with a notice, which was to all intents and purposes the same as in the present application. In *Re Donald*, the Tribunal held that the inclusion of a figure in a notification notice which does not represent the actual combined income is an "event" "which required a response" (paragraph 53).

The Tribunal notes that in the present case, there is a question as to whether the applicant read the notification notice or not. The Tribunal must consider however, that if the applicant did not read the notice, or did not read it fully, she did so at her own peril. The Tribunal notes that this is consistent with *Re Donald*, where the Tribunal considered that there was an obligation to at least read the notification notices.'

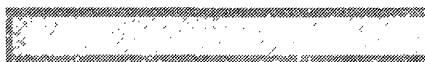
(Reasons, paras 38-40)

The AAT concluded that the combined income as shown on the notification notice dated 18 July 1996 was incorrect, and this constituted an 'event' pursuant to s.68(1) of the Act which required Elliot to notify the Department. In failing to respond to the 'event', Elliot failed to comply with a provision of the Act and the overpayment became a debt due to the Commonwealth under s.1224(1) of the Act. The Tribunal was satisfied that there was no reasonable excuse as to why Elliot could not comply with the notification requirements. The debt could not be waived on the basis of administrative error because the failure to comply was a contributing cause to the debt.

Formal decision

The decision of the SSAT was affirmed.

[A.T.]



Age pension: assets test; hardship provisions

HOWLETT and SECRETARY TO THE DFaCS
(No. 19990317)

Decided: 13 May 1999 by J. Dwyer.

Background

The Howletts were on age pension from 1988, being paid under the 'financial hardship' provisions of the *Social Security Act* (the Act). These provisions allow for payment of pension to people whose assets would otherwise preclude payment to them. The Act allows this where it can be established that a person has unrealisable assets and would suffer severe financial hardship if the hardship provisions were not applied to them. The age pension that was being paid to the Howletts was 'stopped' (in the words of the decision informing them of the event) on 5 September 1996, at about the time when they sold a parcel of land, one of several that had been subdivided the previous year on a parcel of farming land held by the wife. The Howletts each owned a farming property which was farmed in partnership with their son who owned a third property also farmed within the partnership. The main property had been in the family for generations. The Howletts' own house on that property was the one they moved into when they married some 60 years previously. The property in the wife's name had been bought in 1962.

After the subdivision of the wife's block into six blocks in 1995, the blocks were placed on the market. Only one of the six was sold. The settlement date for that sale was 16 September 1996, shortly after the decision to 'stop' their pensions was made. At the time of the decision, the value of the whole of the Howletts' property exceeded \$377,500 which was the assets limit for social security pension payment at the time of the decision to 'stop' the pension. Whilst the Department accepted that some of the property was an 'unrealisable asset', the subdivided blocks were not regarded as unrealisable by the Department.

The legislation

The Act defines an 'unrealisable asset' as follows:

'11.(12) An asset of a person is an **unrealisable asset** if:

- (a) the person cannot sell or realise the asset; and
- (b) the person cannot use the asset as a security for borrowing.

11.(13) For the purposes of the application of this Act to a social security pension (other than a pension PP (single)), an asset of a person is also an **unrealisable asset** if:

- (a) the person could not reasonably be expected to sell or realise the asset; and
- (b) the person could not reasonably be expected to use the asset as a security for borrowing.'

As stated above, where assets are in excess of the limits set under the Act, the hardship provisions may be applied. The circumstances in which this will occur are provided for in s.1129 of the Act. Section 1129 sets out the following:

'1129.(1) If:

- (a) either:
 - (i) a social security pension is not payable to a person because of the application of an assets test; or
 - (ii) a person's social security pension rate is determined by the application of an assets test; and
- (b) either:
 - (i) sections 1108 and 1109 (disposal of income) and 1124A, 1125, 1125A and 1126 (disposal of assets) do not apply to the person; or
 - (ii) the Secretary determines that the application of those sections to the person should, for the purposes of this section, be disregarded; and
- (c) the person, or the person's partner, has an unrealisable asset; and
- (d) the person lodges with the Department, in a form approved by the Secretary, a request that this section apply to the person; and
- (e) the Secretary is satisfied that the person would suffer severe financial hardship if this section did not apply to the person;

the Secretary must determine that this section applies to the person.

1129.(2) A decision under subsection (1) takes effect:

- (a) on the day on which the request under paragraph (1)(d) was lodged with the Department; or
- (b) if the Secretary so decides in the special circumstances of the case—on a day not more than 6 months before the day referred to in paragraph (a).

1130.(6) If:

- (a) an unrealisable asset is a farm; and
- (b) the farm is operated by a person who is a family member of the person to whom this section applies; and
- (c) it is not reasonable to expect the farm to be used for another purpose;

the Secretary, in working out the amount per year that could reasonably be expected to be

obtained from a purely commercial application of the farm, is to have regard to the overall financial situation of the person operating the farm.'

The Department did not dispute that certain of the property continued to be an 'unrealisable asset' because the Howletts could not be expected to sell or realise the property on which they lived; which produced their livelihood and that of their son; and which they could not be expected to borrow against as the farm had not been income producing due to drought. However, the Department submitted that the wife's property (the subdivided property), one block of which had been sold, was not an 'unrealisable asset'.

In regard to the unsold remaining blocks, the AAT said that the overall economic value of the farm would be affected by the sale of further blocks, as the land was required for grazing. It also found that there had been no offers to purchase any of the remaining blocks for the two years they had been on the market. The Tribunal expressly found that the remaining land (including the subdivided blocks) was an 'unrealisable asset'.

The AAT pointed out that the Secretary must determine that s.1129(1) applies to a person if paragraphs (a) to (e) of s.1129 are met. Paragraph (c) here was met because it was established that the asset was unrealisable. Paragraph (d) was met because the Howletts had lodged the necessary application, requesting to be paid under the hardship provisions. The AAT then turned to the remaining subsections of s.1129 to establish whether the hardship provisions should be applied.

Disposal of assets

Subsection 1129(1)(b) deals with the consideration of whether the person has disposed of income or assets. When Lot 5 was sold, the proceeds were paid into the farm partnership account; \$50,000 was placed into fixed deposits of \$5000, maturing at monthly intervals. The proceeds were used for living expenses and to provide money for running the farm. The Department argued that paying the proceeds of sale to the partnership constituted a disposal of asset as that meant an asset that would otherwise be available for the personal use of the Howletts was deprived.

The AAT said, however, that there were two difficulties with that proposition. First, the actual settlement of the land occurred on 16 September 1996 and so could not be relevant to the decision made on 4 September 1996 to 'stop'

pension. Second, the sum was not given away by being put into a partnership account in fact used for the Howletts' living expenses and for farm expenses. The same account into which the sale proceeds were put was the one used to receive their pension payments before these ceased. Also, paying the proceeds into the partnership account meant that a joint liability of the Howletts in the books of the partnership was turned into a credit balance. Paragraph (b) of s.1129(1) was satisfied — no assets had been disposed of.

Severe financial hardship

Paragraph (1)(e) of s.1129 requires that a person establish that they would suffer severe financial hardship if the section did not apply to them. The Department referred to policy guidelines that for a married couple, liquid assets over \$10,000 would preclude a finding that the couple was in severe financial hardship. The AAT accepted the Departmental guidelines (with one slight reservation), and applied *Lumsden and Secretary to the DSS* (1986) 34 SSR 430, where the AAT said that hardship will be difficult to establish where an income in excess of the maximum pension rate payable is available to a person. With some \$20,000 available to them at or about the time of the decision under review, the Howletts could not establish financial hardship.

The Tribunal, therefore, sought further evidence from the Howletts after the hearing to establish whether the balance in the Howletts' partnership account fell below \$10,000 at any point of time between when the decision had been made and the time of the hearing before the AAT. This raised the question of whether the AAT could look at facts after the decision was made or was limited to reviewing only those facts at the time of the decision to 'stop' the pensions.

Date at which facts to be determined

The Tribunal addressed the question of whether the Tribunal's review function was limited to the time at which the decision under review was made. On this question, the Tribunal was again able to draw on the decision in *Lumsden*, which bore some similarity to the Howletts' matter in that *Lumsden* did not meet the hardship criteria at the time the decision under review was made, but did so at the time of the hearing. In looking at this issue, the AAT considered whether the Federal Court decision in *Haidar v Secretary to the DSS*, (1998) 3(5) SSR 72 decided subsequently to *Lumsden*, prevented the course adopted in *Lumsden* which was to take into account

facts subsequent to the time of the decision under review. However *Haidar* concerned a closed period, whereas the Howletts' issue did not, and in any event the Court in *Haidar* stated the following general proposition consistent with *Lumsden* and ultimately the course adopted by the AAT in the Howletts' matter:

'It is clear enough that the Tribunal sitting on appeal from a decision maker, be it the Minister or another Tribunal, must take into account the facts as they exist at the time the matter is heard by the Administrative Appeals Tribunal, to the extent those facts are relevant to the decision. It is not limited to taking into account events which occurred at the time the original decision was made, nor for that matter facts as they were known at that time, notwithstanding that later knowledge would lead to a revision of the earlier factual assessment.'

(Reasons, para. 43)

However, the powers of a review Tribunal may be limited further by the nature of the decision itself. In this instance the question arose whether the decision to 'stop' the pension was a decision to cancel or one to suspend.

Suspension or cancellation

As explained in *Freeman v Secretary to the DSS* (1988) 45 SSR 587 the distinction between suspension and cancellation is important in establishing the extent of the Tribunal's powers to vary a decision from a date later than the original decision was made:

'... the nature of a cancellation of the pension is different in substance and effect from that of suspension. A decision suspending a pension has an ongoing effect and the suspension may be terminated at any appropriate time. It may well be within the ambit of the Tribunal's decision to terminate a suspension if the facts before the Tribunal showed that the pension or benefit ought to have been suspended only up to a particular date. A decision cancelling a pension does not have ongoing effect in that way.'

The distinction was of importance here where the original decision referred to pension being 'stopped'. Was this the language of a cancellation or of a suspension? The AAT decided it was a decision to cancel the pension.

The AAT pointed out that had the decision made on 4 September 1996 to 'stop' pension been correct at the time it was made (which the Tribunal expressly found it was not) the Tribunal would have had no power to reinstate age pension from a later date when the partnership account may have fallen below \$10,000.

The AAT found that the decision under review was one to cancel pension and it was not correct at the time it was made.

Section 43(1)(c) of the *Administrative Appeals Tribunal Act 1975* allowed the Tribunal to set the cancellation decision aside and substitute a decision to suspend pension from the first payday after the settlement moneys were received, with the suspension to continue till the point of time when liquid assets fell below \$10,000. This was established on the evidence supplied after the hearing as being 15 June 1998.

Formal decision

The AAT set aside the decision under review and substituted the new decision that age pension should be suspended from the first pension payday after 16 September 1996 until the first pension payday after 15 June 1998.

[M.C.]



Age pension: ordinary income on a yearly basis

SECRETARY TO THE DFaCS AND
LENNON
(No.19990368)

Decided: 31 May 1999 by Deputy
President A.M. Blow.

Background

The two respondents, Mr and Mrs Lennon, were age pensioners. Mr Lennon for a number of years did casual work for the Board of Studies (NSW), marking Higher School Certificate examination papers. In 1997 he did such work from 29 October until 28 November. The Secretary contended that Mr Lennon's fortnightly income during the fortnights that he worked should have been taken into account in assessing his rate of pension for each relevant payday. The SSAT, by majority, took the view that his income from that work had to be taken into account over a one-year period.

Mr Lennon earned a total of \$2329 from the employment in question. On 15 December 1997 a delegate of the applicant decided to reduce the age pension rate of both respondents for the pension paydays that fell on 13 November 1997 and 27 November 1997 on the basis that Mr Lennon's ordinary income on a yearly basis from employment was \$25,332. That decision was affirmed by an authorised review officer on 11 May 1998. On 15 July 1998, the SSAT set aside the delegate's decision, and

remitted the matter for reconsideration with a direction that the respondents' age pension rate for the two paydays in question be recalculated on the basis that Mr Lennon's ordinary income on a yearly basis from employment was \$2329.

The legislation

Section 55(a) of the Act states that a person's age pension rate is to be worked out using Pension Rate Calculator A, in s.1064 of the Act. Module E states:

'1064-E1. This is how to work out the effect of a person's ordinary income on the person's maximum payment rate:

Method Statement

Step 1 Work out the amount of the person's ordinary income on a yearly basis.'

Mr Lennon's income from his casual work clearly came within the definition of ordinary income.

The issue

Was Mr Lennon's 'ordinary income on a yearly basis' to be calculated on the basis that he would continue to earn at the rate he was earning during his periods of employment; or should the amount that he actually earned during those weeks have been treated as his yearly income from employment?

The AAT referred to *Harris v Director-General of Social Security* (1985) 59 ALJR 194 in which the High Court discussed the difference between annual amount of income and annual rate of income. The AAT also referred to an earlier AAT decision *Dunning and Secretary, Department of Social Security* (1986) 33 SSR 420. In *Dunning*, the AAT, relying on *Harris* stated:

'different means may have to be adopted to calculate the annual rate of income of different pensioners, the means being suited to the source or sources of the pensioner's income and the manner in which the pensioner derives that income. But the adoption of a means of calculating the annual income is not a matter of discretion, though it may involve judgment or evaluation. In any particular case, there is a means of calculating the annual income which is the most appropriate in the circumstances of that case. That means, once identified, is the only correct means to adopt to calculate the income.'

(Reasons, para. 14)

The AAT also referred to *Secretary, Department of Social Security and Morris* (1996) 2(6) SSR 80, a case which concerned the meaning of the words 'ordinary income on a yearly basis' in which the AAT decided that regard must be had to the person's income over a 12-month period. The AAT in *Morris* indicated that regard must be had to an