Federal Court

Income test: 'carries on a business'

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

Decided: 11 August 1998 by Drummond J.

The DSS had appealed against the AAT's decision that in assessing the rate of age pension to be paid to Ekis, who worked as a commission-only real estate saleswoman, her ordinary income must be reduced by the expenses she incurred in generating those earnings (see (1998) 3 *SSR* 51).

The law

Subsection 1075(1) of the *Social Security Act 1991* (the Act) provides:

> **1075.(1)** Subject to subsection (2), if a person carries on a business, the person's ordinary income from the business is to be reduced by:
>
> (a) losses and outgoings that relate to the business and are allowable deductions for the purposes of s.51 of the *Income Tax Assessment Act 1936* or s.8–1 of the *Income Tax Assessment Act 1997*, as appropriate; and
>
> (b) depreciation that relates to the business and is an allowable deduction for the purposes of s.54(1) of the *Income Tax Assessment Act 1936* or Division 42 of the *Income Tax Assessment Act 1997*; and
>
> (c) amounts that relate to the business and are allowable deductions under s.82AAC(1) of the *Income Tax Assessment Act 1936*.

The AAT decision

The issue before the AAT was whether Ekis was a person who 'carries on a business' within the meaning of s.1075. It noted authorities to the effect that terms in the Act, also found in other legislation, particularly taxation legislation, could not automatically be treated as bearing the meaning they have in different statutory contexts. It referred to the *Macquarie Dictionary* that defines 'business' as 'one's occupation, profession, trade or calling' where 'occupation' is defined as 'one's habitual employment, business, trade or calling'. It noted that this definition does not refer to whether the person is an employee. Having concluded that Ekis was engaged in 'an occupation or calling in the business of conducting real estate sales', the AAT sought for the meaning to be given to the other component of the phrase, 'carries on', and concluded that Ekis met the statutory requirements.

The error

Drummond J observed that interpreting a composite phrase by dissecting it into its component words and seeking a meaning for each has long been identified as an inappropriate method of constructing such a phrase.

The Court noted that at one stage the definition of 'income' in social security legislation meant net realised income. However amendments in 1991, now in s.1075 of the Act, mean that pension has to be reduced by reference to gross income from all sources, save only for a few specific classes of outgoings of which expenses incurred in carrying on a business are one. Section1075(1) identifies the only class of business expense that is to brought into account in calculating a pension entitlement as limited to expenses incurred in carrying out a business which are deductible from gross income to arrive at assessable income for the purposes of the ITAA. Therefore the expression 'carries on a business' in s.1075 of the Act has the same meaning as the expression 'in carrying on a business' in s.51of the ITAA. It follows that if a person who claims to be carrying on a business for the purposes of s.1075 is an employee, losses and outgoings in respect of the employment cannot be brought into account in the pension entitlement calculation.

To give effect to s.1075 of the Act the AAT was required to determine whether Ekis was an employee, but it had not done so because it had misinterpreted that provision.

Other issues

The Secretary had first argued that on the facts it found the AAT could not in law conclude that Ekis was carrying on a business. Drummond J rejected this approach, suggesting that it amounted to an attempt to magnify or inflate questions of fact into questions of law, and pointed out it that is not the function of the Court to determine questions of fact.

Similarly, the Secretary invited the Court to dispose of the matter rather than send it back to the AAT, on the basis that on the AAT's findings and the undisputed evidence, the conclusion that Ekis was not a person who carries on a business was inescapable. The Court noted that the old test for resolving the question of employee or independent contractor, viz, whether the work was done under such a degree of actual or potential supervision that the worker should be characterised as an employee of, rather than an independent contractor to, the person with supervisory authority, has now been replaced by a more flexible test and must be determined by reference to the circumstances of the particular case. In resolving this question in a particular setting, no one factor is likely to be decisive. Rather, the proper characterisation of the relationship will depend on an assessment of the relative significance of a number of different features of the relationship. That is a task for the AAT, not the Court.

Formal decision

The Court allowed the appeal and remitted the matter to the AAT as originally constituted for redetermination.

[K.deH.]

Newstart allowance: case management activity agreement breach

GARNYS v SECRETARY TO THE DEETYA (Federal Court of Australia)

Decided: 25 June 1999 by Hill J.

Garnys appealed against the AAT decision that his newstart allowance should be cancelled on the basis he failed to comply with the terms of his case management activity agreement (CMAA).

The facts

Garnys had been unemployed for some time. On 1 May 1996 he signed a CMAA, one of the conditions being that Garnys agreed to accept a suitable job offer. He also agreed to apply for all positions where appropriate. Garnys was directed by his case manager to attend an interview and information session with a supermarket that was recruiting for a

number of positions. Garnys attended the information session and completed an application form. He told the personnel officer he was not able to stay for the interview as he had other commitments. The personnel officer thought Garnys had completed his application form inappropriately as he had not completed the work history and urged Garnys to stay for the interview. Garnys waited for some time but became impatient and unhappy. He said he suffered from a number of medical conditions and needed to see a doctor. He eventually left and went to his own doctor. He was unable to obtain an appointment and went to another medical centre. He did not see a doctor at that centre either. Garnys told the AAT that he thought his written application was adequate. He hoped to proceed to a second interview without having to attend the first one.

The AAT decision

The AAT did not accept Garnys' explanation and found that Garnys had been told that he needed to attend the first interview before he would be offered a second interview. In contrast, the SSAT had found that Garnys had done everything he could within the limits of his personal circumstances to obtain a job. The SSAT stated that it reached this conclusion because no final decision would be made on the day of the first interview as to who would be offered a job.

The AAT found that Garnys had inadequately completed his application and that the events which occurred when he went for the first interview that led to him not staying, were reasonably foreseeable and known to him. The AAT concluded that Garnys had not done everything possible to obtain a job as required by his CMAA. The AAT then went on to look at Garnys' general attitude and compliance with the CMAA. His case manager had stated that Garnys had been difficult to contact and had wanted extensions of time regarding notifications. He would often find reasons for not doing certain jobs.

The law

Section 45(5) of the *Employment Services Act 1994* provides that a person will not be qualified for a newstart allowance unless, having entered into a CMAA, the person satisfies the Employment Secretary that he or she is taking reasonable steps to comply with the terms of the agreement. Section 45(6) then provides:

> For the purposes of paragraph 5(b), a person is taking reasonable steps to comply with the terms of a case management activity agreement unless the person has failed to comply with the terms of the agreement and:
>
> the main reason for failing to comply involved a matter that was within the person's control; or
>
> the circumstances that prevented the person from complying were reasonably foreseeable by the person .

Onus of proof

Hill J noted that Garnys was not represented, and on appeal he had wanted to persuade the Court that the Tribunal's conclusions were factually wrong. He wished to present evidence that he had attended a medical centre on the relevant day but had been unable to see the doctor because the centre had closed. The Court found that:

> The fact that the Tribunal decided the facts in a way which Mr Garnys would see as wrong does not demonstrate that the Tribunal erred in law. Clearly on the material before it, the Tribunal was entitled to conclude (it is not totally clear that it did) that Mr Garnys did not go to see any doctor on 25 May 1996. It was for Mr Garnys to produce the evidence to the Tribunal. A tribunal cannot err if it makes the finding of fact on the evidence before it where that evidence is incomplete. It is for an applicant to put all relevant factors before the Tribunal.

(Reasons, para. 18)

Events within the person's control

The Federal Court then went on to consider the operation of ss.44(5) and (6). Hill J stated that without referring to previous Federal Court decisions, he would have thought that s.45(6) operated as a definitional section for s.45(5). Section 45(5)(b) on its own implied that if reasonable steps were taken to comply with the agreement, even if there was no ultimate compliance, it was sufficient to satisfy the paragraph. However, s.45(6) means that it is not necessary for the person to show they have taken reasonable steps to comply with the agreement. 'Rather the job seeker is deemed to have taken reasonable steps to comply with the terms of the agreement unless the provisions of subsection (6) operate': Reasons, para. 22.

Newstart allowance will be cancelled or suspended if the person has failed to comply with the agreement and either paragraph 45(6)(a) or (b) is made out. The Court noted that this does not accord with the interpretation in *Secretary to the DEETYA v Ferguson* (1997) 147 ALR 295. Hill J noted though that the difference in interpretation did not matter in this case.

The agreement

The Federal Court stated that where there was a suggestion that a person had failed to comply with the terms of the agreement, that person should be made aware of which precise terms of the agreement had not been complied with, otherwise the person would be denied natural justice. Garnys had been told at various stages of three matters that might lead to non-compliance. The first was failure to attend the interview, the second the inappropriate completion of his application form, and the third was the failure to do everything he could to get a job. The AAT appears to have relied on the first of these reasons, that is, the failure to attend the interview. Garnys argued that he did in fact apply for the position. Hill J noted:

> Given the consequences of action which could lead to a job seeker being destitute there is much to be said for the view that the language in an agreement such as this should be strictly construed.

(Reasons, para. 25)

The Court noted a further problem because the agreement stated that Garnys should apply for jobs where appropriate. Garnys suffered from dermatitis so he could not work with food, and so a job with a company selling food was inappropriate.

Failure to comply with the agreement

Hill J stated that the AAT's reliance on the fact that Garnys had failed to fill out the application form appropriately was an irrelevant factor when considering s.45(6).

The Court then turned to whether the main reason for Garnys failing to comply with the agreement was within his control (s.45(6(a)). It was necessary for the AAT to make a finding of fact as to what the main reason was for failing to comply with the agreement. Hill J found that the AAT in its reasoning did not identify the main reason for Garnys failing to apply for an appropriate job. There was an obligation on the Tribunal, a statutory obligation, to make findings of material questions of fact and to give reasons for those findings. The AAT simply stated that whatever the main reason was, it was within Garnys' control.

Similarly, to comply with s.45(6)(b), the AAT would need to identify any circumstances preventing the person from complying with the agreement. Having identified those circumstances, the AAT then must decide whether these circumstances were reasonably foreseeable. Once again the AAT had not identified any circumstances although it has said that everything was foreseeable. The Court noted that if *Ferguson* is right, then it may well be that the AAT was required to consider whether Garnys took reasonable steps to comply with the agreement.

Formal decision

The Federal Court set aside the decision of the AAT and remitted the matter back for re-hearing in accordance with the law.

[C.H.]

[Contributor's Comment: Hill J's comments that 'it is for an applicant to put all relevant factors before the Tribunal' would appear to run counter to the observations of the Full Court in *McDonald v Director-General of Social Security* (1984) 6 ALD 6, that there is no legal onus of proof before the AAT. Pursuant to s.33(1)(c) of the *Administrative Appeals Tribunal Act 1975* the AAT is not bound by the rules of evidence and 'may inform itself on any matter in such manner it thinks appropriate'. Presumably this would have enabled the AAT to make further inquiries to establish whether Garnys had gone to see a doctor on 25 May.
Although newstart recipients no longer enter CMAAs, the comments by Hill J on these agreements would apply equally to Newstart Activity Agreements (see s.601(4)).]

Disability support pension: continuing inability to work

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

Decided: 22 July 1999 by Drummond J.

The DSS appealed against the decision of the AAT that Pusnjak was entitled to be paid the disability support pension (DSP).

Background

Pusnjak was 56 years old at the time of the appeal, having been born in 1942. He had a poor grasp of English and was poorly educated with no trade skills. He had spent his working life as a labourer. He was granted the invalid pension in 1988, which was replaced by the DSP in 1991. The pension was cancelled in 1996 because Pusnjak had an impairment of less than 20%. The SSAT agreed with that decision. The AAT decided that Pusnjak's back problem left him with an impairment of more than 20% and that he had a continuing inability to work.

The law

The qualification for DSP pension is set out in s.94 and provides:

> **94.(1)** A person is qualified for disability support pension if:
>
> (a) the person has a physical, intellectual or psychiatric impairment; and
>
> (b) the person's impairment is of 20 points or more under the Impairment Tables; and
>
> (c) one of the following applies:
>
> (i) the person has a continuing inability to work;
>
> ...
>
> **94.(2)** A person has a continuing inability to work because of an impairment if the Secretary is satisfied that:
>
> (a) the impairment is of itself sufficient to prevent the person from doing any work within the next 2 years; and
>
> (b) either:
>
> (i) the impairment is of itself sufficient to prevent the person from undertaking educational or vocational training or on-the-job training during the next 2 years; or
>
> (ii) if the impairment does not prevent the person from undertaking educational or vocational training or on-the-job training — such training is unlikely (because of the impairment) to enable the person to do any work within the next two years.
>
> **94.(3)** In deciding whether or not a person has a **continuing inability to work** because of an impairment, the Secretary is not to have regard to:
>
> (a) the availability to the person of educational or vocational training or on-the-job training; or
>
> (b) if subs. (4) does not apply to the person — the availability to the person of work in the person's locally accessible labour market.

Continuing inability to work

It was accepted before the Court that Pusnjak had a 20% or more impairment rating. The DSS argued that the AAT had not confined itself to assessing the impact of Pusnjak's impairment on his ability to work. It had also taken into account Pusnjak's personal circumstances, limited work skills and experience. The DSS argued that the wording of s.94(2) *the impairment of itself*, meant that these other matters could not be taken into account. It was argued by the DSS that the test was whether there was any work, occupation or activity available anywhere in Australia that the person would be able to do despite having the particular impairment.

According to Drummond J s.94(2) should be considered in the following way. First, the person must satisfy the requirement in s.94(2)(a) and then s.94(2)(b)(i). If the person does not satisfy s.94(2)(b)(i), then consideration must be given to whether he can meet the requirements of s.94(2)(b)(ii).

The Court then considered the argument of the DSS that s.94(2) should be narrowly interpreted. It concluded that very few people in Australia would ever satisfy the test.

> I therefore see no reason for finding in the existence of other welfare benefits a ground for adopting the extremely restrictive test of eligibility for the disability support pension which the Secretary (to the DSS) urges upon me.

(Reasons, para. 14)

Drummond J found the meaning of s.94(2) to be ambiguous or obscure. Applying s.15AB *Acts Interpretation Act 1901* he referred to extraneous material. The Court found that it could not be the purpose of the legislation to restrict the DSP to a relative handful of grossly disabled people. Parliament had identified 20% as the initial eligibility criterion, and this was quite low. Extraneous material revealed the clear legislative intent or purpose of s.94(2). The Explanatory Memorandum introducing the amendments to s.94 in 1995 stated that s.94(2)(b) was amended:

> To ensure that a person will not qualify for DSP if the person's impairment does not prevent the person from undertaking educational, vocational or on-the-job training unless such training would be unlikely (because of the impairment) to enable the person to do any work within two years.

Drummond J decided that:

> The only circumstance peculiar to the particular claimant that the Secretary can take into account is whether the claimant's impairment itself may prevent him from completing what would ordinarily be no more than a two-year retraining course in that time.

(Reasons, para. 26)

According to the Court it was also clear that attitudinal factors, such as lack of motivation to work, should be disregarded. However, this did not mean that the term 'impairment' was a narrow concept. It incorporated any psychiatric condition that might result from a physical injury. Also, the limited range of work activities that a person is fitted for by their actual skills and experience, could not be ignored.

Section 94(2)(a), according to Drummond J, was intended:

> to focus the decision makers' attention on whether the impairment by itself might prevent the particular pension applicant from doing any kind of work for which that person was already fitted by reason of his actual work skills and work experience, ie., work of the kind he was (the impairment apart) capable of doing without the need for any retraining.

(Reasons, para. 30)

Section 94(2)(b) then proceeds logically to identify the impact occupational retraining might have on the person's eligibility for the DSP.