

Formal decision

The AAT affirmed the decision under review.

[S.L.]

Parenting payment: 'carries on a business'

**CANTLAY and SECRETARY TO
THE DFACS**
(No. 199900725)

Decided: 29 September 1999 by
A.F. Cunningham.

Background

Since 1994 Cantlay had received sole parent pension. This pension was replaced by parenting payment and he continued to receive this until April 1998 when Centrelink cancelled his payment. As well, Centrelink raised a debt for overpayment of sole parent pension and parenting payment (single) for the period 30 May 1996 to 16 April 1998. Centrelink claimed that Cantlay had failed to disclose his income as an employee with Department of Premier and Cabinet during the period. Cantlay claimed he was an independent contractor, not an employee, and his business expenses should be allowable deductions from his gross salary in calculation of his rate of payment.

The issues

Whether Cantlay was 'carrying on a business' and entitled to reduce his ordinary income by the deduction of business related expenses?

The legislation

Section 1075(1) of the *Social Security Act 1991* states:

- (1) [Income reduced] 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 related to the business and are allowable deductions for the purposes of section 51 of the *Income Tax Assessment Act 1936* or section 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 subsection 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 subsection 82AAC(1) of the *Income Tax Assessment Act 1936*.

The nature of the relationship

Cantlay worked for Foley, a member of Tasmanian Greens Political Party. This work began in 1995 and he was initially remunerated very little with Foley meeting his expenses. At the same time, Cantlay was re-establishing his business 'Sounding Board Management and Research Services'.

After the 1996 election, more moneys were available to the Tasmanian Greens for advisory support services. The government required Cantlay be appointed by Department of Premier and Cabinet as a temporary employee. This was agreed to by Cantlay. His hourly rate was stated as \$13.96 per hour but Cantlay had negotiated with Foley an hourly rate of \$30.00 (less than his normal rate).

Cantlay maintained that his working relationship with Foley was as a consultant not employee. The formal arrangement with the State government was merely a mechanism for payment. He worked for Foley as he had done prior to the formal arrangement. His hours were irregular and variable. He basically worked from home, used his own equipment which included computers, a photocopier, Internet access and printers. He engaged two other people to assist him with his work for Foley who also used his home office equipment. Cantlay selected the type of work he wished to do and if there were a task that he felt was outside his area of expertise, he would suggest to Foley that he engage someone else.

Foley confirmed this arrangement with the Tribunal. He engaged Cantlay as a consultant for the purpose of providing advice, undertaking reports and legislative amendments. Foley stated that whilst he and Cantlay consulted as to the type of work that would be undertaken, Cantlay exercised control at all times in relation to what was prepared and was responsible for the outcomes.

The Department submitted that the period prior to March 1996 was irrelevant. Foley had no power to employ Cantlay but was merely his supervisor. The relationship between Cantlay and the Department of Premier and Cabinet was one of employee and employer and the fact that another type of relationship was intended was not relevant.

The Tribunal concluded that there was no dispute that the Department of

Premier and Cabinet employed Cartlay pursuant to an instrument of appointment during the relevant period. However this instrument of appointment and the relationship created did not of itself determine, for the purposes of the Act, whether or not Cantlay is entitled to have any business expenses deducted from his ordinary income. Pursuant to the provisions of s.1075 of the Act, Cantlay is entitled to reduce his ordinary income as defined in s.1072 by deductions allowable under the *Income Tax Assessment Act* if it is found that he is carrying on a business.

The Tribunal then considered a number of cases that looked at the definition of 'carrying on a business' — *Ekis and Secretary, Department of Social Security* (1998) 3 SSR 51 and *Evans v FCT* (1989) 98 ATC 4540. In *Blockley v Federal Commissioner of Taxation* (1923) 31 CLR 503 on the question of whether a person is carrying on a business, the High Court commented 'is one of fact, not of law, depending on a variety of circumstances ...'

The Tribunal also noted that the nature of an employer/employee/contractor relationship was recently examined by the High Court of Australia in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16. The Tribunal drew on these decisions to discuss the factual situation of Cantlay.

On balance the Tribunal found that the circumstances of Cantlay's employment relationship suggest one of a contract for services rather than a contract for service. It was task or result orientated rather than simply the provision of labour in return for a specified wage. There was sufficient evidence to persuade the Tribunal that Cantlay had established a business and was trading as Sounding Board Management and Research Service. He provided these services to Foley during the relevant period and was 'carrying on a business' within the meaning of s.1075(1) of the Act.

Formal decision

The decision under review was set aside and in substitution the Tribunal decided that the applicant's losses and outgoings, allowable under s.51(1) and s.54(1) of the *Income Tax Assessment Act 1936*, were to be deducted from his ordinary income in accordance with s.1075(1) of the *Social Security Act 1991*.

[M.A.N.]