

Administrative Appeals Tribunal Decisions

Newstart allowance: Activity Test; unemployed

CASTLEMAN and SECRETARY TO THE DFaCS
(No. 2000/543)

Decided: 30 June 2000 by S.M. Bullock.

Background

The applicant claimed newstart allowance on 23 December 1997. During the period 26 October 1998 to 5 February 1999, he was working as a Finance Consultant for NSW Home Loans. The Department decided that he did not meet the Activity Test during this period due to the work he was carrying out at the time.

The issue

To qualify for newstart allowance, a person must satisfy the Activity Test or not be required to satisfy this test. The sole issue is this appeal was whether the applicant was satisfying the Activity Test, i.e. was he 'actively seeking and willing to undertake paid work' within the meaning of s.601(1) of the Act?

The evidence

Castleman accepted a position as a Finance Consultant for NSW Home Loans. The characteristics of his position and his activities during this time were:

- he was not bound by particular hours;
- he initially commuted from Sydney to Wollongong each day and later moved to Wollongong to set up a flat which he used as an office;
- he worked for 33-40 hours a week;
- he travelled at least 12,000 business kilometres as part of the work;
- he installed a fax/answering machine and rented accommodation in Wollongong (away from his residence in Sydney);
- he received \$1,000 month retainer;
- he was required to provide weekly sales reports and attend meeting as required.

Evidence was also given that he would spend approximately 26 hours a week in relation to job-seeking activities and make four to five applications a month.

The submissions

It was submitted on behalf of the applicant, that Castleman knew this job would not be

successful and that it was in his interest to find a 'proper job'. Also his job-seeking activities were 'beyond the average job seeker in terms of hours spent'.

The cases of *McKenna and Director-General of Social Services* (1981) 3 ALD 219 and *Director-General of Social Services v Thomson* (1981) 38 ALR 624 were referred to as authority that if a person's main focus is to obtain a job, then other activities do not mean that this person is not a job seeker.

Hours spent by Castleman seeking work and the fact that he made a loss from this business were also submitted as factors to be taken into account.

The Department submitted that Castleman's main focus was his job and that employment seeking was passive. In effect he had a full-time job during the period — the fact that he made a loss was not relevant.

Findings

The AAT accepted the evidence in relation to Castleman's activities during the period. It concluded that he held himself out as a Finance Consultant and tried to make the position succeed 'as evidenced by his commitment of time, energy and finances'.

The Tribunal considered the cases of *McKenna* and *Thomson* and also referred to the cases of *Te Velde and Director-General of Social Services* (1981) 3 ALN N111, *Weekes and Director-General of Social Services* (1981) 3 ALN N141b and *Doyle and Secretary, Department of Social Security* (1985) 26 SSR 313.

The Tribunal concluded that the fact he continued job-seeking activities does not detract from his position as an employed person as this is not uncommon for any person seeking to better their employment situation. In essence, the evidence was not suggestive of a person who was unemployed.

Formal decision

The AAT set aside the decision under review in relation to earlier periods that were not in dispute and affirmed the decision in relation to the period 28 October 1998 to 5 February 1999 on the basis that Castleman did not satisfy the Activity Test during this period.

[R.P.]

Newstart allowance: fraud, effect of bankruptcy on overpayment debt, waiver

DOBSON and SECRETARY TO THE DFaCS
(No. 2000/41)

Decided: 28 January 2000 by J.T.C. Brassil.

Background

Dobson received newstart allowance (NSA). He worked intermittently as an actor. On 27 May 1997, the DFaCS decided to raise and recover an overpayment of \$2453.83 for the period from 20 June to 27 November 1996. On 27 November 1997 Dobson entered bankruptcy and he was discharged in June 1998. However, at the time of the bankruptcy, the Commonwealth did not attempt to prove a debt. The SSAT set aside the DFaCS decision to raise and recover a debt, remitting the matter to Centrelink with directions to recalculate the debt. The DFaCS appealed to the AAT.

Effect of bankruptcy

The issue before the AAT was whether the debt owed to the Commonwealth survived the bankruptcy. Section 153(2)(b) of the *Bankruptcy Act 1966* provided that discharge from bankruptcy does not release the bankrupt from a debt incurred by means of fraud. The DFaCs alleged that Dobson's failure to fully declare income in fortnightly declarations as required by s.658 of the *Social Security Act 1991* (the Act) amounted to fraud.

Dobson argued he was not well enough to cope with official matters and may have fallen down in regards to the declarations of income due to illness, not fraud. The AAT considered a medical report from Dr Benjamin Elisha, Dobson's General Practitioner who reported that due to various illnesses and distressing personal matters his patient's 'mentality at the time was not coherent'. In oral evidence Dr Elisha described various illnesses and conditions including heart disease, hypertension, depression, shoulder and back injuries, diabetes and an angioplasty. Dr Elisha said that, given his medical