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 form 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

problems, he did not expect Dobson to function properly in work-related matters.

Submissions

The DFaCS submitted that s.153(2)(b) of the *Bankruptcy Act 1966* did not allow Dobson to avoid the debt as the false representations of income in the fortnightly declarations amounted to fraud. Hence the debt was said to have survived the bankruptcy.

Dobson argued there were special circumstances at times of the allegedly fraudulent statements. His mother died on 31 October 1996. His relationship of 20 years broke down in 1996 and he had serious health and psychological problems. Dobson gave evidence to the AAT that, as he had great difficulty in coping with everyday living at the time, many official and administrative tasks were beyond him. He told the AAT that payments from his acting work arrived sporadically, some being royalties or residuals for work completed years ago.

Consideration of the issues

The AAT found that, in breach of the *Social Security Act 1991,* Dobson failed to notify Centrelink of some income received. Whilst the amount of the debt was unclear, the AAT was satisfied that there was a debt of approximately $2500.

The AAT referred to the case of *Secretary, Department of Social Security v Southcott* 2(9) *SSR* 126 where North J found that the right of the Commonwealth to recover a debt is limited in the case of bankruptcy. The means of debt recovery provided in the *Social Security Act 1991* are replaced by the right of the Commonwealth to prove a debt in bankruptcy. Because the Commonwealth did not prove the debt, then, unless there was a fraud, the right to recover a debt ceased when Dobson became bankrupt.

Fraud?

Did Dobson's failure to fully declare all income, as required by the *Social Security Act 1991* amount to fraud? The AAT cited *Civitareale and Secretary, Department of Family and Community Services* [1999] AATA 486. This case applied the definition in Osborn's Concise Law Dictionary, stating that fraud entails 'moral obliquity'.

The definition also stated

> fraud is proved when it is shown that a false representation has been made
>
> (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false...

The AAT also considered the case of *R v Sinclair* [1968] 3 All ER 241 at 146 which stated that 'to cheat and to defraud is to act with deliberate dishonesty to the prejudice of another's propriety right'.

Having considered Dobson's medical and emotional condition at the time of the alleged fraud, the AAT was not able to find any deliberate dishonesty or any false representation made knowingly or recklessly. Hence the AAT said a failure to notify in these circumstances was not fraud under the *Bankruptcy Act 1966.* As there was no fraud, the debt owed to the Commonwealth ceased when Dobson became bankrupt. Hence, withdrawals of repayments from Dobson's DSP were not authorised and should be repaid.

Although it did not need to consider the issue of waiver, the AAT commented that it would consider a waiver favourably had the debt remained.

Formal decision

The SSAT decision was set aside. The debt owed to the Commonwealth ceased on Dobson's bankruptcy. All withdrawals from his pension since that date were not legal and should be repaid.

[H.B.]

Family allowance overpayment: special circumstances

GIBBONS and SECRETARY TO THE DFaCS (No. 2000/464)

Decided: 9 June 2000 by J.A. Kiosoglous.

Background

The applicant received family allowance after providing an estimate on 24 June 1997 of $60,000 for 1997/98 income. Actual income was more than 10% of the estimate and a debt was raised for the period 3 July to 18 December 1997.

The issue

The issues in this appeal were:

- is there a debt?
- should the debt be waived?

The evidence

Gibbons represented his wife. His evidence was that he had advice from Centrelink that there was a 25% leeway, rather than 10%. He submitted, therefore, that the debt arose due to administrative error.

Evidence was also given of their current family situation, including:

- failure of a business and subsequent bankruptcy;
- their 13-year-old son had suffered from ADD for seven years;
- their 6-year-old son suffered from cerebral palsy and micro cephalic epilepsy. This son had a life expectancy of five years and there were 'enormous' care and financial obligations;
- the decision to give their children education in Adelaide and consequently incurring $135 month in bus passes;
- general financial difficulties.

The Department argued that, while sympathetic to the applicant's situation, there was a demonstrated capacity to repay without compromising the children's care.

The law

There was no dispute that a debt existed under ss.885 and 1223. The Tribunal considered the application of the administrative error provision of the Act but found that if there was an error it did not cause the debt.

The main issue was the application of special circumstances waiver which is covered by s.1227AAD.

The AAT accepted that the debt could not be written off and that the applicant did not 'knowingly' make false statements or breach the Act.

The AAT found that the 'striking feature' was the 'enormity of the burden' faced by the applicant and her husband. The Tribunal discussed the issue of distinguishing sympathy and special circumstances. The Tribunal noted that it should consider the overall effect of the debt recovery against the impact that recovery would have on the family. It also noted that it should consider the best interests of the children and their quality of life.

The Tribunal found the expenses associated with the children's care were unusual and exceptional, as compared with other disabled children. This together with other financial issues and the burden of caring for the children, especially the six-year-old constituted special circumstances — and warranted waiver of the debt.