Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Parenting payment debt: income from business or employment; waiver

CROOK and SECRETARY TO THE DFaCS (No.19990923)

Decided: 8 December 1999 by Dr. E. Christie.

Background

Crook returned to Australia in 1997 after a ten year absence. He and his wife applied for family allowance and parenting payment in November 1997. At that time Centrelink advised him that his entitlements would be based on an annual income of $24,000 and provision of a profit and loss statement.

Having had extensive real estate experience, and believing he could re-establish such a career, Crook began work as an estate agent, on a commission-only basis, in October 1998. He contended that he was not an employee of the parent estate agent company as he was able to carry out activities to promote himself, and was anticipating high expenses in the first six months or so in the course of establishing himself in this career. On 20 November 1998 Crook was paid $8843 in commissions. Apart from this amount, and small earnings in March and June 1999, he received no other income in 1998-99. Crook had received a Centrelink letter in November 1997, although he did not read the notification obligations on the back of the letter. That letter included the advice that Crook's entitlements had been calculated on an income level of $254 a fortnight for each of Crook and his wife, and obliged him to notify Centrelink if he began work or if his income exceeded $60 a fortnight. As his income in 1998-99 did not exceed $24,000 he did not notify Centrelink of his employment or earnings. An overpayment occurred as Crook continued to be paid by Centrelink, his employment and earnings coming to light only after he lodged information with the Australian Taxation Office.

An overpayment was raised against Crook totalling $1243.80 for the period 8 October 1998 to 3 December 1998. This decision was affirmed by the Social Security Appeals Tribunal in March 1999. The critical issues were whether the income received by way of commission should be treated as income from a business or whether Crook was an employee. A further issue was whether the debt should be waived. It was argued by Crook that he had relied on the advice that his entitlement would be worked out on the figure of $24,000 per annum, and that if had been properly advised he would not have worked as a commission only real estate agent because he was aware of the high set up costs involved. He would have instead sought work as an employee.

The decision

The AAT, notwithstanding Crook's assertions, decided that though paid on commission Crook was an employee of the parent estate agent company, and was not carrying on a business. It said:

> The nature of Master/Servant, employer /employee/contractor relationship has been examined by the Courts over the years. A more "flexible" test is found in the decision of the High Court of Australia in ***Stevens v Brodribb Sawmilling Company Proprietary Limited*** (1985-1986) 160 CLR 16 wherein Mason J said at page 24:
>
> 'A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it: *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561, at p 571; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395, at p 402; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, at p 404. In the last mentioned case Dixon J said:
>
> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."
>
> But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question: *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539, at p 552; *Zuijs' Case*; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR at p 401; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at p 218. Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.'
>
> On consideration of all the factual evidence before the Tribunal, in terms of Mr Crook's duties and responsibilities at Richardson and Wrench, including the terms of the "Individual Employee Flexibility Agreement" as well as the "REIQ Employment Agreement" (Exhibit 5, Supplementary Submissions), Employer obligations and the relevant licence(s) held at the time the Agreement was entered into, the Tribunal concludes that, in his specific circumstances, Mr Crook was an employee of Richardson and Wrench and cannot be said to be carrying on a business for the purposes of the application of Section 1075 of the Act.

The AAT also concluded that the 1997 notification notice was sufficient to make Crook aware of his obligations to contact Centrelink should specific financial situations arise. By not reading the notification obligations on the reverse of the Centrelink letter sent to him in November 1997, Crook had contributed in part to the administrative error which led to the overpayment. As such, waiver of the debt under s.1237A could not occur. Further, the AAT noted the test of 'special circumstances' in *Beadle v Director General of Social Security* (1985) 26 *SSR* 321 — that to be 'special' circumstances need to be unusual, uncommon or exceptional. Crook's failure to read the notification obligations sent to him together with a consideration of the family's current financial position and employment prospects, led the AAT to conclude that special circumstances sufficient to justify exercise of the waiver contained in s.1237AAD did not exist.

Formal decision

The AAT affirmed the decision under review.

[P.A.S.]