Federal Court Decisions

Case Management Activity Agreement: reasonable steps to comply

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

Decided: 4 August 2000 by Birchett J.

The Department appealed to the Federal Court against the AAT decision that Fitzalan was taking reasonable steps to comply with the terms of his Case Management Activity Agreement.

The facts

Fitzalan had been in receipt of newstart allowance for more than 300 weeks. He entered into a Case Management Activity Agreement that stated that he would do everything he could to get a job. In October 1995 his case manager referred him to a job with the Roads and Traffic Authority (RTA) in the small town where he lived. Fitzalan attended the RTA and obtained a list of interview questions. He did not stay for the interview, and later telephoned the RTA to say that he was declining the job.

Fitzalan told his case manager that when he realised he would be required to camp away from home and work on weekends, he realised he could not accept the job. He thought that he would be required to be away from home for three to four weeks at a time camping. He had recently bought his own home and he liked to work on the house on the weekend.

The employer gave evidence to the AAT that Fitzalan would be required to work away from home for four days during the week. When he was away from home he would be given accommodation and full board in a motel at the employer's expense. If he was required to work on the weekend he would be paid penalty rates.

The law

When the decision was made that Fitzalan had not complied with the Case Management Activity Agreement, the applicable law was found in the *Employment Services Act 1994*. Sub-sections 45(5) and (6) provide:

> **45(5)** The person is not qualified for a newstart allowance or a youth training allowance in respect of a period unless ...
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> (a) when the person is required under section 38 to enter into a Case Management Activity Agreement in relation to the period, the person enters into that agreement; and
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> (b) while the agreement is in force, the person satisfies the Employment Secretary that the person is taking reasonable steps to comply with the terms of the agreement; and
>
> ...
>
> (6) 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:
>
> (a) the main reason for failing to comply involved a matter that was within the person's control; or
>
> (b) the circumstances that prevented the person from complying were reasonably foreseeable by the person.

Section 42(1) is also relevant. It provides:

> **42(1)** Subject to subsection (2A), for the purposes of paragraph 39(2)(a), particular paid work is taken to be unsuitable for a person if, and only if, in the Employment Secretary's opinion: (a) the person lacks the particular skills, experience or qualifications that are needed to perform the work and no training will be provided by the employer; or ...

The SSAT decision

The SSAT found that Fitzalan had not failed to take reasonable steps to comply with his Case Management Activity Agreement. The SSAT thought that Fitzalan had attended the interview and been given the questionnaire after the interview. After he read the questionnaire he decided not accept the job. Fitzalan's evidence to the SSAT was that he was particularly concerned about being away from home.

The SSAT concluded that Fitzalan had done everything within his power to obtain the job. Because it involved living away from home for an extended period, the job was not suitable for him.

The AAT decision

Evidence to the AAT indicated that Fitzalan's literacy skills were poor. He had left previous employment due to problems with reading and writing. The RTA told the AAT that they were intending to fill two positions and that five people were interviewed. Essential criteria for the position were an ability to understand and carry out instructions, and an ability to work overtime and stay away from home on short notice. The employer also advised that employees were accommodated in motels and provided with an allowance for meals. The employees were driven to the place of work on a Monday and driven home on Friday.

The AAT affirmed the SSAT decision on two grounds. The first ground was that because the job was temporary (for three to five months) it did not meet the general objective of the *Employment Services Act*, which was to assist a person to find sustainable employment. The second ground argued by the AAT was that Fitzalan was not able to understand and carry out instructions. Nor would he be capable of participating in the employer's Safe Work Practices because of his poor literacy skills. It found that certain paid work was unsuitable if the person lacked the particular skills to carry out that work.

Short-term employment

The Federal Court found that the AAT had erred in suggesting employment must be long term. There was nothing in the legislation suggesting that a job for three to five months was not suitable employment. Work for three to five months would have been of assistance to Fitzalan because he had been out of work for nearly six years. Any job would improve his skills and morale. There was nothing in the *Employment Services Act* that stated that employment should be for a particular duration.

Suitable employment

The second ground relied on by the AAT was in relation to s.42(1)(a). Burchett J noted that Fitzalan himself had never raised this objection. The Court found that there was simply no evidence that Fitzalan could not obey instructions or participate in Work Safe Practices. Fitzalan had a licence and had undergone a welding course. He had previously been employed and been able to carry out instructions. There was no evidence for the AAT's conclusion.

A fundamental error made by the AAT was to ignore the question of whether Fitzalan was in breach of the agreement to do everything possible to get a job. He did not attend the interview, and did not obtain full details of what the job involved.

The interaction of s.45(5) and (6)

Burchett J noted:

> In other words, it is not made clear whether subsection (6) merely provides one-way of satisfying the requirements of subsection (5)(b), or whether this is the *only* way of doing so. The problem has produced some conflict of authority.

(Reasons, para. 17)

In *Secretary to the DEETYA v Ferguson* (1997) 76 FCR 426 Mansfield J observed that s.45(5)(b) has primacy over s.45(6). Section 45(5) will only apply if the person satisfies the Employment Secretary that he or she is taking reasonable steps to comply with the terms of their agreement. Section 45(6) provides the threshold test. If that section is satisfied then the person must show the Employment Secretary he or she is taking reasonable steps to comply with the terms of the agreement. If the person has complied with the terms of the agreement then the person is taken to be taking reasonable steps to comply. If the person has failed to comply with the terms of the agreement, then he or she can still be taking reasonable steps to comply if the main reason for the failure was a matter not within his or her control, or the circumstances preventing compliance were not reasonably foreseeable. This reasoning was followed in two further Federal Court decisions.

However in *Garnys* v *Secretary to the DEETYA* (1999) 164 ALR 319 Hill J stated that he was of the opinion that s.45(6) provided the definition for s.45(5)(b). Burchett J concluded that the weight of authority was with the interpretation outlined by Mansfield J in *Ferguson* until this matter was resolved by the full court of the Federal Court.

This means that if it was found that the main reason for Fitzalan not complying with the agreement was within his control or reasonably foreseeable, it would still be necessary to decide whether or not Fitzalan was taking reasonable steps to comply with the agreement.

> A favourable finding on this latter question could, for example, be made in a case where a failure to comply, although 'within the person's control', was trivial, and there were other things being done by the person to perform the agreement.

(Reasons, para. 23)

The agreement

The Court then considered whether the first clause of the agreement, which required Fitzalan to do everything he could to find a job was invalid for uncertainty. The Court went on to find that even though this was a general obligation, it was not too vague and thus void for uncertainty. The clause had sufficient definite meaning. The AAT had said that Fitzalan was not required to attend an interview if the job was unsuitable. The Federal Court found this to be incorrect. 'The words "a job" in it are general; they do not referred to a particular job on offer on a particular occasion' (Reasons, para 25).

There is a further obligation in clause 1 of the agreement to undertake suitable paid work. This raises the question of the suitability of the job. Section 42(1) provides a part definition of what is a suitable job. This becomes an implied term of the agreement. If an implied term is imposed by statute then it is appropriate to take into account the purpose of the statute. It is also appropriate to construe the term with regard to the purpose of the Case Management Activity Agreement itself. The purpose of both the statute and the agreement is to overcome a long-term inability to obtain employment. Therefore, the term 'suitable paid work' should not be construed restrictively. It was difficult to see how roadwork offered to Fitzalan in the vicinity of the town where he lived, where he was required to stay away from home for up to four nights, could be regarded as unsuitable.

Burchett J found that as a matter of law, Fitzalan had failed to comply with the terms of the agreement and that the main reason for his failing to comply was a matter within his control, namely his decision not to attend the interview. With respect to the issue of whether Fitzalan was taking reasonable steps to comply with the agreement, the onus was on him to show that he had taken such reasonable steps.

Formal decision

The Federal Court set aside the decision of the AAT and the SSAT and affirmed the decision of the Authorised Review Officer that Fitzalan's payment of newstart allowance be cancelled. There was no order as to costs.

[C.H.]

Ordinary income on a yearly basis

SECRETARY TO THE DFaCS v ROLLEY
(Federal Court of Australia)

Decided: 20 June 2000 by French, Kiefel and Dowsett JJ.

The Department appealed against the decision of the AAT that Rolley did not owe a debt of age pension paid to her between 30 April 1998 and 6 August 1998.

The facts

The Education Department employed Rolley as a casual cleaner between 30 April 1998 and 6 August 1990. Her actual income for the year from employment was $1503.25. Centrelink decided that she owed a debt of $542.92 cents. On review the authorised review officer reduced the debt to $490.67.

The SSAT decision

The SSAT identified the issue as whether Rolley's ordinary income on a yearly basis was $1503.25 or $4885.65 as submitted by Centrelink. The SSAT decided that Rolley's ordinary income was $1503.25 and thus less than the income free area limit. She was entitled to the age pension she was paid and there was no debt.

The AAT appeal

The AAT affirmed the decision of the SSAT. According to the AAT the issue to be decided was the proper construction of 'ordinary income on a yearly basis'. Rolley had a discrete period of short-term employment, which was not expected to continue. The AAT had to decide whether it should annualise the income received during that period, or treat the income she received during her period of employment as annual income for the whole year. The AAT decided that Rolley's income was the actual income she had received for the whole year.

The law

The rate of payment of the age pension is determined by reference to the pension rate calculator in s.1064. In particular, module E provides:

> Method statement
>
> Step 1 work out the amount of the person's ordinary income on a yearly basis.

Ordinary income on a yearly basis

The Court referred to *Harris* v *The Director-General Of Social Security* (1985) 57 ALR 729 where the High Court considered the meaning of the phrase 'the annual rate of income', the predecessor to 'ordinary income on a yearly basis'. The High Court had identified as critical the distinction between an annual amount of income and an annual rate of income.

> A rate of income, like a rate of interest, could vary within any annual period though expressed as an annual rate.

(Reasons, para. 10)