Administrative Appeals Tribunal Decisions

Age pension: principal home; absence exceeding 12 months

ATTARD and SECRETARY TO THE DFaCS
(No. 2000/1020)

Decided: 22 November 2000 by Dr J.D. Campbell.

Background

The Attards were receiving age pension when they advised Centrelink that they planned to return to Malta for more than 12 months.

Twelve months after departing, the Attards were advised that their rate of pension had been reduced as their house was no longer considered to be their 'principal home'. While they were away, their children lived in the home, rent free. The Attards only took clothes to Malta and they always intended to return to Australia.

When their pension was cut, they moved to live rent free with their sister-in-law. Mr Attard had $70,000 in an investment account in Australia.

The issue

The issue in this appeal was whether to assess the Attards' home as part of their combined assets due to their staying overseas for more than 12 months.

The law

Section 1118 exempts a person's principal home when calculating the value of a person's assets. Section 11(7) states as follows:

> A residence of a person is to be taken to continue to be the person's 'principal home' during:
>
> (a) any period (not exceeding 12 months) during which the person is temporarily absent from the residence.

Submissions

Two issues were argued:

- Subsection 11(7)(a) was presumptive and not exhaustive. Consequently if absence was more than 12 months, the circumstances should be considered to decide whether the residence remains a principal home;
- the hardship provision applied in this case as the Attards were unable to access their savings while they were in Malta.

Findings

The Tribunal found that there were a number of options open to the Attards once they were aware of the reduction in their income: they could have returned home, or accessed their savings. The Tribunal had

> ... great difficulty in making a finding of severe financial hardship, particularly where significant funds are not accessed, rent free accommodation is being provided to family members at Artarmon, and a decision to remain in Malta is maintained (all being discretionary decisions).

(Reasons, para. 22)

The Tribunal then considered the interpretation of s.11(7) (a). It concluded that the residence in question was at all times the Attard's principal home except for the period when the Act says that it is not.

In the Tribunal's view, after 12 months temporary absence, the residence ceases to be the principal home. The subsection was found to be definitive and exhaustive as it is for all the circumstances defined in s.11(7) of the Act.

> A contrary interpretation would in the Tribunal's view create a nonsense, and defeat the intention of s.11(7) of the Act to create clearly defined circumstances in which continuance of principal residence exemption status can be maintained despite the absence of residence.

(Reasons, para. 26)

> The Tribunal distinguished between the 'character' and 'status' of the principal home: the Tribunal finds that for the purposes of the Act, the home at Artarmon no longer enjoyed the character and status of the Applicants' principal home once the Applicants had been absent from residence for a period of 12 months, and that thereafter until their reoccupation, the Artarmon residence, while enjoying the character of a principal home, did not enjoy the status of a principal home within the defined circumstances of the Act ... in essence the Tribunal finds that the Artarmon home of the Applicants was deprived of its exempt status as a non assessable asset for the purposes of the Act.

(Reasons, para. 27)

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Disability support pension: special circumstances

PRICE and SECRETARY TO THE DFaCS
(No. 2001/0177)

Decided: 9 March 2001 by D.P. Breen.

This was an appeal against a decision of an authorised review officer (ARO), as affirmed by the SSAT, that a compensation charge of $23,649.60 was owing to the Commonwealth.

Background

Price was injured at work in 1987 and 1990. He was finally put off work in 1994. He received sick leave from his employer, then workers compensation payments and finally received disability support benefit. He was a plaintiff in a class action against his employer and settled his compensation payment following mediation sessions. Price had, through his solicitors, obtained quotes for all of the expenses which would have to be repaid to organisations such as the Health Insurance Commission, Workers Compensation and Centrelink

When Price first went on sickness benefits he made sure that Centrelink was given all the information they required and was kept up-to-date with respect to any changes, including information about compensation. On 31 May 1999, Price's solicitors filled in an application form seeking a quote as to the preclusion period which would apply and any subsequent repayments which would have to be made. The solicitors failed to include information on the form as to the workers compensation payments which Price had received. Although Centrelink had the correct information on file, they acted only on the information on the form and informed the solicitors that the preclusion period would run from 30 March 1987 to 13 February 1994 and that there would be no compensation charge owing. Price agreed to settle his claim with his employers on the basis of the quote he was given by Centrelink.

In August 1999, when the solicitors officially informed Centrelink of the compensation settlement, Centrelink officially calculated the preclusion period referring to the information in their computers. They informed Price that

since he had been receiving workers compensation payments until 20 June 1996, the preclusion period would run from 21 June 1996 to 6 April 2000 and a compensation charge of $23,649.60 was now due. An ARO reviewed the matter on 20 August 1999 and determined that in fact the preclusion period should have run until 24 August 2000, but exercised his discretion under s.1184 of the *Social Security Act 1991* (the Act) so that the preclusion period ended on 6 April 2000 as previously advised.

Mr Price argued that he would have settled for an amount which covered the amount owing to Centrelink had he been aware of the charge.

Reasons

Subsection 1184(1) of the Act is as follows:

> (1) For the purposes of this Part, the Secretary may treat the whole or part of a compensation payment as:
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> (a) not having been made; or
>
> (b) not liable to be made;
>
> if the Secretary thinks it is appropriate to do so in the special circumstances of the case.
>
> One would certainly hope that the disregarding of relevant information within Centrelink's possession when giving advice is an '*unusual*', '*uncommon*' or '*exceptional*' occurrence for Centrelink. Mr Price had provided all of the relevant information to Centrelink when he applied for his disability pension. Although the solicitors forwarded an incomplete form to Centrelink when seeking the quote, Centrelink failed to check their computer to ensure that they had the complete information required.
>
> Not only would this be a quick and easy procedure, it would assist in ensuring that Centrelink's clients are receiving accurate information about matters which can be quite complex. It would be quite a different matter if Centrelink had never been provided this information and only had the solicitor's incomplete form to work from. This is clearly not the case here. Mr Price acted in full reliance on the quotation given to him when negotiating what he appreciated to be his one and only chance at settlement. He was detrimentally affected as a result of that reliance.

(Reasons, paras 10 and 11)

Formal decision

The Tribunal set aside the SSAT's decision and substituted the decision that so much of the compensation payment be disregarded in order for the preclusion period to be reduced so that no compensation charge is due to Centrelink.

[A.B.]

Family payment: notifiable event; appropriate tax year

SECRETARY TO THE DFaCS and HALL
(No. 2000/0971)

Decided: 8 November 2000 by J.D. Campbell.

Mrs Hall was receiving family allowance in 1996 when her husband became unemployed. Mr Hall was paid newstart allowance (NSA) from 17 October 1996. On that date Mrs Hall was sent a notice, pursuant to s.872 of the *Social Security Act 1991* (the Act), stating that she must notify within 14 days '... if you or your partner; start work or commence work, change jobs, or start self employment ...'

Mr Hall commenced casual work on 16 December 1996, but neither he nor Mrs Hall advised the former Department of Social Security (DSS). The job became full time on 20 March 1997. Mr or Mrs Hall must have advised DSS because on 30 April 1997 a letter was sent to Mrs Hall advising that her family payments (FP) [which would have been paid at the maximum rate while Mr Hall was paid NSA] had been reduced to the minimum rate as Mr Hall was no longer receiving NSA. (Overpayments of NSA and parenting payments arising from their failure to advise of Mr Hall's casual work were recovered and were not in issue.)

Estimates

On 2 May 1997 a form requesting income and assets details was sent to Mrs Hall. She returned it on 18 May 1997, stating that:

- their 1995/96 combined taxable income (CTI) in 1995/96 was $19,609;
- Mr Hall 'started or recommenced work or changed jobs on 20 March 1997;
- Mrs Hall estimated their CTI in 1996/97 to be $4538 for herself plus $10,000 and NSA for Mr Hall; and
- their income in the last four weeks was $587 FP, $1868.88 partner allowance, and Mr Hall's payslips for the last four weeks were attached.

A letter dated 16 May 1997 was sent to Mrs Hall advising that her FP rate was worked out on their CTI [in 1995/96] of $19,609, and that she must advise within 14 days if their CTI would be more than $25,685 in 1995/96 or 1996/97.

A 'Changes to Your Income and Assets' form was returned by Mrs Hall on 17 July 1997 in which she estimated their CTI in 1997/98 to be $18,586. In the calculations she did not include amounts garnisheed from Mr Hall's salary for child support payments to his previous wife. She did not complete the estimate at question 12. The rate of FP continued to be based on their CTI in 1995/96 of $19,609.

On 16 October 1997 Mrs Hall was requested to notify within 14 days if their CTI in 1996/97 or 1997/98 were to exceed $26,731.40, and on 21 November 1997 she advised that their actual CTI in 1996/97 was $20,754. A further notice was issued on 16 December 1997 requesting her to notify if their CTIs in 1996/97 or 1997/98 exceeded $20,754; a similar notice of 19 January 1998 requested her to notify if the CTIs exceeded $26,426; and another of 17 September 1998 requested her to notify if the CTIs exceeded $25,740.

Mrs Hall returned an annual 'Review of Your Family Allowance and Childcare Assistance' form on 21 October 1998 in which she advised their CTI in 1997/98 was $29,593, and their estimated CTI in 1998/99 was $26,000 to $27,000. On 18 November 1998 it was decided by Centrelink to recover FP totaling $3550.05 paid to Mrs Hall from 17 July 1997 to 8 October 1998. That decision was set aside on 18 May 1999 by the SSAT which held there was no debt.

Notifiable events

In the AAT's view the statutory framework provided that a determination that FP is payable to a person continued in effect until it ceased to be payable as a consequence of issues of compliance, or failing to comply, with notification requirements under s.872. Section 860 permitted a recalculation to occur during a calendar year where there had been a failure to notify of a notifiable event. Section 1069-H13 and s.1069-H14 nominated that the appropriate year for a FP payday was the base tax year, this being the tax year that ended on 30 June in the calendar year that came immediately before the calendar year in which the payment occurs. Changes to the appropriate tax year because of a notifiable event could only occur in defined circumstances, namely s.1069-H18 and s.1069-H19.

Section 1069-H6 provided:

> If the Secretary gives a person a notice under s.872(1) relating to the payment of family payment to the person, the Secretary may state in the notice that an event described in the notice is a notifiable event for the purposes of this Module.

For Mrs Hall it was argued that the notice sent to her on 17 October 1996 was deficient in that it did not state that