

Newstart allowance: activity test; unemployed

SECRETARY TO THE DFaCS and
SAHIN
(No. 2001/732)

Decided: 3 August 2001 by
J. Handley.

Background

The Department decided that Sahin was not entitled to newstart allowance because he was considered to be self-employed and not unemployed. Since he was not unemployed, he was not entitled to newstart allowance.

The SSAT, on review, set aside the decision of the Department and decided that Sahin was 'available for work'.

The issue

To qualify for newstart allowance, a person must satisfy the Department that they are 'unemployed'. The sole issue in this appeal was whether Sahin was 'unemployed' within the meaning of s.593 (1) of the Act.

The evidence

Sahin owned 26 acres of land in Mildura of which 14 acres were used to grow sultanas and 4 acres were used for wine grapes.

Sahin told the Tribunal that it was not his intention to operate the property as a 'serious economic enterprise'. He said that apart from a three to four week period when the grapes were picked, he was available for work. He had worked in the past, pruning for other growers and was registered with Centrelink as unemployed.

He said the business was operating at a loss and that because of the size of his property and competition, it was not possible to earn income sufficient to meet his debts. Also he could not pay for the necessary plant and equipment that would be required to produce more grapes.

In relation to day-to-day management of the property, he said he relied on contractors. Contractors were used for ploughing, spraying, fertilising, cultivating and rotary hoeing. These tasks could be undertaken whether he was on the property or not.

The ongoing maintenance of the property was carried out every morning and night, and other jobs such as pruning were completed on weekends.

Conclusion

The AAT accepted the evidence in relation to Sahin's activities. It concluded that Sahin initially intended to develop the property but that it became obvious that this was not possible. The Tribunal concluded that the property did not oc-

cupy Sahin on a full-time basis and that apart from the three to four week period when he worked on the property full-time, he was available to look for work elsewhere. The Tribunal found that maintenance of the property could be carried out in the morning, evening or weekends.

The Tribunal considered the cases of *Howie and Secretary, Department of Social Security* (1986) 8 ALD N174 and *Director-General of Social Services v Thomson* 1982 38 ALR 624.

The Tribunal discussed the distinction between 'underemployed' and 'unemployed'. It found that Sahin's situation was different to a shopkeeper who was waiting for customers or a person engaged in a business where they were trying to develop their business within the marketplace.

The Tribunal found it 'remarkable' that Sahin could spend so little time on his business; however he had both looked for and obtained work apart from his business. There was nothing about the ownership of his land which prohibited him from being available to work for other people.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Federal Court

Compensation: periodic payments or lump sum

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

Decided: 29 June 2001 by Branson,
Lindgren and Mansfield JJ.

Reid appealed a decision of von Doussa J that the compensation payments received by Reid reduced the rate of disability support pension (DSP) paid to him to nil.

The facts

Reid was injured at work. He claimed compensation and was paid weekly payments from November 1990 to March 1995. Under the relevant State legisla-

tion the workers compensation authority determined that Reid's loss of future earning capacity could be capitalised and interim lump sum payments made. Four interim payments covering particular periods were made to Reid for the total period 30 March 1995 to 24 March 1999. On 30 January 1998 Reid applied for the DSP.

Centrelink treated the four lump sum payments made to Reid as periodic payments and as a result the rate of DSP payable to Reid was reduced to nil. Reid argued that the compensation provisions of the *Social Security Act 1991* (the Act) did not apply to him.

The law

Section 1163A of the the Act provided in 1998:

1163A.(1) If:

- (a) a person is entitled to periodic payments under a law of a State or Territory; and
 - (b) the person's entitlement to the periodic payments is converted under the law of the State or Territory into an entitlement to a lump sum; and
 - (c) the lump sum is calculated by reference to a period;
- this Part applies to the person as if:
- (e) the person had not received:
 - (i) the lump sum; or
 - (ii) if the lump sum is to be paid in instalments—any of the instalments; and
 - (f) the person had received in each fortnight during the period a periodic compensation payment equal to:

lump sum amount

number of fortnights in the period

where:

'lump sum amount' is the amount of the lump sum referred to in paragraph (b);

'number of fortnights in the period' is the number of whole fortnights in the period referred to in paragraph (c).

Section 1165 of the Act deals with lump sum amounts and precludes a person from receiving social security payments for the lump sum preclusion period. Section 1168 provides for the reduction in payments where periodic compensation payments have been received. The relevant definitions are contained in s.17 of the Act. The definition of compensation includes a payment made under a scheme of insurance or compensation under State law in respect of lost earnings or lost capacity to earn. It includes periodic payments.

The State Act under which Reid received his compensation payments allows for payment for loss of future earnings.

The primary judge

Reid argued that at the time he made his claim for DSP he was not covered by s.1163A(1)(a) of the Act because he was not a person who 'is entitled to periodic payments under a law of the State.'

Von Doussa J noted that even though the subsection was expressed in the present tense it was describing events in the past. This was logical because there is only an entitlement to a lump sum where an earlier entitlement to periodic payments has been converted to an entitlement to a lump sum. When this section is read as a whole it is clear that it refers to past events. Otherwise the object and purpose of the section would be frustrated, and any other construction would not reflect the intention of Parliament. It was noted that where s.1165 applies, s.1163 does not.

As the lump sum payments received by Mr Reid in March 1997 and March 1998 were each lump sum payments calculated by reference to a period, and as the requirements of pars 1163A(1)(a) and (b) were fulfilled, s.1163A governed Mr Reid's application for disability support pension and not s.1165.

(Reasons, para. 15)

The Full Court

The majority (Branson and Mansfield JJ) agreed with von Doussa J. Reid did not obtain a right to be paid DSP when he became incapacitated for work. Reid had made no claim at that time — a requirement under the Act. If a claim was made, Centrelink then had to determine if Reid was qualified and whether the pension was payable at the time the claim was made (s.114). Section 1163A

in its present form was in force at that time and applied to his claim. The majority rejected the argument put by Reid that s.1163A applied only where the loss of earning capacity occurred after 12 December 1995. Applying the present s.1163A did not imply that it operated retrospectively.

Lindgren J stated that s.1163A operated prospectively only and so could not apply to Reid's situation. Reid received his first lump sum payment in March 1995 and ceased to be entitled to weekly payments. From 1 January 1994 to 11 December 1995 s.1163A provided that if a person's periodic payments for a period were converted to a lump sum which was paid in two or more instalments then the person was considered to be still receiving periodic payments for the period. The lump sums paid to Reid would not be caught by this provision because each was not paid in two or more instalments. The amendment to s.1163A was introduced on 12 December 1995 to close this loophole. But the closure was prospective in its operation. There is a presumption that this amendment does not apply retrospectively because the amendment did not expressly state that it should.

However it was not necessary to rely on the presumption against retrospectivity. Because the amended s.1163A uses the present tense it is clear that it refers to:

A state of affairs which prevails contemporaneously with the operation of the subsection, that is, after 12 December 1995. Accordingly, the subsection provides that if at any time after that date a person is entitled to periodic payments under a law of a State or Territory and that entitlement is then converted under that law into an entitlement to a lump sum which is calculated by reference to a period, Part 3.14 of the SS Act applies.

(Reasons, para. 35)

This means that if Reid's entitlement to periodic payments was converted to an entitlement to one or more lump sums prior to 12 December 1995, then provided he received the lump sum as a single payment s.1163A did not apply. The wording of s.1163A(1) suggests that the legislature deliberately chose those words to ensure that the section referred an actual entitlement in existence at the time the amended subsection operated.

Formal decision

By majority the Federal Court dismissed the appeal.

[C.H.]

Disability support pension: in gaol

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

Decided: 2 July 2001 by Gray J.

Garden appealed against the AAT decision that while he was an in-patient of a psychiatric institution he was 'in gaol'.

The facts

In 1995 Garden was convicted of murder and sentenced to be detained in a psychiatric institution for 18 years and 9 months. In December 1996 Garden was discharged and transferred to prison because he was compliant with his medication and had no overt psychiatric symptoms. By May 1998 Garden was no longer compliant with his medication and concerns were expressed about his mental state. He was transferred back to a secure psychiatric unit. Shortly after he lodged a claim for a disability support pension.

The law

Section 98(1)(e) of the *Social Security Act 1991* (the Act) provides that even though a person is qualified for a disability support pension it may not be payable because the person is in gaol. Section 1158 provides:

A social security pension (other than pension PP (single)) is not payable to a person on a pension day if:

- (a) on that payday the person is:
 - (i) in gaol; or
 - (ii) undergoing psychiatric confinement because the person has been charged with committing an offence;

The term 'in gaol' is defined in s.23(5) as including 'a person being lawfully detained in a place other than a prison, in connection with the person's conviction for an offence'. Section 28(8) defines psychiatric confinement and includes the proviso that a person is not considered to be in psychiatric confinement where the person is undertaking a course of rehabilitation.

The *Mental Health Act 1986* (Vic) and the *Sentencing Act 1991* (Vic) provide that if a person is found guilty of an offence they can be admitted to an approved mental health service as an involuntary patient instead of being sentenced, if the person is mentally ill and requires treatment. Such a person may be discharged from the mental health service and returned to a prison if the person no longer needs to be