

remitted in several instalments. All the payments made to Sullivan were thus correctly characterised as 'lump sum' payments and so were subject to the operation of s.1067G-H23A of the Act, and the overpayment was correctly raised by Centrelink.

Formal decision

The Tribunal set aside the decision under review.

[P.A.S.]

Farm help income support: farmer and farming enterprise

SECRETARY TO THE DFaCS and OLIVER
(No. 2002/724)

Decided: 23 August 2002 by R.D. Fayle.

Background

Oliver claimed farm help income support. This claim was rejected by Centrelink. On appeal to the SSAT, Oliver's appeal was successful and the Tribunal found that Oliver was a 'farmer' who was 'effectively in control of the farm enterprise'.

Evidence

Oliver gave evidence that he had been running a piggery in partnership with his mother on his father's property since 1990. Thirty acres of the farm were used exclusively for this purpose. In exchange for labour the partnership was provided with grain for pig feed and Oliver was given rent-free accommodation on the property.

On 30 June 2000, the piggery assets (.30 pigs) were transferred from the partnership to a discretionary trust. This was due to crop failures and insufficient grain to make the business viable. He also sold all moving plant and renovated the pens and yards, on the possibility that if conditions improved he would recommence the business. His work on the property ceased on 20 August 2001. He then set up a handyman business in the local town.

Submissions

The Department submitted that:

- Oliver had no right or interest in land on which the piggery was run as he did not own it and there was no lease.

- Improvements to the piggery belonged to the owner of the land.
- There was no shared farming arrangement between Oliver and his father (the owner of the land).
- When piggery assets were transferred to the trust on 30 June 2000, Oliver forfeited any beneficial interest he may have had in the property.
- Oliver disposed of livestock before 10 August 2001 and any activities that he participated in until he left the property on 20 August were not related to the piggery.
- Oliver did not derive a significant part of his income from the piggery, at least between 30 June 2000 and 20 August 2001. Consequently there was no 'farm enterprise' as stock and equipment had been disposed of by then.

The submissions made on behalf of Oliver were that:

- Oliver had professional training in piggery management and was registered as a pig breeder.
- Oliver sold his piggery because it was no longer viable due to low prices and lack of feed.
- Only the pigs were disposed of on 30 June 2000. The infrastructure remained on the property and Oliver continued working on the farm until 20 August 2001.
- Oliver had an interest in the piggery property and unfettered control of the piggery until he left the property on 20 August 2001.
- The arrangement with Oliver's father concerning sharing the grain was similar to a shared farming arrangement.
- The nature of the work that Oliver did on the farm was linked to the running of the piggery, since one was dependent on the other. Without grain, there would be no feed for the pigs.
- Oliver's circumstances fell within the objects of the Act in that due to circumstances beyond his control he was unable to meet daily living expenses and he was forced to leave the industry.

The law

The relevant legislation is ss.8B and C of the *Farm Household Support Act 1992* and the definition sections relating to the terms 'farm enterprise' and 'farmer'.

farm enterprise means an enterprise carried on within any of the agricultural, horticultural, pastoral, apicultural or aquacultural industries.

farm help scheme payments means payments of the following kinds:

- payments of farm help income support;
- payments of re-establishment grants;
- payments of assistance under the farm help advice scheme.

farmer means a person who:

- has a right or interest in the land used for the purposes of a farm enterprise; and
- contributes a significant part of his or her labour and capital to the farm enterprise; and
- derives a significant part of his or her income from the farm enterprise.

8B Qualification for farm help income support

Subject to this Division, a person is qualified for farm help income support in respect of a period if:

- the period begins on or after the farm help scheme payment commencement day; and

throughout the period, the person:

- is a farmer; and
 - is at least 18; and
 - is an Australian resident; and
 - is in Australia; and
- the person has been a farmer for a continuous period of at least 2 years immediately before the period; and
 - a certificate of inability to obtain finance issued in respect of the person has effect throughout the period.

8C Persons not qualified if Secretary determines that they do not effectively control farm enterprises

A person is not qualified, or ceases to be qualified, for farm help income support in respect of a period if the Secretary determines that:

the person is not effectively in control of the farm enterprise for which the person claims farm help income support; and

farm help income support should not be payable to the person in respect of the period.

The issue

The Tribunal identified that the key issue was whether Oliver was a 'farmer' for a continuous period of two years before he applied for farm help income support on 10 August 2000.

Findings

The Tribunal dealt with the issues raised in turn and concluded that:

- While Oliver's use of the land was not subject to any legal interest or formal lease, the arrangement between Oliver and his father had continued for at least 10 years and Oliver had made struc-

tural improvements at his own cost. There was a tacit agreement between the parties that in exchange for farm labour provided by Oliver, his father gave him a share of the grain for feed and provided rent-free accommodation. This was sufficient to establish a right or interest in land for the purpose of a farm enterprise.

- In relation to the transfer of the business to the trust, the Tribunal found that this change was only for the purposes of taxation and achieved no more than removing Oliver's mother from the business (his partner under the partnership agreement) and adding Oliver's spouse and two children. The Tribunal noted that the Act is intended as beneficial legislation and consequently this was a case 'where substance should override form'.
- In determining whether a 'farm enterprise' was using the land on 10 August 2001, the Tribunal considered various cases that had looked at the meaning of 'enterprise', there being no definition in the Act. The Tribunal concluded that this term was not dependent on the level of business activity.
- It then went on to consider whether Oliver was a 'farmer'. The Tribunal found that this was clearly the case prior to disposal of the assets, and even on the sale of assets, the completion of the enterprise by way of repairs and renovations amounted to farming activities of the piggery enterprise. He maintained effective control of the piggery until he left the land on 20 August 2001.
- The Tribunal was satisfied that Oliver contributed a significant part of his labour and capital to the piggery. Taking into account the grain received and the 'fringe benefit rent free house' together with income derived, a significant part of his income came from the farm enterprise.

The Tribunal concluded that Oliver was a 'farmer' at the date of claim and had been a farmer for at least two years before this date. The Tribunal was also satisfied that s.8C did not preclude eligibility in this case.

Formal decision

The Tribunal affirmed the decision of the SSAT and found that Oliver was qualified for farm help income support when he made the claim on 10 August 2001 although he was not entitled to receive this support due to his spouse's level of income.

[R.P.]

Lump sum settlement of claim: whether in respect of lost earnings or lost capacity to earn

SECRETARY TO THE DFaCS and
CIOCCIA
(No 2002/759)

Decided: 2 July 2002 by G. Mowbray.

The issue

After receiving a lump sum payment in respect of an accident, Cioccia was required to pay back to Centrelink an amount of benefit received by him during what was deemed to be a compensation preclusion period. In this matter the issues were first, whether the settlement payment paid to Cioccia was a 'compensation payment' in that a portion of the amount was paid in respect of lost earnings or lost capacity to earn; and secondly, whether any part of that payment should be disregarded as having not been made due to the special circumstances of the case.

Background

Cioccia suffered a motor vehicle accident in 1996 at a time when he was receiving unemployment benefits, and later began receiving disability support pension (DSP) from December 1997. He later received a lump sum payment of \$60,000 from NRMA Insurance in respect of the accident, and subsequently Centrelink sought to recover some \$10,884 in benefits paid to him on the basis that the lump sum included a component in respect of lost earnings or lost capacity to earn. This decision was affirmed by the Authorised Review Officer, but in December 2001 the SSAT determined that although \$30,000 of the settlement amount was considered to be in respect of economic loss, \$20,000 of that amount should be disregarded due to the special circumstances of the case.

The law

The *Social Security Act 1991* (the Act) by s.17(2) defines compensation to include:

- ...
- (a) a payment of damages; or
- ...
- (c) a payment ... in settlement of a claim for damages or a claim under such an insurance scheme; or
- (d) any other compensation or damages payment;
- ... that is

- (e) made wholly or partly in respect of lost earnings or lost capacity to earn ...

Where a compensation payment is made, s.17(3) of the Act provides that 50% of the settlement amount is to be deemed the 'compensation part', which part is by s.1165 of the Act used to determine the preclusion period during which Centrelink payments (including DSP) cannot be paid. However, s.1184 of the Act provides that the whole or part of a compensation payment may be treated as having not been made if it is considered appropriate to do so in 'the special circumstances of the case'.

Discussion

The Tribunal first considered whether the payment made to Cioccia was 'wholly or partially in respect of lost earnings or lost capacity to earn'. The Tribunal noted the decision in *Cunneen and Secretary, Department of Social Security* (1995) 39ALD 440 that, in determining this, attention needed to be paid to '... the nature of the entitlement to the compensation payment rather than the manner in which the payment is made ...'. The Tribunal further noted the comments in *Lawlor and Department of Family and Community Services* (1999) 57 ALD 509 that to determine the nature of a payment it was necessary for the Tribunal to 'go behind the settlement' and determine what the payment was actually for, and that in this regard the correspondence between the parties needed to be considered, rather than simply the heads of claim or the terms of the settlement itself.

In this matter the Tribunal noted that at the time of the settlement Cioccia had not worked for some years, and that various correspondence between his solicitors and the insurer had noted that no amount had been included in the settlement in respect of lost earnings or lost capacity to earn. While the statement of claim had included a claim for economic loss, it was apparent from the documentation available to the Tribunal that in fact there had been no settlement in respect of such loss, and the Tribunal so found. Accordingly, the Tribunal concluded that the settlement payment did not amount to compensation for the purposes of s.17 of the Act. Given this, the Tribunal did not need to consider whether special circumstances existed or whether s.1184 was applicable to Cioccia's case.

Formal decision

The Tribunal set aside the decision under review and determined that the \$60,000 settlement paid to Cioccia was not a compensation payment as defined in the Act.

[P.A.S.]