Newstart allowance: activity test rate reduction period; whether voluntary resignation; whether unemployment due to misconduct

SECRETARY TO THE DFaCS and FOLEY
(No. 2002/626)

Decided: 26 July 2002 by J. Kiosoglous.

The issues

The issues in this matter were whether Foley resigned voluntarily from his employment, and whether such resignation was reasonable, or whether he was dismissed for misconduct. If the resignation was voluntary and was not reasonable, or if it arose due to his misconduct, then an activity test rate reduction period applied to his Centrelink payments.

Background

Foley was a case manager with an insurance company and was previously in another similar company and with the WorkCover Authority. Between December 1999 and May 2000 he was required by his employer to undergo three performance counselling interviews at which his work and performance were reviewed and strategies for improvement were outlined. After the third such interview he met with his employer's management staff and a union representative to discuss the future of his employment with the company. Foley stated that he found these processes very stressful and felt he was being unfairly targeted and scrutinised by his employer.

In August 2000 while looking for opportunities for other employment Foley went into his employer's computer system to ascertain the amount of work available through another WorkCover employer. He looked only at numbers of claims and did not read any files. Nevertheless, when his employer became aware of this unauthorised computer access, Foley was told to either resign or be dismissed instantly. He was unaware that his actions constituted a breach of the conditions of his employment and believed that other case managers had acted similarly, and thought that at most his actions would warrant a warning. He chose to resign rather than be dismissed as he believed a dismissal on his resumé would prevent him securing another job, and he was given no opportunity to seek legal advice or union assistance. He later applied for newstart allowance but faced an activity test rate reduction period as he had resigned voluntarily from his prior employment. Foley sought a review of this decision, which was affirmed by an authorised review officer. The decision was set aside by the SSAT which in February 2001 found that he did not resign voluntarily nor was his employment terminated due to misconduct, and that therefore the activity test breach should not apply.

Foley was later treated for severe depression but was able to obtain further employment as a case manager at a TAFE.

The law

The *Social Security Act 1991* (the Act) by s.628 provides that:

> **628.** If:
>
> (a) a person's unemployment is due, either directly or indirectly, to a voluntary act of the person ...and
>
> (b) the secretary is not satisfied that the person's voluntary act was reasonable ...
>
> then an activity test rate reduction period applies.

Section 629 of the Act provides for similar outcomes where the unemployment arises from a person's 'misconduct as a worker'.

Misconduct as a worker

The Tribunal considered the meaning of 'misconduct as a worker', and noted the decision in *North v Television Corporation* (1976) 11 ALR 599 that misconduct should refer to '... conduct so seriously in breach of the contract that by standards of fairness and justice the employer should not be bound to continue the employment'. Having regard to this and the examples given in the *Guide to Social Security Law* (which gave examples of misconduct as including fighting, theft and harassment) the Tribunal concluded that Foley's actions could not be said to be so serious as to meet the *North* criterion. His unemployment could not therefore be said to be due to misconduct and so s.629 of the Act was inapplicable.

Unemployment due to voluntary act

The Tribunal then considered whether Foley's unemployment was due to his own voluntary act. The Tribunal concluded that, given the context of a series of employment performance interviews, Foley's employer was keen to terminate his employment and had failed to ensure that his rights were not prejudiced. He was not in a financial position to challenge any dismissal via unfair dismissal provisions. He was given no opportunity to seek advice as to the options presented to him, was denied natural justice in the process, and in the circumstances '... took the only course that any reasonable person confronted with a similar situation would have taken'. The Tribunal concluded that even if it was considered that Foley had resigned voluntarily, his resignation was reasonable in the circumstances. Hence s.628(b) of the Act was not satisfied, and no activity test rate reduction period was applicable.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]

Assets test: value of loan

O'BRIEN and SECRETARY TO THE DFaCS
(No. 2002/822)

Decided: 27 September 2002 by B.J. McCabe.

Background

O'Brien claimed newstart allowance. This was granted by Centrelink and later cancelled after additional information was received. The reason for cancellation was that O'Brien loaned funds to a family trust. This was considered an asset and the total value of O'Brien's assets exceeded the threshold for payment of newstart allowance.

Centrelink's decision was affirmed by the Social Security Appeals Tribunal.

The issue

The issue in dispute in this appeal was the value of the loan made to the family trust.

The facts

O'Brien established a family trust of which he was the sole beneficiary and a director of the trustee company. The trust purchased a business and $50,000 worth of shares as an investment. These purchases were funded by a loan made by O'Brien to the trust of approximately $200,000.

Documentation showed that the amounts were provided to the trust as a loan rather than a capital investment although the evidence of O'Brien indicated that the amounts were on 'capital account'. Further documentation included a statement that 'security/liability of the loan is limited to available funds'.

The submissions

O'Brien argued that he was not legally obliged to repay the full amount of the loan at any particular time. He argued that the value of the loan should be limited to the 'borrowers maximum liability at any point'.

The Department used the face value of the debt for the purposes of the assets test although it allowed some discounting.

The findings

The Tribunal considered s.1122 of the *Social Security Act 1991* and the documentation provided by O'Brien. It stated:

> The applicant's argument has some attraction. If an advance is made pursuant to a loan, and the terms of the loan provide for repayment of an amount less than the face value of the loan, there is no reason why the discounted amount should not be the relevant figure for the purposes of s.1122. But the loan documentation must clearly evidence that intention. The documentation in this case does not meet that requirement. It seems to me the applicant is attempting to formalise and explain what was in fact a loose arrangement that had not been negotiated at arms' length.

(Reasons, para. 17)

The Tribunal then considered the case of *Joyce and Repatriation Commission* (AAT 10410, 15 September 1995). In this case a loan was made to a trust and the applicant argued that the value of the loan should be the market value of the assets if the loan was called in. The AAT rejected this argument, acknowledging that the assets would not meet the value of the loan at the time but noted that this situation may change and repayment may be possible in the future.

The Tribunal agreed with this approach and noted that O'Brien had not attempted to call up the loan from the trust so that a definite value could be ascertained.

The Tribunal concluded that s.1122 requires the face value of the loan to be used, 'unless some other amount is repayable under the terms of the agreement'. In this case there was no clear agreement about the amount payable by the trust and there was no demand for repayment. Consequently the face value of the loan should be used for the purpose of the asset test.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Age pension: income test and life assurance

DAVIES AND SECRETARY TO THE DFaCS (No. 2002/904)

Decided: 3 October 2002 by Senior Member W.J.F. Purcell.

Background

In 1985 Davies changed jobs and requested that a non-exempt policy be reassigned as an endowment policy. Consequently a life assurance policy was created. Premiums were set at $1200 a year and the policy was payable on 28 March 2001 (Davies' 65th birthday), or, alternatively, on his death.

In March 2001, Davies became eligible for age pension and he advised of the surrender of his policy. Centrelink assessed the sum of $15,772 as income for a period of 12 months commencing on April 2001. This decision, in itself had no impact on his pension until August 2001 when he advised the Department of changes to his combined assets. As a consequence his pension became subject to the income test and his rate was struck at $261.90 a fortnight. On appeal to the SSAT, the income amount was discounted by the value of bonus additions of $2164.91 which in turn reduced the amount to be maintained as income to $13, 607.09.

Legislation

The relevant sections of the *Social Security Act 1991* (the Act) considered by the Tribunal were ss.8 and 1073:

> **income**, in relation to a person, means:
>
> (a) an income amount earned, derived or received by the person for the person's own use or benefit; or
>
> (b) a periodical payment by way of gift or allowance; or
>
> (c) a periodical benefit by way of gift or allowance;
>
> but does not include an amount that is excluded under subsection (4), (5) or (8);
>
> ...
>
> **income amount** means:
>
> (a) valuable consideration; or
>
> (b) personal earnings; or
>
> (c) moneys; or
>
> (d) profits;
>
> (whether of a capital nature or not);
>
> ...
>
> **(11)** An amount received by a person is an exempt lump sum if:
>
> (a) the amount is not a periodic amount (within the meaning of subsection 10(1A)); and
>
> (b) the amount is not a leave payment within the meaning of points 1067G-H20, 1067L-D16 and 1068-G7AR; and
>
> (c) the amount is not income from remunerative work undertaken by the person; and
>
> (d) the amount is an amount, or class of amounts, determined by the Secretary to be an exempt lump sum.
>
> Note: Some examples of the kinds of lump sums that the Secretary may determine to be exempt lump sums include a lottery win or other windfall, a legacy or bequest, or a gift—if it is a one-off gift.
>
> Section **1073 (1)**
>
> Subject to points 1067G-H5 to 1067G-H20 (inclusive), 1067L-D4 to 1067L-D16 (inclusive), 1068-G7AA to 1068-G7AR (inclusive), 1068A-E2 to 1068A-E12 (inclusive) and 1068B-D7 to 1068B-D18 (inclusive), if a person receives, whether before or after the commencement of this section, an amount that:
>
> (a) is not income within the meaning of Division 1B or 1C of this Part; and
>
> (b) is not:
>
> (i) income in the form of periodic payments; or
>
> (ii) ordinary income from remunerative work undertaken by the person; or
>
> (iii) an exempt lump sum.
>
> the person is, for the purposes of this Act, taken to receive one fifty-second of that amount as ordinary income of the person during each week in the 12 months commencing on the day on which the person becomes entitled to receive that amount.

Submissions

Davies argued that his endowment policy operated during its term of 16 years in the same way as a superannuation insurance policy. The end benefit provided for retirement in the same way as superannuation would. The Act (until 1983) treated this type of insurance, as well as superannuation insurance, as an exempt lump sum.

The current Act does not mention endowment insurance and departmental guidelines which changed from July 1997 treated bonuses as income for a period of 12 months. Davies argued that this guideline was harsh, inequitable and discriminatory and that no income should be maintained.

Davies submitted that the decision should be made under s.8(11)(d) exempting the bonuses for the same reasons that applied prior to July 1997.