Administrative Appeals Tribunal

Newstart Activity Agreement: refusal to sign agreement; whether refusal constitutes unreasonable delay in entering agreement

HEWITSON and SECRETARY TO THE DFaCS (No. 2002/1178)

Decided: 25 October 2002 by J. Handley.

The issue

The issue for determination in this matter was whether the refusal by Hewitson to sign a Newstart Activity Agreement (NSA), despite his agreement to abide by its terms, of itself constituted 'unreasonable delay' in entering that agreement. Centrelink in August and October 2001 determined that such refusal did constitute unreasonable delay, and that Hewitson had therefore twice committed an activity test breach, the effect of which was the imposition of six-month periods of reduced payments at 18% and 24% rate reduction respectively. The SSAT affirmed these decisions on 11 December 2001.

Background

Hewitson had been unemployed for about 25 years, and in May 2001 attended Centrelink and completed various documents regarding a 'Preparation for Work Agreement'. He was later referred to an employment provider 'Employment AMES' (AMES) for 'intensive assistance activity', and was advised that this would involve renegotiation of the 'Preparing for Work Agreement'. In July 2001 he attended an interview at AMES where this agreement was renegotiated, but although Hewiston indicated he was prepared to abide by the agreement and meet its terms, he refused to actually sign it. Later that month he again attended an interview at AMES where, on learning that he again would not sign any agreement, no agreement was prepared. Following each of these interviews AMES advised Centrelink of Hewitson's refusal to sign, and in turn breach action against him was initiated.

The law

The *Social Security Act 1991* (the Act) provides by s.593(1) that a person is qualified for NSA if when not a party to a Newstart Activity Agreement '... the person is prepared to enter such an agreement ...'. By s.607(1) of the Act where a person is required to enter a Newstart Activity Agreement and where '... for any ... reason, the Secretary is satisfied that the person is unreasonably delaying entering into the agreement ...' the Secretary may give the person notification that he or she is being taken to have failed to enter the agreement, a consequence of which is that NSA ceases to be payable.

Discussion

Hewitson contended and the Tribunal accepted that he was at all times willing to be bound by the agreement negotiated through AMES, and did not object to any terms in the agreement, but that his view was that he was under no obligation to actually sign any agreement, and would not do so.

The Tribunal noted the decision in *Secretary, Department of Social Security and Chadwick* (1996) 44 ALD 479 that the question of whether entering an agreement had been unreasonably delayed must be determined against the objective standard of what a reasonable person would do. A contract or agreement, the Tribunal concluded, may be oral, written or a combination of both, and noted that although many persons would not take objection to signing such an agreement there was nothing in the legislation specifically requiring such signature. As beneficial legislation, had such a requirement been considered essential then it would have been explicitly provided for in the legislation. There was no evidence that Hewitson had delayed or refused to enter the Agreement — indeed he was, the Tribunal concluded, denied the opportunity to 'enter' it because he was breached by Centrelink and further because, on the occasion of the second interview with AMES, no agreement was in fact negotiated or prepared, and so none could be 'entered into'. Centrelink had determined that an agreement would only exist if Hewitson was prepared to sign it, and so denied him the opportunity to demonstrate his commitment to it and his willingness to undertake its terms, notwithstanding his express indication of willingness to be bound by them.

Formal decision

The Tribunal set aside the decision under review and determined that Hewitson had not unreasonably delayed entering into a Newstart Activity Agreement.

[P.A.S.]

Activity test breach: applicability of legislation

SECRETARY TO THE DFaCS and HOSIE No. 2003/47

Decided: 17 January 2003 by J.Cowdroy.

Background

Hosie was in receipt of newstart allowance whilst he was employed on a casual basis for a short period in November 2000. He earned a gross amount of $225.30 but on an 'Application for Payment of Newstart Allowance' form he declared gross earnings of $60. Centrelink determined that Hosie had knowingly provided false information in relation to his employment earnings and applied an activity test rate reduction period of 18% reduction for 26 weeks. The matter was heard on the basis of written submissions.

The issue

The issue was whether the words 'when required to do so under a provision of this Act' in s.630AA of the *Social Security Act 1991* (the Act) encompassed a notice issued pursuant to s.68 of the *Social Security Administration Act 1999* (the Administration Act).

Legislation

Section 68 of the Administration Act states:

(1) Subsection (2) applies to a person to whom a social security payment is being paid.

(2) The Secretary may give a person to whom this subsection applies a notice that requires the person to do either or both of the following:

(a) inform the Department if:
(i) a specified event or change of circumstances occurs; or
(ii) the person becomes aware that a specified event or change of circumstances is likely to occur;
(b) give the Department a statement about a matter that might affect the payment to the person of the social security payment.

Prior to the introduction of the Administration Act on 20 March 2000, the requirement to provide information was contained in s.658 of the Act which stated:

(1) The Secretary may give a person to whom a newstart allowance is being paid a notice that requires the person to give the Department a statement about a matter that might affect the payment of the allowance to the person.

Section 630AA of the Act states:

(1) If a person:
(a) refuses or fails, without reasonable excuse, to provide information in relation to a person's income from remunerative work (the failure); or
(b) knowingly or recklessly provides false or misleading information in relation to the person's income from remunerative work (the provision of information);

when required to do so under a provision of this Act, a newstart allowance is not payable to the person.

(2) If a newstart allowance becomes payable to the person after the time it ceases to be payable under subsection (1), then:
(a) if the failure or the provision of information is the person's first or second activity test breach in the 2 years immediately before the day after the failure or the provision of information — an activity test breach rate reduction period applies to the person; or
(b) if the failure or the provision of information is the person's third or subsequent activity test breach in the 2 years immediately before the day after the failure or the provision of information — an activity test non-payment period applies to the person.

The Tribunal also referred to ss.244 and 245 of the Administration Act.

'Provision of this Act'

Hosie relied on the SSAT's interpretation of the relevant sections of both Acts. He submitted that the words 'under a provision of this Act' in s.630AA(1) of the Act are to be interpreted by reference to s.23(1) of the Act which defines 'this Act' as being 'the Social Security Act 1991 as originally enacted or as amended and in force at any time'. If it were accepted that s.244 of the Administration Act applies to s.630AA of the Act, it would effectively be ignoring the restrictive definition contained in s.23(1) of the Act.

Hosie considered it significant that other sections of the Act specifically referred to the Administration Act. In particular, he noted the definition of 'social security law' found in s.23(15) and (16) of the Act, which is mirrored in s.3(3) and 3(4) of the Administration Act.

Hosie argued that because s.244 of the Administration Act lacked specificity, it had no application to s.630AA of the Act. This meant that the Act does not contain any provisions that would empower the Secretary to require a person in Hosie's position to provide information about his earnings. As a consequence there was no basis upon which a breach could be imposed.

The Department contended that as the repealed s.658 of the Administration Act was a section under which a person could be required to give information, regard could now be had to s.68 of the Administration Act, as it is the section to which s.658 of the Act corresponds.

In relation to the definition of 'social security law' in both Acts, the Department argued that the notices issued under s.68 of the Administration Act are notices issued under the 'social security law' as defined in s.3(3) and (72) of the Administration Act and s.23(15) and (16) of the Act.

The Tribunal noted that the issue of whether the words 'a provision of this Act' in s.630AA of the Act should be interpreted as a reference to the *Social Security Act 1991* alone or include a reference to the *Social Security (Administration) Act 1999* was the subject of decision in *Secretary, Department of Family and Community Services and Mark Quinn* [2002] AATA 81. The Deputy President concluded in that case that:

> it is difficult to conclude that it would have intended that s.630AA(1) should be of no effect ...The effect of s.244 is that those provisions then be read as referring to corresponding provisions in the Administration Act. That interpretation accords with the purposes revealed by the social security law even though, in its application in a particular case, it may be thought to lead to the imposition of unbearable hardship.

(Reasons, para.18)

The Tribunal agreed with the reasoning in *Quinn* and found that s.630AA(1) should apply where Hosie had knowingly provided false information in relation to his income as required by a notice given under s.68 of the Administration Act. The Tribunal found that Hosie knowingly failed to give such information and had committed an activity test breach.

> The consequence of that action is that he is subject to a newstart allowance activity test rate reduction of 18% for a 26-week period. This would seem a harsh result given the monetary amount involved in the breach, however the Tribunal has no means of ameliorating the financial hardship that no doubt will flow from this decision.

(Reasons, para. 20)

Formal decision

The Tribunal set aside the decision under review and in substitution determined that an activity test breach and an 18% rate reduction should be imposed on Hosie's newstart allowance for the period 21 March 2001 to 18 September 2001.

[M.A.N.]

Austudy payment: allowable study time

PRIEST and SECRETARY TO THE DFaCS (No. 2002/1191)

Decided: 19 November 2002 by M.Allen.

Background

The applicant completed a four-year degree at the University of Tasmania in 1998. At the beginning of 2002 he enrolled in a Bachelor of Psychology at Curtin University. This was also a four-year degree.

It was not disputed that for the first three years of the course all the units were semester based. However, it was in respect of the fourth year, that differences arose. The applicant had contended that the dissertation component of the final year of his course was a full year unit on the basis that semester one was taken up with writing a proposal, conducting a literature review, obtaining ethics committee approval for the research and preparation for and commencement of the research and that semester two consisted of completing the research and writing up the dissertation. On that basis, the applicant contended that as he had already completed a four-year degree, he should be eligible for Austudy for a full year not for six months as the SSAT had found.

The issue

The issue to be decided in this matter was whether the applicant was eligible