Newstart allowance activity test; unreasonable delay

DUNN and SECRETARY TO THE DFaCS (No.2004/211)

Decided: 1 March 2004 by N. Bell.

Background

The Department decided to impose an activity test breach in February 2003 on the grounds that Dunn delayed entering into a Preparing for Work Agreement (PFWA). Dunn had previously signed a Preparing for Work Agreement; however he was contacted and asked to renegotiate his agreement to include intensive support.

Dunn refused to sign this agreement stating that the requirement to attend an interview with a job network member was illegal and that the terms should be negotiable.

The evidence

The objections raised by Dunn were that:

- the notice sent to him by Centrelink requiring him to renegotiate the agreement was incorrect because it did not mention the imposition of a penalty if he did not enter into the agreement and also he was unemployed before the introduction of mutual obligation and therefore was not obliged to enter into the agreement
- he was entitled to two interviews before he was breached
- the terms of the agreement should be negotiable.

Dunn argued that he objected to the terms of the renegotiated agreement because they were said to be 'non negotiable'. He conceded that the earlier agreement signed by him stated that it could be varied.

The law

The relevant sections of the *Social Security Act 1991*, considered by the Tribunal, included ss.604-607 and 635.

The issue

The issue considered by the Tribunal was whether Dunn had unreasonably delayed entering into a PFWA. This in turn required consideration of whether his refusal to agree to the terms of the agreement constituted unreasonable delay.

Conclusion

The AAT dealt firstly with the issue of the letter sent to Dunn. It found that the letter provided the place and time of the proposed interview and complied with the requirements of s.605(3).

In relation to the second issue raised by Dunn, the Tribunal found that the legislation anticipates that the formulation of an agreement may require discussion on more than one occasion; however there was nothing in the Act requiring more than one interview. The Tribunal referred to the decision in *Long and Department of Family and Community Services* [2000] AATA 33 which stated:

> where the manner of a person's refusal to sign an agreement is such that it is clear that the refusal would persist then that refusal is indicative of unreasonable delay in entering an agreement. I agree with the Respondent's submission that regardless of how many interviews were attended by the Applicant his refusal would persist in the future.

(Reasons, para. 20)

In relation to the third issue raised by Dunn, the Tribunal noted that although it is contemplated by the legislation that an agreement is to be negotiated it was clear that certain terms 'did not require the consent of the jobseeker'.

Dunn had referred to the case of *William Thomas Bartlett v Secretary, Department of Social Security* (1994) 33 ALD 661 as authority for the proposition that terms, whose primary purpose is to monitor a person's compliance with the activity test, are invalid.

However, the Tribunal found in this case that the terms simply required 'intensive support' and consequently did not fall within the terms described in the *Bartlett* case.

The Tribunal stated that s.604 allows the Secretary to require a person to enter into an agreement, 'the terms of which are approved by the Secretary'. This framework does not support the conclusion that the negotiating power of each party is equal.

The Tribunal concluded that the terms of the agreement were not in breach of s.606 (4) (which considers the person's capacity to comply with an agreement and the person's needs) and therefore Dunn's refusal to agree to those terms constituted an unreasonable delay.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Youth allowance: independence; whether guardian relationship

SEMMENS and SECRETARY TO THE DFaCS (No. 2004/187)

Decided: 26 February 2004 by B. Davis.

The issue

The sole issue in this matter was whether Semmens was independent for the purpose of determining the rate of youth allowance ('YA') to be paid to him, or whether he was living in the care of a guardian.

Background

Semmens lived with his mother until four years of age, then with his grandfather, but for 12 years thereafter lived with his aunt and uncle Mr and Mrs Anderson, who cared for him as a member of their family. His mother saw him only once in those 12 years, and he had no knowledge of his father's whereabouts.

Semmens was aged 17 years in 2004 and was employed full time. He regarded the Anderson residence as his home, and wished to continue residing there. He had applied for YA at the independent rate on 30 October 2002, but this claim was rejected by Centrelink on the basis that his living arrangements were such that the Andersons should be regarded as his long-term guardians. This decision was affirmed by the SSAT in March 2003. The Andersons argued that it was unfair that payment of YA at the independent rate should be refused after their personal sacrifice to assist their nephew over a number of years.

The law

The definition of 'independent' for YA purposes is contained in s.1067A(9) of the *Social Security Act 1991* ('the Act') which provides:

> **1067A.(9)** A person is independent if:
>
> (a) the person cannot live at the home of either or both of his or her parents:
>
> (i) because of extreme family breakdown or other similar exceptional circumstances; or
>
> (ii) because it would be unreasonable to expect the person to do so as there would be a serious risk to his or her physical or mental well-being due to violence, sexual abuse or other similar unreasonable circumstances; or

(iii) because the parent or parents are unable to provide the person with a suitable home owing to a lack of stable accommodation; and

(b) the person is not receiving continuous support, whether directly or indirectly and whether financial or otherwise, from a parent of the person or from another person who is acting as the person's guardian on a long-term basis; and

(c) the person is not receiving, on a continuous basis, any payments in the nature of income support (other than a social security benefit) from the Commonwealth, a State or a Territory.

In this matter it was not disputed that Semmens met the requirements of s.1067A(9)(a) and (c), but the question was whether he met the remaining criterion — whether he was being supported by a 'person who is acting as the person's guardian on a long-term basis'.

Discussion

The AAT considered that, as the Andersons had provided care for Semmens for more than 12 years, a close and long-term relationship could be said to exist. In the absence of a definition in the Act of the term 'guardian' the Tribunal considered the dictionary definition of this term which referred to questions of the degree of independence and ability to manage one's own affairs.

The Tribunal, noting the purpose of YA was to provide assistance for children with little support and Semmens' living arrangements, concluded that the Andersons had to be regarded as Semmens' guardians. Hence the claim for YA to be paid at the independent rate could not succeed.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]

Family tax benefit: reasonable action to obtain maintenance

THOMAS and SECRETARY TO THE DFaCS (No. 2004/221)

Decided: 3 March 2004 by S. Webb.

The issue

In this matter the question at issue was whether 'reasonable maintenance action' had been taken by Roslyn Thomas, which in turn affected the rate of family tax benefit ('FTB') to be paid to her for the period 14 June 2000 to 18 October 2001. In this period FTB had been paid at the base rate, and she contended that a higher rate should have been paid to her.

Background

Thomas had two children, her son Dean having been born in April 1998. Thomas made an informal verbal arrangement for the payment of weekly maintenance with Dean's father, but did not seek an administrative assessment of maintenance under the *Child Support Act*, nor did she seek acceptance under that Act of the informal maintenance arrangement which she had made. She in fact received an average of $50 per fortnight from Dean's father, but this amount was not assessed under the *Child Support Act* or against any impartial measure.

She lodged a claim for FTB in May 1998 in which she advised Centrelink that she did not have a maintenance agreement with Dean's father, and that she did not receive maintenance payments in respect of her children. Despite this information, she was paid the maximum rate of FTB in respect of Dean until June 2000 (an error of coding acknowledged by Centrelink), and then at the base rate until October 2001. The payment error was discovered in about May 2000 during a review, following which Thomas was sent letters in May and June 2000 regarding the rate of FTB being paid to her, and advising her that a higher FTB rate may be payable should she take reasonable action to seek maintenance in respect of Dean. Thomas claimed that she received neither letter, although the Tribunal accepted that the second had in fact been sent. On 18 October 2001 Thomas lodged a completed Child Support Assessment Form, following which her FTB payments were increased as it was accepted that she had undertaken reasonable maintenance action at that time. Thomas contended that at no stage was she informed that her informal arrangement with Dean's father was not 'reasonable maintenance action'.

The law

The rate of FTB is calculated in accordance with the Rate Calculator at Schedule 1 of the *Family Assistance Act 1999* (s.58). Under Clause 10 of that calculator, FTB is payable at the base rate unless the parent concerned takes action that is considered to be reasonable to obtain maintenance. Clause 10 provides:

10. The FTB child rate for an FTB child of an individual is the base FTB child rate (see clause 8) if:

(a) the individual or the individual's partner is entitled to claim or apply for maintenance for the child; and

(b) the Secretary considers that it is reasonable for the individual or partner to take action to obtain maintenance; and

(c) the individual or partner does not take action that the Secretary considers reasonable to obtain maintenance.

Discussion

The Tribunal noted that the *Social Security Family Assistance Guide* establishes policy guidelines regarding maintenance action. Those guidelines provide that reasonable action will be considered to have been taken if, inter alia, a parent completes an assessment form and has payments collected by the Child Support Agency, or lodges a Child Support Agreement. Noting that the Tribunal is not bound to follow such policy Guidelines (*Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60), the Tribunal determined that the question of 'reasonableness' required attention to be paid to both the reasonableness of the amount of maintenance paid and also to the reasonableness of the action taken to obtain that maintenance.

In considering the question of 'reasonableness', the Tribunal determined that three steps were necessary — (1) determination of the identity of the person with maintenance liability for the child; (2) assessment of the appropriate level of maintenance that is payable in the particular situation; and (3) action to arrange for payment of maintenance at the appropriate level. In Thomas' situation, although it was accepted that an informal maintenance arrangement had been made, there was no evidence that an impartial assessment of liability had been made, and therefore there was no way of determining whether the amount being paid by Dean's father was a reasonable amount in the circumstances. As such '... Ms Thomas' action to obtain