

Federal Court Decisions

FTB debt: administrative error waiver; severe financial hardship

**PRESTON v SECRETARY TO
THE DFaCS
(Federal Court of Australia)**

Decided: 29 March 2004, by Stone J.

On 9 May 2001 it was determined that Preston was liable to repay a family tax benefit (FTB) overpayment of \$1451.76. That decision was affirmed by an authorised review officer, the SSAT and the AAT.

It was conceded that the overpayment was made solely because of an administrative error on the part of the Department and that Preston received it in good faith. In those circumstances the Department is required to waive the debt if Preston would suffer 'severe financial hardship' if it were not waived; *A New Tax System (Family Assistance)(Administration) Act 1999*, ('the FAA Act') s.97.

Background

At the time of the AAT hearing, Preston was living alone in a three-bedroom house and in receipt of a widow allowance of \$190.05 per week. Apparently Preston had unencumbered legal title to the house, although before the AAT she claimed that by informal arrangement the property was co-owned by her parents and sister. The Department had been recovering the FTB overpayment by deduction from Preston's pension at the rate of \$5 per fortnight.

The decision of the AAT

Before the AAT Preston claimed that she was in 'severe financial difficulty' and gave evidence concerning her financial circumstances. However, the AAT was not satisfied that Preston's financial circumstances constituted severe financial hardship or that she would suffer severe financial hardship if the debt were not waived. Consequently the Tribunal held that the debt could not be waived under s.97 of the *FAA Act*. The AAT said:

In this case, Preston's sole income is the Widow Allowance, which is paid at the maximum rate of \$380.10 per fortnight. She is the sole title-holder of the house in which she resides even though she claims that, by informal familial arrangement, the property

is co-owned by her parents and sister. The financial details brought to light on the evidence indicate that Preston's income of approximately \$190 per week is sufficient to cover her essential living costs but is not sufficient to cover outstanding debts or the cost of repairs to the house or household equipment.

Preston's options were considered during the hearing and it may be possible for her to take in a boarder or to sell the house and move into cheaper accommodation. Preston noted, however, that she would be reluctant to take in a boarder because her daughter and grandson may need to move into the house as they are currently living in one small room that is inadequate for their requirements. She also expressed concerns about her security and personal safety. Preston submitted that she would not be able to sell the house and buy cheaper accommodation because the house is very run down and would not command a high price.

The social security scheme is beneficial in character and the public interest is not served by driving people in Preston's circumstances to destitution. The fact that Preston owns, at least in part, the house in which she lives does not preclude her from severe financial hardship. That Preston has options open to her is not in doubt and it is not for the Tribunal to determine whether she should sell her home or take in a boarder. It is clear however on the evidence that Preston receives the maximum rate of Widow Allowance and is managing to repay her debt at the rate of \$5 per fortnight.

The Tribunal is not satisfied that Preston's financial circumstances constitute severe financial hardship or that she will suffer severe financial hardship if the debt is not waived. It follows that the debt cannot be waived under section 97 of the Act.

Was a question of law raised by the appeal?

The Court noted its jurisdiction was limited to an appeal on a question of law. As a result the Court could not interfere with the AAT's assessment of whether the facts of Preston's financial situation would properly fall within the description of 'severe financial hardship' were the debt not waived. This conclusion was, however, subject to the proviso that the Tribunal's process of fact finding should not be contaminated by legal error such as failure to accord natural justice, making a finding of fact where there is no evidence for such a finding or failure to consider a material factor. In addition, the requirements of the *Administrative Appeals Tribunal Act 1975* ('the AAT Act') had to be observed. Relevantly, s.43(2B) required the Tribunal, where it gave written reasons for its decision, to include in

those reasons, 'its findings on material questions of fact and a reference to the evidence or other material on which those findings were based'.

The AAT's failure to take a material fact into account

Preston referred to the AAT's comment that her income was sufficient to cover her 'essential living costs' but not to cover 'outstanding debts or the cost of repairs to the house or household equipment'. It was submitted that this comment showed that, in determining the question of severe financial hardship, the Tribunal took account only of the 'essential living costs' and did not take the outstanding debts into account, these being a material factor that the Tribunal was obliged to take into account. This submission was rejected, the Court viewing the statement as a summary of its conclusions, which should not be inappropriately analysed with 'an eye keenly attuned to the perception of error'.

The finding that Preston had options to alleviate her financial situation

In her evidence concerning her financial position Preston described to the AAT how she was unable to afford to heat the house during winter, that she could not afford to visit a doctor and generally ate only twice a day. She described how she juggled her income so that she could pay something towards her debts which included a debt to her parents in respect of the amount advanced to discharge the house mortgage, as well as arrears in relation to rates, electricity and telephone services. Despite this Preston said that, at least in some respects, for example electricity, she was falling further behind as she could not manage to pay the monthly bills.

On the basis of Preston's evidence of her financial position the AAT found that her income was sufficient to cover 'her essential living costs' but not to cover 'her outstanding debts or the costs of repairs to the house or household equipment'. Bearing in mind the comment of the Full Court in *Repatriation Commission v Hall* (1988) 78 ALR 687 at 694 that severe financial hardship does not require 'proof of destitution' The Court commented that it would not have been surprising had the Tribunal come to the conclusion that the phrase was apt to describe Preston's position.

What was clear, however, was that the Tribunal was heavily influenced by its view that Preston had available to her two options, either of which was capable of relieving her financial difficulties and which therefore would protect her from 'severe financial hardship' should the FTB debt not be waived. The options to which the Tribunal referred were taking in a boarder or selling her home and moving to cheaper accommodation. It was noted, however, that the Tribunal did not refer to any evidence on which it based this finding or describe the process of reasoning by which it arrived at this conclusion.

Although there was evidence before the AAT that Preston had clear legal title to a three-bedroom house, the possibility that others had an interest could not be excluded. There was no evidence before the AAT as to the availability of cheaper accommodation. As a result the Court considered that the AAT had concluded that these options to alleviate Preston's financial position were open, without any evidence or other material to justify that conclusion. In doing so the Tribunal made an error of law that vitiated its finding of that material fact.

Failure to give adequate reasons

Alternately the AAT's reasons in respect of the options it found were available to Preston were criticised for failing to set out the basis of its finding and its reasoning processes. In particular the AAT did not explain the chain of reasoning that led it to conclude that the options would alleviate the financial position of Preston, so payment of the debt would not cause severe financial hardship.

It was submitted for Preston that it was impossible to discern the reasoning process by which the Tribunal reached the conclusion that Preston would not suffer severe financial hardship. The AAT found that Preston's income was only sufficient to cover her 'essential' living costs but was not sufficient to cover house or household equipment repairs nor would it extend to the repayment of any of her debts. It was argued that the Tribunal did not explain what it had included in essential living costs. The Tribunal noted Preston's evidence that she could not afford to pay for heating in winter and often could not afford to buy food but did not comment on that evidence or explain how this position was consistent with its ultimate conclusion.

The Court referred to the decision in *Brackenreg v Comcare Australia* (1995) 56 FCR 335 where Sheppard J stated:

The findings made in respect of [the applicant's] activities obviously played an important part in the reasoning process of the Tribunal. In my opinion the Tribunal was obliged to indicate quite clearly how it was that it made those findings notwithstanding the evidence given by [the applicant] about her difficulties ... An informed reader might be forgiven for thinking that the Tribunal had overlooked the detail of the evidence and in this way misapplied it or misunderstood it. Then there needs to be brought into account the other obligation, that is the obligation to refer to the evidence upon which material findings of fact were based.

Thus the Court concluded that the AAT's finding that options existed whereby Preston might alleviate her financial position was a material finding made by the Tribunal and carried with it an obligation to refer to the evidence on which that finding was based. The Tribunal's conclusion that Preston could pay the FBT debt without severe financial hardship was based on that finding but the Tribunal did not explain the reasoning processes by which it came to that conclusion. The Tribunal did not explain how it was treating key aspects of Preston's evidence. Therefore the Tribunal's reasons did not comply with the requirements of s.43(2B) of the *AAT Act* and should be set aside.

Formal decision

The decision of the AAT was set aside and the matter remitted to the AAT for reconsideration in accordance with the Court's reasons. No order was made as to costs.

[A.T.]

Age pension assets test: meaning of 'home owner'; whether effective gift of shares

DART v SECRETARY TO THE DFACS

(Federal Magistrates Court of Australia)

Decided: 6 August 2004

Dart lodged an appeal against a decision of the AAT made on 13 December 2002, which affirmed the decision to refuse his application for an age pension on the basis that he did not satisfy the assets test provided for in the *Social Security Act 1991* ('the Act').

Background

Dart applied for an age pension on 18 July 2001, and was refused on the basis of an assessment of his assets at the time of application, being \$299,502 as follows:

Bank of Queensland savings	\$1,131.00
Trumps Pty Ltd shares	\$7.00
Fastcombe Pty Ltd shares	\$7.00
Loan to Trumps Pty Ltd	\$44,171.00
Shares in Sobrante Pty Ltd	\$105,562.00
Gifts of Shares in Sobrante P/L	\$148,624.00

He was determined to be a home owner for the purposes of the Act. As a result, at the relevant time and pursuant to s.1064 of the Act, a person without a partner was permitted to own up to \$141,000 in assets and receive a full pension. If he was not a home owner, he would be entitled to receive the full age pension provided his assets did not exceed \$242,000. Part pension entitlements arose for asset levels above these figures, cutting out at \$277,000 (home owner) and \$378,000 (non home owner).

Dart resided in a home at Corinda registered in the name of Fastcombe Pty Ltd as Trustee for the Dart Security Trust. Dart was not a beneficiary under the Trust, but was one of three directors and the majority shareholder in Fastcombe. On that basis the AAT found he controlled the Trust and this was conceded by Dart. The Trust held a number of property assets purchased over previous years. Sobrante Pty Ltd was a company which received distributions of profit from the Dart Security Trust.

Dart had been involved in the business of selling edible nuts and dried fruit, with the trading operations being conducted by the Trumps Trust. Dart was not a beneficiary of the Trumps Trust, but he was one of three directors and the major shareholder in Trumps Pty Ltd, the Trustee of that Trust.

Dart argued, among other things, that the AAT had erred in finding that he was a home owner for the purposes of the Act; in finding that he had not taken all effective steps to effect the gift of shares to his children by May 1996; and in failing to determine the proper basis on which the shares in Sobrante Pty Ltd should be valued.

Was Dart a home owner?

Section 1118 of the Act says that the family home may be disregarded for the purposes of the assets test:

1118(1) in calculating the value of a person's assets for the purpose of this Act ... disregard the following: