Carer payment: asset value; hardship provisions

HALDAS and SECRETARY TO THE DFaCS (No. 2004/910)

Decided: 30 August 2004 by J. Dwyer.

The issue

In this matter the questions were, first, whether the value of Haldas' assets exceeded the relevant limits for carer payment and, second, whether his property at Phillip Island should be excluded from assets test calculations as an 'unrealisable' asset.

Background

Haldas provided constant care for his 93-year-old mother in their private residence. She was assessed as suffering from various ailments and in need of 'high level' care. Haldas had provided that care since selling his shop in July 2001, and it was accepted that he was qualified for carer payment (CP). The principal issue in question was the value of his assets, and in particular whether a block of land on Phillip Island should be considered to be 'unrealisable' and so discounted from the total value of his assets for pension purposes.

Payment of CP to Haldas was cancelled in January 2002 because of the value of his assets, but re-granted in May 2002 on the basis that his only assessable asset was a property at Cowes valued at $220,000, one third of which was owned by Haldas and the remaining two-thirds by a family trust, of which he had full control. An AVO re-valuation of the Phillip Island property in late 2003 valued it at $1 million, following which payment of CP to Haldas was again cancelled. The land was vacant, but Haldas had a planning permit to build six units on it, his intention since its purchase in 1988 being to live in one of the units in his retirement and to finance that retirement from the remainder. His evidence was that he regarded the property as 'his superannuation'. He was unaware of the requirements for self managed superannuation funds at the time of the purchase of the land, and to now transfer the property to a recognised superannuation fund would attract extensive capital gains taxes and legal fees.

The law

Under s.1064-A1 of the *Social Security Act 1991* ('the Act'), the rate of a person's CP is calculated with reference to the income and assets test, the latter of which is set out in s.1064-G3 and s.4 of the Act to include the assets held by a person but excluding assets to be disregarded under s.1118(1). That section excludes from asset test calculations, inter alia, the '... value of a person's investment in ... a superannuation fund ...'

Under ss.1129 and 1130 of the Act, an asset may be disregarded from asset valuations if, in the view of the Secretary, the person has an 'unrealisable asset' and '... the person would suffer severe financial hardship ...' (s.1129(1)(c)), in which case the value of the 'unrealisable asset' is to be disregarded for pension purposes. Section 11 of the Act defines an 'unrealisable asset' as:

> **11.(12)** An asset of a person is an **unrealisable asset** if:
>
> (a) the person cannot sell or realise the asset; and
>
> (b) the person cannot use the asset as a security for borrowing.
>
> **11.(13)** For the purposes of the application of this Act to a social security pension (other than a pension PP (single)), an asset of a person is also an **unrealisable asset** if:
>
> (a) the person could not reasonably be expected to sell or realise the asset; and
>
> (b) the person could not reasonably be expected to use the asset as a security for borrowing.

Discussion

The Tribunal first considered whether the value of Haldas' assets exceeded the allowable limit. Although Haldas produced evidence of a 2001 sale of a neighbouring but larger block for $874,000, the Tribunal accepted the certified AVO valuation of $1 million. The Tribunal noted that Haldas regarded the property as, in effect, his superannuation, but concluded that, notwithstanding this view, it was not in fact an investment in a superannuation fund, and therefore the exemption from assets test calculations provided by s.1118(1) of the Act could not be applied. As such, the value of his assets at all times exceeded the allowable limits, and Haldas was precluded from receiving CP.

The Tribunal then considered whether the Phillip Island property was an 'unrealisable asset' within ss.11(12) and 11(13) of the Act. The Tribunal concluded that there was no evidence that Haldas could not sell or realise the property, should he elect to do so, nor that no buyer could be found at a reasonable price if he were willing to sell. As such, the property was not an 'unrealisable asset' as defined in s.11(12) of the Act.

However, Haldas contended that he could not reasonably be expected to sell the land because of his longstanding emotional attachment to it. He argued that his decision to purchase and to retain the land was prompted by his intention to plan for his retirement, and his capacity to meet his own retirement had been made more difficult by his decision to undertake the full-time care of his mother, as a result of which he had sold his shop which had been his sole source of income.

The Tribunal noted the decision in *Farrow and SDSS* (1986) 5 AAR 1 that, in considering whether an asset was 'unrealisable', it was necessary to consider both the whole of an applicant's circumstances and the objectives of the legislation when the particular provision was enacted. The Tribunal also noted the need to consider personal and economic factors in determining whether it was reasonable for a property to be sold (*SDSS v Copping* (1987) 12 ALD 634; *Repatriation Commissioner v Hall* (1988) 15 ALD 84) and in particular the comment in the latter case that '... the test of reasonableness takes into account the public or community interest as well as the interests of the claimant for a pension ...'

Noting that the purpose of the carer provisions was to encourage the caring of people at home, and facilitate this by providing income for those unable to earn because they are caring for another person, the Tribunal concluded that in this situation '... [t]here is both a personal benefit to Mrs Haldas and a public benefit to the community in her being cared for at home and not taking up one of the scarce nursing home beds' (Reasons, para. 42). The Tribunal also noted that it would in fact be cheaper for the public purse to pay CP to Haldas to support his care of his mother, than to meet the cost of her care as a nursing home resident.

Having regard to the unusual nature of the situation, and in particular Mrs Haldas' age and ill health, the uncertain duration of her need for care, the length of time Haldas had owned the Phillip Island land, his attachment to it and its proposed use to fund his retirement, the Tribunal concluded that he could not be reasonably expected to sell or realise the land, nor be expected to use it as security for borrowing. As such, the land was an 'unrealisable asset' within s.11(13) of the Act. In turn, ss.1129 and 1130 applied to require that the value of the land be disregarded in determining Haldas' assets for pension purposes.

Formal decision

The Tribunal affirmed the decision to cancel Haldas' CP because of the assets test, but set aside the decision to reject his claim to have the hardship provisions applied to his situation, and in lieu determined that s.1129 applied to Haldas.

[P.A.S.]

Suspension of newstart allowance: failure to attend appointment; whether reasonable and reviewable

BUTLER and SECRETARY TO THE DFaCS (No. 2004/735)

Decided: 13 July 2004 by G. Friedman.

Background

Butler was in receipt of newstart allowance (NSA) from March 2001, but this payment was cancelled on 6 October 2003 after Butler failed to contact Health Services Australia to make an appointment for a medical review. This decision was set aside after review by an Authorised Review Officer (ARO), who wrote on 28 October 2003 advising Butler to attend an appointment with a psychologist on 18 November 2003. Centrelink sent a similar letter dated 29 October 2003, which also advised that failure to attend the interview may result in cessation of NSA payments, though Butler contended that he never received this second letter.

Butler did not attend the interview on 18 November 2003, but sent a nominee who delivered a letter from Butler. He advised the Tribunal that he had not attended for medical reasons, and believed his letter to this effect was a sufficient explanation for his non-attendance. Following the failure to attend the interview, payment of NSA was suspended, a decision affirmed by an ARO on 8 December 2003. Butler appealed to the SSAT which on 12 February 2004 determined that it had no jurisdiction to review the decision to require Butler to attend the interview with a psychologist, and further on 23 March 2004 affirmed the decision to suspend payment of NSA.

Butler alleged that some documents and medical reports had been obtained by Centrelink without his consent, that Centrelink had been at times unhelpful and insulting in their dealings with him, and that he was suffering extreme financial difficulties through the Centrelink decision to suspend his NSA payments.

The issues

The issues in this matter were first, whether the requirement to attend an appointment was a reviewable decision and, second, whether the decision to suspend NSA payments following the failure to attend that interview was correct.

The law

Under s.63(3) of the *Social Security (Administration) Act 1999* Centrelink may require a person to attend an appointment as part of the consideration of the person's entitlement to NSA. That Act by s.63(5) further provides that:

> **63.(5)** If:
>
> (a) a person is receiving, or has made a claim for, a newstart allowance; and
>
> (b) the Secretary notifies the person under subsection (3); and
>
> (c) the requirement of the notification is reasonable; and
>
> (d) the person does not comply with the requirement;
>
> a newstart allowance is not payable, and if, at a later time, a newstart allowance becomes payable to the person, an administrative breach rate reduction period applies to the person.

The meaning of 'decision' is defined in s.23(1) of the *Social Security Act 1991* ('the Act') to mean:

> 'decision' has the same meaning as in the *Administrative Appeals Tribunal Act 1975*;
>
> Note: subsection 3(3) of the *Administrative Appeals Tribunal Act 1975* defines 'decision' as including:
>
> - making, suspending, revoking or refusing to make an order or determination;
> - giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
> - issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
> - imposing a condition or restriction;
> - making a declaration, demand or requirement;
> - retaining, or refusing to deliver up, an article;
> - doing or refusing to do any other act or thing.

The issues in this case were, therefore, whether the requirement to attend an interview with a psychologist was a 'decision' as defined in the Act, and so whether it was reviewable, and whether the decision to suspend NSA payments to Butler was correct.

Discussion

The Tribunal noted the decision in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and in particular the comment in that matter that a 'decision' '... must resolve an actual substantive issue...'. Here, the Tribunal accepted that the requirement to attend the psychologist appointment was preparatory to the determination of Butler's entitlements to NSA, and so not a reviewable decision within the terms of the Act.

The Tribunal noted Butler's anger over the way he believed Centrelink had handled his claims, but that he was unwilling to provide the medical and other information necessary for a determination of his entitlement to be made. Given his long-standing health difficulties, the Tribunal concluded that the requirement that he attend the appointment with a psychologist was a reasonable one within s.63(5) of the Act in order to clarify his entitlement to NSA or another payment. In turn, the Tribunal determined that the decision to suspend NSA payment was correct.

Formal decision

The Tribunal affirmed the decisions under review.

[P.A.S].

Austudy: whether enrolled

SINES and SECRETARY TO THE DFaCS (No. 2004/683)

Decided: 29 June 2004 by N. Isenberg.

Background

Sines attended Southern Cross University. He received Austudy from 2001 to 20 March 2003. The University subsequently advised Centrelink that Sines' 2002 enrolment was cancelled from 28 March 2002 and Centrelink raised a debt of $5901.35 for the period 29 March 2002 to 20 March 2003.

The University then advised Centrelink that Sines enrolment for semester one was reinstated and Centrelink recalculated the debt for the period 22 July 2002 to 20 March 2003. The basis of the