Administrative Appeals Tribunal

Actual means test: assets of a partnership

GREEN and SECRETARY TO THE DFaCS (No. 2001/0359)

Decided: 2 May 2001 by D.W. Muller.

In general terms the maximum rate of youth allowance during a payment period is affected by the financial capacity of the youth's parents during the period. If the parents are self-employed or members of a business partnership their financial capacity is measured by their capacity to spend and save, their 'actual means'. Actual means will usually be reduced if there is a reduction in liquid assets during the relevant year, resulting in a higher rate of youth allowance.

The relevant parts of the *Social Security (Family Actual Means Test) Regulations 1998* (the Regulations) provide:

> **7.** For these Regulations, the **savings** of a person include the following amounts:
>
> (a) ...
>
> (b) the person's share in any profit retained by a partnership of which the person is a member who has a substantial influence over whether partnership profit is distributed to:
>
> (i) the person or a member of the person's family ...
>
> ...
>
> **15.(1)** This regulation applies in working out the actual means, for an appropriate tax year, of a person who claims or receives youth allowance, and of each other person who is a member of that person's family.
>
> (2) In working out actual means, the following amounts spent or saved in that tax year by the person are not included:
>
> ...
>
> (h) spending or saving from the proceeds of any liquidation of assets of the person held at the beginning of that year;
>
> ...
>
> (3) In addition, in working out actual means for that tax year, the following amounts are not included:
>
> ...
>
> (b) an amount of assumed spending equal to the amount of any reduction in liquid assets of the person held at the beginning of that year and not accounted for by spending of a kind mentioned in subregulation (2).

Green's parents were equal partners in a partnership which traded as Townsville Auto Parts, and his mother was a partner in a firm trading as Banks Bros Properties. During the year in question the liquid assets of the former partnership reduced by $12,106, and his mother's portion of the reduction in liquid assets of the latter amounted to $743. These amounts were spent by the family on living expenses.

Green's family spent $42,117 on home, transport, education, general living expenditure and other things during the year. Other matters were subsequently taken into account and the actual means were worked out to be $28,526. The issue was whether or not that figure should have been further reduced by the amounts, totalling $12,849, taken from the accounts of partnerships.

Green contended that the total of the two amounts by which his parents' equities in the liquid assets of the partnerships were reduced, namely $12,849, should not have been included in the actual means of the family. For the Secretary it was argued that the partnerships are legal entities which are separate from Mr and Mrs Green, so the loss of assets by the partnerships were not losses of assets of the parents.

The AAT held that a partnership is not a legal entity distinct from the partners. Partnerships in Australia do not have a legal personality that is distinct from the individual partners. It might be convenient to treat the partnership business and the affairs of the members independently for such purposes as accounting and taxation, but that does not create a separate legal entity. In a general partnership, all members retain the power (subject to the partnership agreement) to manage the enterprise, and all members are personally liable for partnership debts. Partnership is essentially contractual in its nature.

It noted that s.5 of the *Partnership Act 1891* (Qld) provides:

> 5.(1)Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.
>
> (2) But the relation between members of any company or association which is –
>
> (a) registered as a company under the *Companies Act 1863* or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or
>
> (b) formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter;
>
> is not a partnership within the meaning of this Act.

The AAT concluded that r.15 of the Regulations should have been applied to the partnerships' assets insofar as they affected the shares of Green's parents, because the partnerships' assets were the assets of those two persons. The savings of the partnerships would also have been their personal savings (subject to their share) pursuant to r.7. The Regulations should have been read as a whole.

Formal decision

The AAT set aside the decision under review and decided that for the relevant year the actual means of Green's family should have been reduced by a further $12,849. It remitted the matter to recalculate the rate of youth allowance payable to Green for 1999.

[K.deH.]

Valuation of land: registered valuer or opinion of estate agent

CLARKE and SECRETARY TO THE DFaCS (No. 2001/214)

Decided: 21 March 2001 by M.D. Allen.

The issue

The issue in the matter was the appropriate valuation to be given to a parcel of land owned by Clarke. The effect of the accepted valuation was that the rate of Disability Support Pension (DSP) paid to Clarke would alter.

Background

Clarke owned farming and grazing property west of Kempsey in New South Wales, which was valued by a local estate agent at $120,000 to $125,000, but by the

Australian Valuation Office (AVO) at $170,000. At the times these valuations were undertaken, neither valuer was aware that permission by the local Shire Council had been given to Clarke to subdivide the land into four blocks. However, the SSAT accepted the AVO's valuation of the land. Subsequently the applicant supplied a revised estimate of value to the Department, which was rejected. The Department contended that only a valuation provided by a registered valuer could be accepted.

Discussion

It was not disputed that the value of the property would affect the rate of DSP to be paid to Clarke. The sole issue was the appropriate value for that property.

The Tribunal noted the evidence of local sales and assessments of comparability between those properties and the several blocks of land held by the applicant. It accepted that '... it is not the law that an opinion by a Real Estate Agent familiar with the particular market can be ignored' (Reasons, para. 14) and it did not consider that the Department's policy of only accepting the opinion of a registered valuer could be followed blindly.

The Tribunal noted that, although the subdivision of the property was in progress, a prospective buyer would face considerable costs to complete the subdivision, to allow for the issue of new titles, and the like. The Tribunal noted the fundamental test of valuation contained *in Spencer v the Commonwealth of Australia* [1907] 5 CLR 418 at 432. The key question was '... [w]hat would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?'

Applying this test, the Tribunal determined that the total value of the land did not represent what a 'prudent purchaser' would be willing to pay, and that the appropriate value of the land was that supplied by the local estate agent, as that valuation made some allowance for the costs of subdivision.

Formal decision

The Tribunal determined that the appropriate value of the land for DSP purposes was $125,000.

[P.A.S.]

Newstart activity agreement: breaches; requirement to comply with legislative provisions

SECRETARY TO THE DFaCS and ALDERTON and SECRETARY TO THE DEPARTMENT OF EMPLOYMENT, WORKPLACE RELATIONS & SMALL BUSINESS (No. 2001/208)

Decided: 20 March 2001 by H.E. Hallowes.

Background

Alderton was provided with 'intensive assistance' by Employment National. She signed an agreement with the Salvation Army Employment Plus in May 1999 to attend their office every Monday and Wednesday. Alderton was 'breached' for failing to comply with this condition in June 1999. The DFaCS claimed that Alderton had two previous activity breaches and imposed a non-payment period. The SSAT had set aside the decision on the basis there was no valid agreement between Alderton and the Secretary to the DFaCS (the Secretary).

The issues

The issues were:

- whether there was an agreement between Alderton and the Secretary;
- whether the agreement was in a form approved by the Employment Secretary;
- whether there a failure by Alderton to comply with the activity test; and
- whether this was her second or third activity test breach ?

Legislation

The relevant legislation is contained in s.593(1) (qualification for newstart allowance), s.601(5) (failure to comply with terms of agreement), s.604(1C) (nature of newstart activity agreement), s.605(1), s.606 (newstart activity agreements), s.626(1) (when newstart allowance not payable) and s.630A (non-payment for eight weeks).

Approved form of agreement

Section 604(1C) of the *Social Security Act 1991* (the Act) states:

> A Newstart Activity Agreement is a written agreement in a form approved by the Secretary and the Employment Secretary. The agreement is between the person and the Secretary.

The Tribunal noted that the agreement form was headed 'Department of Employment, Workplace Relations and Small Business' but that there was no identification on the bottom of the form as to when it was generated and who may have approved the form. The Tribunal also noted that by virtue of:

> subsection 23(1) of the Act, Employment Secretary means 'the Secretary to the Employment Department' and pursuant to the same subsection Employment Department means 'the Department of Employment, Workplace Relations and Training'. However, the Department of Employment, Education and Training ceased to exist on 1 May 1998 when the Department of Employment, Workplace Relations and Small Business came into existence. It appears to be an oversight that the above definitions in subsection 23(1) of the Act have not been amended to reflect this change.

(Reasons, para. 10)

The Tribunal decided that s.19B(2) and (3) of the *Acts Interpretation Act 1901* were applicable and that the Governor-General had:

> made orders and directions under s.19B on 21 October 1998 such that the Tribunal is satisfied that the relevant provisions of s.604(1C) have been complied with regarding the approval of the form by the appropriate Secretaries.

(Reasons, para. 11)

Agreement between Alderton and the Secretary

The Tribunal also considered whether the appropriate delegation had been made from the Secretary to Salvation Army Employment Plus. The Tribunal concluded that Instruments No 779 and 780 dated 1 December 1998 delegated the Secretary's powers under s.605 and s.606 to specified officers within the Department of Employment, Workplace Relations and Small Business.

Employment Plus negotiated an agreement with Alderton which was then approved by the relevant officers of that Department. The Tribunal was satisfied that the provisions of s.604(1C) were met and Alderton had an agreement with the Secretary.

The Tribunal expressed concern that the above documents had not been before the SSAT and consequently the SSAT had decided there was no valid agreement. The Tribunal drew attention to the:

> care which must be taken in the preparation of documents and in the application of legislation to a person's circumstances so that additional administrative review costs are not incurred as a result of insufficient information being placed before a primary review body.

(Reasons, para. 13)