

Administrative Appeals Tribunal decisions

Assets test: 'deemed' income

SHARPE and SECRETARY TO DSS
(No. S86/158)

Decided: 11 April 1988 by R.A. Layton.

On the introduction of the assets test in March 1985, the DSS decided to cancel Sharpe's age pension because of the value of his property. Sharpe asked the AAT to review that decision.

Reasonable income?

The DSS conceded that Sharpe met the requirements of the financial hardship provisions, as set out in s.7(1) of the *Social Security Act* [formerly s.6AD(1)]; and that the value of the property should be excluded from the assets test. This review focused on what 'deemed income' should be taken into account in assessing the rate of Sharpe's pension.

At the time of the decision under review, s.7(4) [formerly s.6AD(3)] of the Act gave the Secretary a discretion to reduce the annual rate of pension payable to the person, 'having regard to the annual rate of income that could reasonably be expected to be derived from, or produced with the use of' the disregarded property.

From 13 November 1987, s.7(4) was replaced by a new sub-section. The Secretary no longer has a discretion; but, where a person's property is disregarded under the financial hardship provisions, the person's pension is reduced by 2.5% of the value of that property or the annual commercial return from the property, whichever is the lower.

On 10 December 1987, the Minister representing the Minister for Social Security made a statement to the House of Representatives. The Government gave an undertaking that, where a farm was being operated by a family member of a pensioner and it was not reasonable to expect the farm to be used for another purpose, the new s.7(4) - 'will be administered so that the overall financial situation of that family member will be taken into account in determining what rent, if any, that family member could reasonably be expected to pay.'

The DSS told the AAT that, because of this undertaking, it had adopted a practice which required Sharpe's position to be considered according to the legislation as it existed prior to 13 December 1987.

Most of Sharpe's property consisted of 1,045 acres of land, which Sharpe had leased to his 3 sons in 1982. They paid rent of \$2000 a year as well as rates of \$2298. The net value of this land was \$235 050.

The appropriate legislation

The AAT said that, in applying to the AAT for review of the DSS decision, Sharpe was asserting a right to be paid an age pension once he satisfied the requirements of the *Social Security Act* - albeit a right contingent on a favourable AAT decision. Amendment to the legislation after the application for review could not take away that accrued right, unless that legislation was declared to operate retrospectively: this point was established by decisions such as *Scharnguivel* (1984) 7 ALN N59; *Rigopoulos* (1985) 28 SSR 353; *Scharrer* (1986) 35 SSR 446.

The 1987 amendment to s.7(4) had not indicated, with the 'reasonable certainty' needed, that Parliament intended that legislation to apply retrospectively. The need for that 'reasonable certainty' had been recognized by the High Court in *Maxwell v Murphy* (1957) 96 CLR 262.

Accordingly, the DSS decision should be reviewed in the light of s.7(4) as it stood at the time of the application for review.

The 'reasonable' income

The AAT examined Sharpe's financial position in detail. It looked at the sons' partnership returns from the farming property: these ranged, over the past 3 years, from a nett loss of \$1294 to a nett profit of \$34 925. Each of the partners had drawn from \$9000 to \$14000 from the partnership in each year, in order to support their families.

The AAT decided that, taking into account the circumstances of the applicant's sons, and the terms of their lease, the amount of income which could reasonably be expected to be derived from that property was \$2000 a year.

The AAT also decided that the payment of Sharpe's sons, under the terms of the lease, of the rates on the land should not be treated as Sharpe's 'income'. The Tribunal disagreed with *Allman* (1987) 38 SSR 474, which had treated such payments as a 'periodical payment or benefit' within the s.6(1) [now s.3(1)] definition of 'income'.

The AAT said:

'Whilst it is true that a payment of a debt on behalf of another person may be a "benefit" to that person, the definition of "income" in the Act refers to "a periodical payment of benefit by way of gift or allowance . . ." I do not consider that the payment of a legal debt, unaccompanied by any receipt of moneys by the

debtor to pay that debt, could be regarded a "benefit . . . by way of gift or allowance". There is no money which comes into the possession of the debtor and such offsetting of a liability is not a "gift" or "allowance", nor would it come within any of the other descriptions contained in the definition of "income", namely personal earnings, moneys, valuable consideration or profits, whether of a capital nature, whether they be earned, derived or received.'

(Reasons, para.56)

The AAT said that, even if the payment of rates were income, the Federal Court decision in *Haldane-Stevenson* (1985) 26 SSR 323 would allow Sharpe's legal liability to pay the rates to 'be offset against the income, which would effectively produce the same result: Reasons, para.57.

A prospective decision?

The AAT said that it should decide the rate of pension payable to Sharpe should be assessed as if the new s.7(4) had not been inserted in the *Social Security Act*. It was not for the Tribunal to apply the new s.7(4) to Sharpe from 13 November 1987. That was a matter for the DSS if it chose at another time to reassess the rate of pension payable to Sharpe. This approach, the AAT said, was supported by the decision in *Reilly* (1987) 39 SSR 494.

The Minister's statement

The AAT said that the undertaking given to the House of Representatives on behalf of the Minister for Social Security and the practice subsequently adopted by the DSS contradicted the new s.7(4). The AAT was authorised to review certain decisions made under legislation. It had no authority to override that legislation in order to give effect to a ministerial undertaking which ran contrary to the provisions. Accordingly, if the Tribunal had concluded that the new s.7(4) was the relevant law to be applied to the decision under review, it could not have given effect to the ministerial undertaking.

Formal decision

The AAT set aside the decision under review and decided that Sharpe was to be granted the age pension from March 1985.

[P.H.]

