Age pension, carer pension: resident of Australia

MR AND MRS MRKONJIC and SECRETARY TO THE DSS (No. 12898)

Decided: 15 May 1998 by J. Handley.

The Mrkonjics requested review by the AAT of a SSAT decision that both the Mrkonjics' pensions be cancelled because Mrkonjic was not a resident of Australia when he applied for the age pension. Mrkonjic's wife had been paid the carer pension.

The facts

Mrkonjic was born in Croatia, migrated to Australia in 1959 and became a citizen in 1967. He returned to Croatia in 1968 and later came back with his wife and children in 1978. The family left for Croatia in 1985 'due to family problems'. They sold their home and investment flats in Australia, and bought a home in Croatia. Mrkonjic told the AAT that they had expected to stay in Croatia for a few months only, but they had remained because his wife's parents were ill and they did not want to interrupt their children's schooling.

The Mrkonjics returned to Australia on a one way ticket on 23 May 1996 leaving their daughter, who was still dependent, with family in Croatia to finish her Year 8 studies before joining them. They deposited $4000 in a Westpac account and boarded with friends. Mrkonjic turned 65 on 18 May 1996, and applied for age pension on 28 May 1996. His wife claimed carer pension on 7 June 1996 on the basis she needed to care for Mrkonjic. Both carer and age pension were granted.

In August 1996 the Mrkonjics heard that a family friend had attempted to rape their daughter, and so they applied to have their pensions paid in Croatia. They left Australia on 8 September 1996. They have not returned because of Mrkonjic's poor health. Part of their property in Croatia has been sold, and some of the proceeds put into their Westpac account. Their pensions were cancelled on the basis that Mrkonjic was not a resident at the time he applied for the age pension.

The law

Section 51 of the *Social Security Act 1991* provides that a claim for age pension is not a proper claim unless the person is an Australian resident and in Australia on the day on which the claim is lodged. Subsection 7(2) defines 'Australian resident' as including a person who resides in Australia and is an Australian citizen. Subsection 7(3) provides:

> 'In deciding for the purposes of this Act whether or not a person is residing in Australia, regard must be had to:
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> (a) the nature of the accommodation used by the person in Australia; and
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> (b) the nature and extent of the family relationships the person has in Australia; and
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> (c) the nature and extent of the person's employment, business or financial ties with Australia; and
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> (d) the nature and extent of the person's assets located in Australia; and
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> (e) the frequency and duration of the person's travel outside Australia; and
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> (f) any other matter relevant to determining whether the person intends to remain permanently in Australia.'

A resident of Australia

The AAT referred to *Hafza v Director-General of Social Security* 26 *SSR* 321 where Wilcox J said the test for residency 'is whether the person has retained a continuity of association with the place . . . together with an intention to return to that place and an attitude that that place remains "home"'. The AAT found the Mrkonjics were not Australian residents when they had claimed their respective pensions, because they did not make any attempt to establish a home in Australia, and their home remained in Croatia. They had not made any attempt to buy or rent a place of their own, and they had not brought their personal possessions from Croatia. They had bought only the barest necessities in Australia; and they did not arrange for their daughter to join them when her studies were finished. They had a house in Croatia where they lived with their son and daughter; and they had not attempted to sell that house. Their immediate family and relatives remained in Croatia.

Carer pension

The AAT referred to s.198(1) and found that Mrkonjic's wife was not entitled to carer pension because her husband was not entitled to the age pension.

Formal decision

The AAT affirmed the decision under review.

[K.deH.]

[Contributor's Note 1. Portability was refused because the Mrkonjics were not residentially qualified when their pensions were granted. Otherwise it would have been difficult to avoid finding that their reasons for leaving within 12 months arose from circumstances that could not be reasonably foreseen when they arrived (see s.1220).]

Carer payment: severely handicapped person; whether constant care

SECRETARY TO THE DSS and RETALLACK (No. 12978)

Decided: 11 June 1998 by J. Kiosoglous.

The background

Retallack's daughter Anastasia was born in July 1981 with Down's Syndrome. In July 1997 when Anastasia turned 16 years, Retallack's supporting parent pension was cancelled and she began receiving newstart allowance. She applied for carer payment (formerly carer pension) on 7 May 1997, citing evidence that Anastasia required personal care, attention and supervision on a daily basis. On 17 June 1997 the DSS rejected her claim, but this was set aside by the SSAT on 13 August 1997.

Retallack had borne responsibility for the total care of her daughter since her birth. Anastasia attended school each day, other than religious holidays or when ill, and the evidence was that her school year was similar to the normal school year. Six weeks before the AAT hearing, Retallack commenced part-time work visiting elderly clients for a total of 5 hours per week, during school hours. Her evidence was that in a usual week she was freed from constant care of her daughter from 9 a.m. until 2.30 p.m. each weekday. She had previously worked as an enrolled nurse but had been able to do so only because of the practical support of another parent who took Anastasia to school.

The issue

It was not in dispute that Retallack's daughter was a 'severely handicapped person' nor that other requirements of s.198(1) of the *Social Security Act 1991* were met. The sole area of dispute was whether Retallack provides constant care for her daughter.

The law

Section 198(2AA) of the Act provides:

> 'If:
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> (a) a person is personally providing constant care for a severely handicapped person;
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> and
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> (b) the person ceases to provide that care in order to undertake training, education, un-

paid voluntary work or paid employment; and

(c) the cessation does not exceed 20 hours per week;

the person does not cease to be qualified for a carer payment merely because of that cessation.'

The AAT considered that the fundamental consideration was the amount of time available to care for a severely handicapped person, and to undertake other tasks. It was not the amount of time spent in employment,but the time during which constant care had ceased, that was critical.

The AAT also noted the provisions of s.198(2) which allows qualification for the carer payment to continue where a carer temporarily ceases to provide constant care for periods or aggregates of periods not exceeding 52 days a calendar year. The AAT concluded that the purpose of this sub-section was to allow carers to obtain respite for the equivalent of one day a week, without losing their entitlement to the carer payment, and that this provision was in addition to and separate from the provisions of s.198(2AA) above. The AAT noted that Retallack would be unable to hold permanent part-time employment unless the position allowed sufficient flexibility to meet the uncertain carer demands of her daughter. Nevertheless, the AAT concluded that Retallack was able, employment opportunity permitting, to work for more that 20 hours a week.

The decision

The AAT set aside the decision and substituted its decision that Retallack did not qualify for the carer payment.

[P.A.S.]

Rate of pension: carries on a business

EKIS and SECRETARY TO THE DSS (No. 12731)

Decided: 13 March 1998 by K.L. Beddoe.

The background

Ekis was a real estate agent in receipt of age pension during 1996 and 1997. In calculating her rate of age pension the DSS took into account gross earnings. Ekis sought to have her expenses as a real estate agent deducted under the social security legislation. The deductions sought had been allowed by the Commissioner of Taxation for assessment of income tax.

The issue

The issue before the AAT was whether Ekis was an employee or was 'carrying on a business', as it was only in the latter case that expenses could be deducted in calculating her level of income for social security purposes.

The legislation

Section 1075(1) of the *Social Security Act 1991* (the Act) provides:

'Permissible reductions of business income

1075(1) Subject to subsection (2), if a person carries on a business, the person's ordinary income from the business is to be reduced by:

(a) losses and outgoings that relate to the business and are allowable deductions for the purposes of section 51 of the Income Tax Assessment Act; and

(b) depreciation that relates to the business and is an allowable deduction for the purposes of subsection 54(1) of the Income Tax Assessment Act 1936 or Division 42 of the Income Tax Assessment Act 1997; and

(c) amounts that relate to the business and are allowable deductions under subsection 82AAC(1) of the Income Tax Assessment Act 1936.'

It was not in dispute that the earnings as a real estate salesperson were 'ordinary income' within the meaning of s.8 of the Act.

Real estate sales work

Ekis was a commission only salesperson with L.J. Hooker, at its Beenleigh office, though concurrent work with other agencies was allowed after prior arrangement and agreement of the franchisee. Ekis' income was a variable proportion of the net commission from sales once the franchise company had taken its percentage. There was no written contract between franchisee and salespersons as to terms of engagement though evidence was given of a verbal contract. Ekis and other salespersons spent roughly 50% of their time in the office, and for the rest organised their own work in sales in the field. Each salesperson was required to be in the office for a whole day once a week.

The responsibilities of the franchise company and franchise manager were to provide various office functions, such as receptionist, office telephones, stationery, contracts, receipts, etc. All property keys were secured at the office. Bulk advertising of listings under the L.J. Hooker banner were placed by the office in newspapers. Sales meetings were organised weekly. At these the franchise manager repeatedly stated to salespersons that they were 'a business within a business', a term to which the AAT attached some significance: Reasons, paras 18, 23, 24, 55. However the franchise manager's evidence to the AAT was that she considered the relationship between the franchise company and the salesperson to be that of employer/employee.

L.J. Hooker forwarded the salespersons' taxation instalments on a monthly basis to the Australian Taxation Office (ATO), and made superannuation contributions on behalf of salespersons.

The responsibilities of the salespersons included supplying their own business cards (though they bore a corporate logo); paying for the corporate wardrobe (though its use was optional); paying all outgoings of petrol, vehicle maintenance, parking fees, mobile phone charges, insurance for passengers they carried in their vehicles. (Workers compensation insurance was paid by the franchise company.) No sick leave or holiday pay was provided. Ekis held formal qualifications to practise on her own account as a principal, and to own her own franchise.

'Business'

The AAT looked at the approach taken by the SSAT, which accepted that the concepts of being an employee and of carrying on a business were mutually exclusive, and had determined that Ekis was an employee, applying principles arising from *Stevens and Bodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, and *Market Investments Limited v Minister for Social Security* (1969) 2 WLR 1.

The AAT noted that the Act provides no definition of the term 'business.' On the other hand, the *Income Tax Assessment Act 1936* (the Tax Act) defines 'business' as 'any profession, trade, employment vocation or calling but does not include occupation as an employee' (s.6(1)).

If it were the case that the meaning in social security legislation was to be the same as in the taxation legislation, the AAT said, it would have been easy to incorporate the definition of 'business' found in the taxation legislation into the Act. Absent that reference, the AAT considered it inappropriate to infer the exclusion of 'occupation as an employee', an exclusion found in the Tax Act. The AAT cited the High Court decision in *Read v Commonwealth of Australia* (43 *SSR* 555) for support for the need for caution in applying decisions construing concepts arising in taxation matters to matters arising in social security, though *Read* concerned the definition of 'income', which is specifically defined in the Act.

The AAT made reference to a dictionary definition of 'business' as 'one's occupation, profession or trade'. It was