



Larry Weil

Unemployment benefit: full-time student

THOMSON and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q81/3)

Decided: 12 June 1981 by T. R. Morling J, J. B. K. Williams and J. G. Billings.

Kim Leonie Thomson had completed a tertiary course in commercial art at the end of 1978. During 1979 she was employed as a commercial artist; but her employment was terminated at the end of 1979.

In February 1980 Thomson applied for unemployment benefit and this was granted by the DSS from 20 February 1980. At about the same time she enrolled in a fashion design course at a College of Advanced Education. She later gave evidence that her intention, in enrolling in this course, was to maintain her drawing skills and to fill in her spare time while looking for paid work.

Thomson attended the College for at least two days each week up to the end of June 1980 and for four days each week from July 1980. In August 1980 the DSS reviewed Thomson's entitlement to unemployment benefit and, on discovering that she was a full-time student, cancelled the benefit. It seems (although the AAT's reasons for decision are silent on this) that Thomson then re-applied for unemployment benefit and this was

granted—presumably after finishing or discontinuing her course at the CAE.

The DSS then decided that the amount paid to Thomson since February 1980 'should not have been paid' and that the amount paid to her should be deducted from her current benefit payments. The power to make these deductions is conferred by s.140(2) of the *Social Services Act*:

140. (2) Notwithstanding anything contained in this Act (other than sub-section (3) of this section), where, for any reason, an amount has been paid by way of pension, allowance, endowment or benefit which should not have been paid, and the person to whom that amount was paid is receiving, or entitled to receive, a pension, allowance or benefit under this Act (other than a funeral benefit under Part IVA), that amount may, if the Director-General in his discretion so determines, be deducted from that pension, allowance or benefit.

Thomson appealed against the Director-General's decision (to deduct the 'overpayments' from her current benefit) to an SSAT. From there she appealed to the AAT. (The Reasons for Decision do not trace Thomson's path through the preliminary appeals procedure; but she must have appealed to an SSAT—see now s.15A(1), *Social Services Act*.)

Can a full-time student be 'unemployed'?

Before the AAT, the DSS argued that Thomson could not have qualified for unemployment benefit while a full-time student because she could not satisfy the Director-General that she was 'unemployed', one of the essential qualifications under s.107(1), *Social Services Act*.

107. (1) Subject to this part, a person . . . is qualified to receive an unemployment benefit in respect of a period . . . if, and only if,

- (a) [specifies minimum and maximum ages];
- (b) [specifies residence in Australia]; and
- (c) the person satisfies the Director-General that—
 - (i) throughout the relevant period he was unemployed and was capable of undertaking, and was willing to undertake, paid work that, in the opinion of the Director-General, was suitable to be undertaken by the person; and
 - (ii) he had taken, during the relevant period, reasonable steps to obtain such work.

The DSS argued, in a written statement filed with the AAT:

Full-time students are not 'unemployed' within the meaning of s.107(1)(c)(i) of the Act, for it is inconsistent with the ordinary use of the language so to describe the applicant in the context of the provisions of the Act relating to the payment of benefit to the unemployed.

The AAT decided that such a blanket exclusion was too broad. While it might be sound as a general rule, it could not be applied to all cases irrespective of the particular facts of each case. And 'the particular facts of Miss Thomson's case [made] the general rule inapplicable to her situation': Reasons for Decision, p.8.

The relationship between full-time study and 'unemployment' was put in these terms by the AAT:

We think that as a general rule and in the absence of special circumstances a person who is a full-time student attending a school or place of learning could not properly be regarded as being unemployed within the meaning of s.107. This result would not flow from any presumption of law to that effect, but rather because enrolment as a full-time student with consequent attendance at classes would demonstrate a commitment to and a preference for study as distinct from employment. It would demonstrate that the person was not unemployed because he had elected to become a full-time student in preference to entering the work force. Moreover, pursuit of full-time studies would of itself ordinarily demonstrate the unwillingness of the student to undertake paid work and inability to take reasonable steps to obtain it. In the usual case

a person undertaking a full-time course of study would make such a commitment to that course of study as to demonstrate his unwillingness to look for and obtain paid work.

But whilst this may be the general rule, there will be cases where it does not apply. We think Miss Thomson's situation is one such case.

The AAT's assessment of Thomson's case Thomson had given evidence to the AAT ('and we formed a favourable impression of her as a witness', said the AAT) that she had embarked on the course without any commitment to complete it; that she would have immediately given up the course if she had been able to obtain employment; that she actively sought employment, absenting herself from classes on about 12 occasions, between February and July 1980, to follow up job prospects; and that she had sought not only work as a commercial artist but less skilled work—'in fast food and other retail establishments'. The AAT concluded:

We accept her evidence that her decision to attend the fashion design course was motivated only by a desire to fill in her spare time while she was looking for paid work. As we have already said we accept her evidence that she did not let her studies interfere with her efforts to obtain work and that she would

have immediately discontinued her studies had she been able to obtain employment. She had no commitment to continue with the course and at all relevant times she was truly in the market for paid work. Her attendance at the College did not in any way preclude or inhibit her from seeking work and it did not reflect any election by her to become a full-time student in preference to entering the work force. In these circumstances we are satisfied that she was 'unemployed' within the meaning of s.107(1)(c)(i) at the relevant time.

... For these reasons we are satisfied that Miss Thomson was throughout the relevant period unemployed and was capable of undertaking, and was willing to undertake, paid work that was suitable to be undertaken by her. We are further satisfied that she took during the relevant period reasonable steps to obtain work. We therefore set aside the decision of the Director-General made pursuant to s.140(2) of the Act that the applicant be required to refund the amount of benefit paid to her.

[The Reporter understands that the Director-General of Social Services has lodged an appeal to the Federal Court of Australia; and that the principal ground of appeal relates to the AAT's decision that a full-time student could, in some circumstances, be 'unemployed'.]

Unemployment benefit: Self-help co-operative

McKENNA and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q81/7)

Decided: 12 June 1981 by T. R. Morling J, J. B. K. Williams and J. G. Billings.

Malcolm Edward McKenna was born in 1941 and had qualified as a secondary school teacher. He worked in several teaching positions until the end of 1979. In January 1980 he applied for unemployment benefit which was granted by the DSS from 9 January 1980.

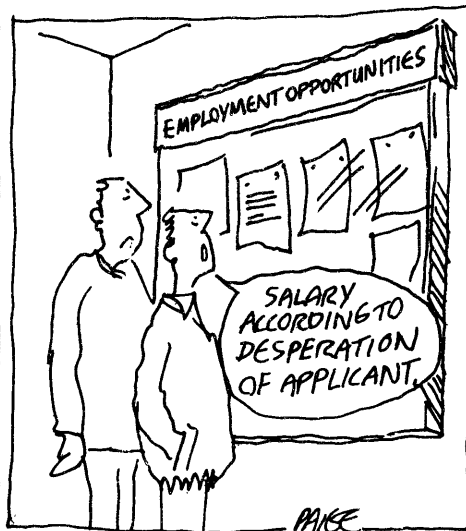
From about that time McKenna became involved in several self-help work co-operatives in which the participants pooled their money (almost all from unemployment benefits) to finance furniture making, soap making and vegetable farming: their objective was, through the sale of various products, to become self-supporting. McKenna was quite open about these activities, regularly reporting them to the DSS in his fortnightly income statements.

On 9 June 1980 McKenna made a written statement to a DSS field officer in which he said that he was '[putting] in an 8-hour day, 5 days a week' on the co-operative. He also said:

My long term aim is to make the self help group a going concern and fully supportive, i.e. receiving salary, but in the meantime will accept work, if suitable to my qualifications.

On 28 August 1980 the DSS cancelled McKenna's unemployment benefit. He appealed to an SSAT which recommended that the cancellation be affirmed. On 10 December 1980 a delegate of the Director-General affirmed the decision to cancel. On 19 December 1980 McKenna applied to the AAT for review of that decision.

Before the AAT, the DSS argued that the



cancellation was justified because McKenna could not qualify for unemployment benefit: he was not unemployed, he was not willing to undertake paid work that was suitable to be undertaken by him, and he had not taken reasonable steps to obtain such work: see s.107(1)(c), *Social Services Act* (reproduced in *Thomson*, in this issue of the *Reporter*).

Before the AAT, McKenna said that one of the reasons he had given up teaching was that he wanted to appreciate the problems of unemployed people and that he could not do this while on a salary substantially in excess of unemployment benefit. He also said that he would not accept an offer of a teaching job if it meant cutting his involvement with the co-operative movement.

On the question of McKenna's 'willingness to undertake paid work', the AAT referred to McKenna's evidence that he would be unlikely to take a paid position if that in-

hibited his work with the co-operative; and to information supplied by him to the DSS on 7 August 1980 (when he said that he had contacted no employers in the previous 14 days) and 26 August 1980 (when he had said that he had made only one inquiry at the local CES office and had added 'work in the co-op. is going well'). The AAT concluded:

17. As has been stated, it was originally for the applicant to satisfy the Director-General that he was willing to undertake paid work and that he had made reasonable efforts to obtain it. It is now for this Tribunal to be so satisfied. It is evident that the applicant was and is enthusiastic concerning the work of the co-operative and that prominent in his thoughts was a concern that the co-operative and his involvement in it should not suffer from his unavailability to participate in it. It would also seem that the applicant had principles which inhibited his engagement in paid employment of the ordinary kind and that he felt that his duty lay in engaging himself to work which he thought was of assistance to others rather than to his own pecuniary advantage. His answers of 7 August 1980 and 26 August 1980 given shortly before the decision to terminate his grant do not indicate any serious effort on his part to obtain work other than with the co-operative. All these considerations give rise to uncertainty as to his attitude at the relevant time and are productive of a lack of satisfaction on our part that he came within the provisions of s.107(1)(c) of the Act.

18. For these reasons we consider that the decision under review should be affirmed.

19. It should be stated that we saw no reason to doubt the *bona fides* of the applicant. We formed the clear impression that he was earnest and sincere in his desire to direct his efforts to the assistance of unemployed persons. On the version given to us by him it would seem that his work has assisted others and it may well be that the efforts of the co-