

**Formal decision**

The AAT set aside the decision under review and decided that a special benefit be paid to Sakaci for the period from 27 May 1983 to 31 October 1983.

[Note: Shortly after this decision was handed down, the DSS issued new guidelines on assurances of support (as maintenance guarantees are now known). These guidelines introduce significant

changes. They are discussed in this issue of the *Reporter*, under the heading, **Administration.**]

## Special benefit: drought-affected farmer

### KIRSCH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/400)

Decided: 31 May 1984 by R.K. Todd.

Kirsch had purchased a large rural property in 1981. Because of the severe drought, he could not plant crops and, by September 1982, he had accumulated debts of \$150000.

At about this time, the State Bank approved a crop advance to Kirsch, including a living allowance of \$5500 and he placed his property on the market for \$260000.

At the end of August 1982, Kirsch applied to the DSS for a special benefit, which was granted for the period from 9 August to 6 October 1982, the day before the crop advance was made available to Kirsch by the State Bank. (The DSS calculation that the living allowance, when divided by the rate of special benefit payable to Kirsch, would last him until June 1983.) Kirsch asked the AAT to review the DSS decision terminating his special benefit.

#### The legislation

Section 124(1) of the *Social Security Act* gives the Director-General a discretion to grant a special special benefit to a person if the Director-General is satisfied that 'that person is unable to earn a sufficient livelihood for himself and his dependents (if any)'.

#### Inability to earn

The AAT said that it was satisfied that Kirsch was, throughout the relevant per-

iod, unable to earn a sufficient livelihood. That inability was to be measured by considering whether there was any measure which Kirsch could have reasonably undertaken to obtain a livelihood. It would have been unreasonable to expect Kirsch to leave his family and his property during the drought to seek employment elsewhere (the prospects of which were extremely slight). Moreover, the depressed rural economy during the drought meant that the sale of his property and of any stock on his property would not have been a sensible or responsible course.

#### The discretion to grant special benefit

The AAT said that it was appropriate for the discretion to grant a special benefit to be exercised in favour of a primary producer who was, for a period of time, struggling because of the drought. In exercising that discretion, the AAT said, there were several factors to be taken into account, including the crop advance made to Kirsch by the State Bank, the special benefit paid to him up to 6 October 1982 and 'the underlying community support which protected the applicant, and certainly others like him, to a degree which would defy any urban comparison.' The AAT expanded on this last point:

In this kind of case a mechanism demanded by Australian agricultural conditions comes into operation and losses over short periods of time are absorbed on a wider front to support the rural economy. The banks, too, accept that a primary producer may require a larger than normal overdraft facility when the credit provided by the rural business community is stretched to the limit. In the

applicant's case, the impression given is that the rural community and the financial institutions that are a part of that community were of considerable support in assisting him to cope with the drought and its financial consequences.

(Reasons, para. 26)

The Tribunal then reviewed Kirsch's financial situation between October 1982 and April 1983 and concluded that the money advanced to him in October 1982 had no 'residual effect after the end of February 1983' and that he had no 'real opportunity to make any realistic budgetary plan for the extension of his finances beyond that date': Reasons, para. 29.

There was, the AAT said, a period of urgent need for financial support between the end of February 1983 and 18 April 1983, when Kirsch's wife was granted unemployment benefits:

The hardship and difficulties that beset the country side were, of course, felt by all, but the applicant has suffered in the extremes. The simple truth of the matter is that the applicant desperately required income to support himself and his family. Balancing all the factors I have mentioned leads me to the conclusion that the applicant is entitled to special benefit from the beginning of March 1983 to the date on which the applicant's wife began receiving unemployment benefits.

(Reasons, para. 30)

#### Formal decision

The AAT varied the decision under review by providing that Kirsch receive special benefit for the period 1 March 1983 to 17 April 1983.

## Unemployment benefit: work test

### FARAH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/137)

Decided: 4 June 1984 by W.A.G. Enright.

Juan Farah asked the AAT to review a DSS decision to recover from him an overpayment of unemployment benefit amounting to \$321.64. According to the DSS, the overpayment had been made when Farah was paid unemployment benefits for a 4 week period, during which he was not 'unemployed' within s.107(1)(c)(i) of the *Social Security Act*.

During that period, Farah had worked as a commission agent, making a net loss of \$63. Farah told the AAT that, before undertaking this work he had been told by the DSS that he would not be disqualified for unemployment benefits and that the amount of his income from the

work would be taken into account in fixing the level of his benefit.

Farah also claimed that this was a case in which the Director-General should have exercised his discretion, under s.107(3) of the *Social Security Act*, to treat Farah as unemployed notwithstanding that he had undertaken paid work.

Finally, Farah claimed that the circumstances of his case was such that the discretion to pursue recovery should be exercised in his favour.

#### Not "unemployed"

The AAT first considered whether there had been an overpayment of unemployment benefit to Farah: this depended on whether Farah was, while working as a commission agent, 'unemployed' within s.107(1)(c)(i) of the *Social Security Act*. On this point the AAT said:

I do not think that the failure of the enter-

prise marks him as unemployed during the relevant period . . . He was, in the relevant period, no different to be briefless barrister waiting dejectedly in his chambers for his profitable week, or the farmer mending fences or disposing of dead livestock with no prospects of income for many months after the drought breaks . . .

(Reasons, para. 20)

#### Should the work 'be disregarded'?

Section 107(3) gives the Director-General a discretion to treat a person as unemployed despite the fact that the person has undertaken paid work -

if the Director-General is of the opinion that, taking into account the nature and duration of the work and any other matters relating to the work that he considers relevant, the work should be disregarded.

The AAT said that this was not a case in which the discretion in s.107(3) should be exercised: the kind of work under-

taken by Farah was not unusual — 'most people selling goods or services depend on the vagaries of demand'; nor was there anything special about the duration of Farah's work. The only matter which could support the exercise of the discretion was the economic failure of the work; but, the AAT said, that failure might have been overcome with persistence or by changing the area in which Farah was selling.

#### The discretion to recover

The AAT said that, whether recovery was made by court action under s.140(1) or by deduction from any future benefits paid to Farah under s.140(2), there was a discretion which should be exercised having regard to the total circumstances of the case.

In the present case, Farah had told the Tribunal that his family's weekly expenses exceeded its weekly income. This, the AAT said, amounted to 'a case of real hardship':

28. In the face of the applicant's hardship and the fact that he was misled, is not in accordance with the principles of administrative justice to attempt to recover any amount overpaid to the applicant for the relevant period. I therefore set aside the decision of the Director-General to recover the unemployment benefit overpaid by resort either to the Act, s.140(1) or s.140(2).

#### Formal decision

The AAT set aside the decision under review and directed that no action be

taken for recovery of the overpayment of unemployment benefit.

### DIKMEN and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. N83/312)

Decided: 15 June 1984 by C.E. Backhouse.

Berna Dikmen had migrated to Australia in 1972, with a diploma in chemistry. She then worked as a chemical analyst, a cashier, a laboratory assistant and a filing clerk until February 1975.

In March 1975, she was granted unemployment benefits and these continued to be paid to her until March 1982. At that time the Commonwealth Employment Service told the DSS that it could not find employment for Dikmen as a laboratory assistant, which was the only field in which she was prepared to work. On the basis of that report, the DSS decided that Dikmen was no longer eligible for unemployment benefit. She asked the AAT to review that decision.

#### The legislation

According to s.107(1) of the *Social Security Act* a person is qualified to receive an unemployment benefit if that person satisfies age and residence qualifications 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 AAT's assessment

The Tribunal said that it was satisfied on the evidence that Dikmen had 'remained firm at all times in wishing to undertake employment in the area in which she regarded herself as best qualified to work' — that is, as a laboratory assistant:

I have come to the view that the applicant was not willing to accept employment in a factory or for that matter in any other type of employment other than the area in which she regarded herself [as] skilled and experienced . . . In consequence it could not be said that she was willing to undertake paid work, that in the opinion of the Director-General, was suitable to be undertaken by her. The evidence showed that she had had employment soon after her arrival in Australia as a cashier and as a filing clerk. Although her command of the English language was not fluent, nevertheless she had been able to hold down positions of this type albeit for short periods and in my view it was a type of employment suitable to be undertaken by her. Further I am not satisfied that she has taken during the relevant period reasonable steps to obtain such work.

(Reasons, para. 9)

#### Formal decision

The AAT affirmed the decision under review.

## Unemployment benefit: full-time student

### ROWAN and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. S84/21 and S84/53)

Decided: 28 June 1984 by J.O. Ballard.

Andrew Rowan had enrolled as a university student in Perth at the beginning of 1983. In September 1983 his application for unemployment benefits was rejected by the DSS.

At the end of 1983, Rowan moved to Adelaide, and, in January 1984, he again claimed unemployment benefit. The DSS rejected this claim.

Rowan asked the AAT to review both DSS decisions.

#### The first decision

The AAT noted that, in *Director-General of Social Services v Thomson* (1982) 36 ALR 624 the Federal Court had said that a full-time student could qualify for unemployment benefit:

[T]he activities being pursued by an applicant for a benefit are to be considered with all other relevant factors in determining whether he or she is unemployed. One important matter for consideration is the applicant's intention at the relevant time.

(36 ALR, p. 629)

Rowan had told the AAT that he had enrolled at university to occupy himself after experiencing difficulty in finding a permanent job. He had begun the 1983

year with some savings and was receiving a TEAS allowance. By September 1983 his savings had been exhausted and he applied for unemployment benefits. At the same time he applied for several jobs, which he would have taken if offered.

The AAT said:

[O]n the applicant's own evidence, he was not looking for work in the first half of the academic year of 1983 and only began to seek employment when his money ran out and he applied for the unemployment benefit. I think there is a reasonable inference from that that he would prefer to remain at the university, and continue with his studies.

(Reasons, para. 13)

#### The second decision

Rowan told the AAT that he had moved to Adelaide to improve his chances of finding work. He had applied for several jobs. In late February 1983 had enrolled at the University of Adelaide and continued to receive a TEAS allowance. After a few weeks he was offered a job which he accepted; and he then withdrew from his course.

The Tribunal said that the evidence showed that after his return to Adelaide, Rowan had sought employment and that 'the most compelling evidence' was his withdrawal from University when he found employment.

The Tribunal said that Rowan's receipt of TEAS (available, according to an official leaflet, 'only to a student who is undertaking an approved course on a full-time basis') was not 'sufficient to nullify the other evidence as to [his] intention at the time' (after his move to Adelaide).

#### Formal decision

The AAT affirmed the first decision and set aside the second decision. It granted Rowan unemployment benefit from the 7th day after his January 1984 claim.

The *Reporter* welcomes contributors discussing current aspects of Social Security law. Contributions should be no more than 1200 words in length, typed double-spaced and may be forwarded to:

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