Unemployment benefit: full-time student

BOURIS and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/880)

Decided: 31 July 1984 by I.R. Thompson.

Chris Bouris had enrolled as a full-time University student at the beginning of 1980. During the long vacations at the end of 1980 and 1981 she had obtained temporary employment. However, she was unable to obtain employment during the long vacation at the end of the 1982 year and, in December 1982, she lodged a claim for unemployment benefit.

When Bouris told the DSS she intended to return to University in March 1983, the DSS rejected her claim. She sought review of that decision by the AAT.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified for unemployment benefit if the person satisfies age and residence requirements and satisfies the 'work test' in s.107(1)(c) – that is,

> (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.

This review centered on the question whether Bouris met the requirements of that paragraph.

Was Bouris 'unemployed'?

In *Green v Daniels* (1977) 13 ALR 1, Stephen J had said that a person could not be 'unemployed' within s.107 while on vacation from University:

> The state of being 'unemployed' I regard as satisfied as soon as a student leaves school, with the intention of not returning but, instead, of entering the workforce, and begins to seek employment.

Bouris conceded that, if this were a correct reading of s.107(1)(c), her claim for unemployment benefit would have to fail. But she pointed out that the provision had been amended after the decision in *Green v Daniels*, by inserting into s.107(1)(c) the phrase 'throughout the relevant period'. The relevant period, she said, was the two week period for which unemployment benefit was paid; and, therefore, the only question (Bouris argued) was whether she intended to obtain suitable employemnt and to enter the paid workforce for that relevant period of two weeks.

The AAT said that, looking at the words of s.107(1)(c) in isolation from the other provisions of the Act, this interpretation was certainly open. However, the AAT said, s.107(1) had to be interpreted in its context, as Stephen J had done in *Green v Daniels*.

Amongst the provisions which appeared with s.107 in part VII of the Act was s.120A, which provided a 6-week postponement of unemployment benefit for a claimant who had ceased to be a full-time tertiary student. The Tribunal said that this provision was clearly based on the assumption that a full-time tertiary student could not qualify for unemployment benefit while enrolled in her or his course; and, the AAT said, the second reading speech of the Minister for Social Security (on the occasion when s.120A was added to the Act in 1977) confirmed that understanding. Moreover, when s.107 was enacted in its present form in 1979, nothing was said by the Minister to indicate that the addition of the phrase 'throughout the relevant period' was intended to qualify for unemployment benefit a student on vacation about to resume her or his course at the end of the vacation.

The AAT then referred to the decision of the Federal Court in *Thomson* (1981) 38 ALR 624. The Court had indicated that there was no inflexible rule which prevented a full-time tertiary student qualifying for unemployment benefit – each case depended on its own facts. But the court had, the AAT said,

> apparently accepted as still appropriate to the present s.107 the analysis by Stephen J of the meaning of 'unemployed' and in particular his statement that the issue of whether Miss Green was unemployed '[involved] the question of whether she had genuinely ended her school career and was seeking a place in the workforce'. Clearly Stephen J was referring to the permanent workforce. The Federal Court emphasized the importance of the person's intention at the relevant time.
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> 22. It is necessary, as the Federal Court pointed out, in construing s.107(1)(c) to keep in mind that the various requirements are not separate and distinct from one another but are interrelated. It is not possible, therefore, to give to the expression 'unemployed' the simple meaning 'without paid work'.
>
> Furthermore, the provisions of s.107(1) must be construed not only together but in their context. I have already referred to s.120A. In that context, I am satisfied, s.107(1)(c) is to be construed as having the effect that, because the applicant was pursuing a five-year university course as a [full-] time student and intended to undertake paid work only for the duration of the break in that course during a university vacation and not to join the workforce on a more long-term basis she was not qualified to receive an unemployment benefit in respect of the period for which she claimed it.

Formal decision

The AAT affirmed the decision under review.

MARTENS and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N84/208)

Decided: 4 October 1984 by B.J. McMahon, M.S. McClelland and A.P. Renouf.

Dennis Martens left school in 1980, worked in several jobs and, in May 1984, was granted unemployment benefit. In July 1983, he enrolled in a 6 month computer course run by a commercial organization (at a fee of $7000).

When Martens informed the DSS that he had enrolled in this course, the DSS cancelled his unemployment benefit and Martens sought review of that decision.

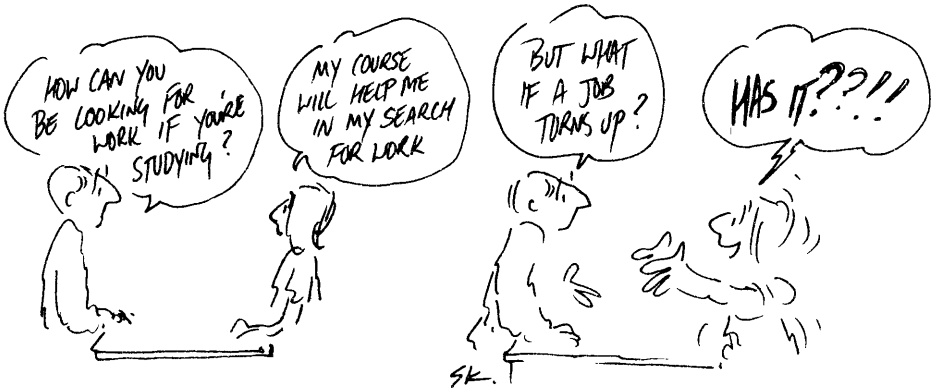
The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified for unemployment benefit if that person satisfies age and residence requirements and

> (c) the person satisfies the Director-General that–
>
> (i) throughout the relevant period he 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 evidence

The AAT accepted Martens' evidence that he had attended the computer course each afternoon for 5 days a week over a 6 month period; that he had made consistent efforts to find employment (by



answering newspaper advertisements and through the computer school) in the computer industry; and that he would have converted to a part-time course if he had found employment during that period.

The AAT's assessment

The Tribunal said that, in deciding whether Martens was 'unemployed', his intention was the important consideration. This was established by the High Court decision in *Green* v *Daniels* (1977) 13 ALR 1, and the Federal Court decision in *Thomson* (1981) 38 ALR 624. In the present case, the evidence had established that Martens had intended

> at all relevant times . . . to join the permanent workforce in the chosen area of his endeavours. This must define his status as an unsuccessful aspirant for employment – an unemployed person.

(Reasons, p. 11).

The AAT then rejected the DSS argument that, by seeking employment only in the computer industry, Martens had not shown a willingness to undertake work and had failed to take reasonable steps to find work. This argument was based on the decision in *Whyte* (1981) 4 *SSR* 37, where the Tribunal had decided that a person who had looked for a job only as a radio announcer had not taken reasonable steps to obtain suitable employment.

However, the AAT said, there was a difference between the labour market for radio announcers and the labour market in the computer industry. After noting that the applicant in *Thomson* (above) had been looking for a design job, the Tribunal said:

> Having regard to the size and rate of growth of the computer segment of our economy, the number of jobs available in it, the mobility of employees and the consequent rate of availability of employment, we consider that genuine and assiduous enquiries in that field amounted to reasonable steps to obtain suitable employment.

(Reasons, p. 14).

Accordingly, the AAT said, Martens had qualified, during the relevant period, for unemployment benefit.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that unemployment benefit be paid to Martens during the relevant period.

KONTOGEORGOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V84/23)

Decided: 5 October 1984 by R. Balmford.

John Kontogeorgos left school in November 1979 and was granted unemployment benefit in January 1980. In Feburary 1980, he decided to obtain a qualification while waiting for employment. An officer of the DSS advised him that he could continue to receive unemployment benefit while attending a commercial hairdressing school. Between March 1980 and January 1981, Kontogeorgos attended this school for about 8 hours a day although he frequently absented himself in order to look for work.

In January 1981, when Kontogeorgos sought reassurance from the DSS as to his continuing eligibility for unemployment benefit, the DSS decided to cancel the benefit and to recover from him money paid between March 1980 and January 1981, namely $2391.

The legislation

Section 140(1) of the *Social Security Act* provides for the recovery of an overpayment which would not have been paid but for a false statement or a failure or omission to comply with the Act.

Section 140(2) gives the Director-General a discretion to recover, by deducting from any current pension, allowance or benefit, an overpayment made for any reason.

According to s.107(1) a person is qualified to receive unemployment benefit if the person satisfies age and residence requirements 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.

Full-time student can qualify for unemployment benefit

The AAT decided that there was no ground for recovery of any overpayment from Kontogeorgos under s.140(1). At no time had Kontogeorgos made a false statement to the DSS nor had he failed to comply with any provision of the Act.

Moreover, there was no basis for recovery under s.140(2) because Kontogeorgos had continued to qualify for unemployment benefit during the whole period of his enrolment at the hairdressing school. Applying the Federal Court decision in *Thomson* (1981) 38 ALR 624, the AAT said that his attendance at the school did not prevent him from qualifying for unemployment benefit. The Tribunal noted that the DSS had acted on the assumption that attendance at an 'educational institution' would prevent a person from qualifying for unemployment benefit. After noting that this term ('educational institution') was relevant for the purposes of the *Student Assistance Act* 1973, the AAT continued:

> The question of whether a particular institution is an educational institution for those specific purposes is not relevant to the question of whether a particular person complies with the requirements of sub-paragraph 107(1)(c)(i). The Department knew what he was doing: he was attending an institution which would train him for a trade; he had told them so. What they really needed to find out was whether he was 'willing to undertake paid work' and 'had taken . . . reasonable steps to obtain such work'. Once the decision of the Federal Court in *Thomson's* case had been handed down, it should have been clear to the Department that attendance at an educational institution is not, of itself conclusive of these matters. It is simply one of the relevant factors.

(Reasons, para 18).

Unemployment benefit: work test

CHI MINH CHAU and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/688)

Decided: 24 July 1984 by C. E. Backhouse.

The AAT *set aside* a DSS decsion to reject Chi Minh Chau's claim for unemployment benefit, a decision made on the basis that he was not 'unemployed'.

Chau and his wife and children arrived in Australia as refugees in February 1980. In November 1982 Mrs Chau leased a vegetable garden. Mr Chau did some work in the garden—ploughing, sometimes selling vegetables and giving advice to his wife. Mr Chau was registered with the CES and had applied for various jobs.

The Tribunal was satisfied that, although Mr Chau helped with the heavy work in the garden, the business was Mrs Chau's: the lease was in her name and income tax returns were filed in her name. Further, Mr Chau had complied with the requirements in s.107(1)(c) and intended during the period in question to join the workforce. 'I further find that he was unemployed although he pursued the activities in his wife's market garden in the time available to him through lack of paid work': Reasons, para. 20.

TATE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/560)

Decided: 6 August 1984 by W. A. G. Enright.

The Tribunal *affirmed* a DSS decision to cancel David Tate's unemployment benefit on the ground that he was heavily involved in farming and therefore not unemployed. The Tribunal stated:

> The whole thrust of the applicant's evidence was that he intended to develop an income producing farm for his support . . . He was self-employed and was seriously and heavily committed to a commercial undertaking . . . It is true that the applicant had no farm income adequate for his support but this was due to the fact that his farm had not reached a stage of development at which it would produce income.