OHL and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q83/174)

Decided: 3 October 1984 by J.B.K. Williams.

The AAT *affirmed* a DSS decision to cancel an unemployment benefit held by Alexander Ohl.

Ohl was employed by a meat processing company, which had closed its plant and dismissed all its workers in March 1983. Ohl was then granted unemployment benefit. On 20 April 1983, the company announced that it had agreed with Ohl's union (the AMIEU) to re-open the meatworks on 26 April and to re-employ all except 17 of its former workers.

However, work did not resume on 26 April and the meatworks did not re-open until 26 May 1983. In the intervening period, the union insisted that all former workers be re-employed; and the company eventually agreed to this demand. Ohl unsuccessfully sought other employment in this intervening period; but the DSS cancelled his benefit on 4 May on the basis that his present unemployment was due to his being engaged in industrial action, and so disqualified by s.107(4) of the *Social Security Act*.

Ohl claimed that the disqualification in s.107(4) should not be applied to him because he had tried to leave the meat industry to find other employment during the relevant period. But the AAT concluded that, while he 'had unsuccessfully applied for other jobs, he would nevertheless [have] been in employment during the relevant period with the company, had it not been for the dispute between the AMIEU and its members and the company': Reasons, p. 6. He was accordingly disqualified by s.107(4).

Unemployment benefit: postponement

PEARSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/55 and V83/161)

Decided: 7 September 1984 by R. Balmford.

Colin Pearson was appealing against two decisions of the DSS to postpone payment of unemployment benefit. The first matter concerned postponement in April 1982 after Pearson left GMH on the ground that Pearsons' unemployment was due to his misconduct as a worker (s.120(1)(b)); the second postponement occurred after Pearson left Silverwood and Beck in June 1982 on the ground that his unemployment was due to his voluntary act which was without good and sufficient reason (s.120(1)(a)).

The legislation

Section 120(1) of the *Social Security Act* provides:

> The Director-General may postpone . . . the date from which an unemployment benefit shall be payable to a person . . .
> (a) if that person's unemployment is due, either directly or indirectly, to his voluntary act which in the opinion of the Director-General, was without good and sufficient reason;
> (b) if that person's unemployment is due to his misconduct as a worker . . .

GMH matter

The senior personnel officer from GMH gave evidence. He described the disciplinary system, agreed to by the unions, involving several stages of verbal warning, counselling and then dismissal. Pearson commenced work in the foundry at GMH in March 1982. In his third week of employment he had a second stage disciplinary counselling after being told not to leave his place of work without contacting his supervisor. During the counselling he apparently agreed that he had left his place of work to go over to the engine plant where he used to work, in order to find employment in that area. Pearson complained about the dirt and dust in the foundry. But the area was said to comply with safety requirements, safety equipment was available and Pearson's medical examination showed that he was able to work in that area. Attempts were made to find a job in the engine plant for him, but these were unsuccessful. A few days later Pearson again left his place of work and a third stage counselling was set up where he said he could not work in the foundry area. His job was then terminated.

The Tribunal concluded that Pearson's unemployment in April 1982 was due to his misconduct as a worker.

Silverwood and Beck matter

Pearson gave 4 reasons for leaving his employment with Silverwood and Beck: travelling was difficult, working conditions were bad, he was not receiving the award wage and he could only do a sit down job because he had arthritis in his hip.

The AAT agreed with the SSAT that the travelling involved in getting to and from the job was not unreasonable. Pearson's foreperson at Silverwood and Beck gave evidence about working conditions, which were described as not noisy or dirty; and a variety of safety equipment was available.

The AAT noted that Pearson gave no evidence that he was underpaid at Silverwood and Beck and pointed out that, if this was so, there were ways to remedy this. Medical reports indicated that he was fit for the sort of work he had undertaken. Finally, the Tribunal referred to Pearson's work history and suggested that this showed a certain consistency on Pearson's part.

The Tribunal concluded that Mr Pearson's voluntary act of leaving Silverwood and Beck in June 1982 was 'without good and sufficient reason'.

Formal decision

The decisions under review were affirmed.

Unemployment benefit: claim for backpayment

GRAY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/902)

Decided: 26 October 1984 by R.K. Todd.

Norman Gray had worked as a self-employed motorcycle stunt man at country shows for some weeks prior to November 1982, registering a business name in October. In mid-November he enquired at a DSS office about his eligibility for unemployment benefits. He claimed that he was told that he would not be eligible because he had a registered business. Over the next 2 months he unsuccessfully applied for a number of jobs, borrowed $1000 from a finance company and was supported by his parents.

In Feburary 1983, Gray claimed and was granted unemployment benefit, which was backdated to 7 days before his claim, in accordance with s.119(1A) of the *Social Security Act*. When the DSS refused to backdate payment of this benefit to November 1982, Gray sought review by the AAT.

The legislation

Section 119(1) of the Act provides that unemployment benefit is payable 7 days after making a claim, or after becoming unemployed, 'whichever was the later'. Section 119(1A) is an exception to this, as is s.119(1)(b), which dispenses with the 7-day waiting period when a person has served a waiting period within the past 12 weeks. But there are no other exceptions; and s.116 provides that a claim for unemployment benefit shall be in writing, in a form approved by the Director-General and lodged with a Registrar.

No basis for retrospective claim

In the present case, the AAT said, Gray had not completed a form and attempted to hand it in: if he had, there would 'have been grounds for saying that he had made a claim, and made it in writing.' And if he had clearly said that he was making an oral claim, which the DSS had not accepted, there would have been a basis for considering an *ex gratia* payment, as in *O'Rourke* (1981) 3 *SSR* 31. But neither a written nor an oral claim had been attempted in November 1982; and

there was no basis on which payment of unemployment benefit could be made from that time.

Special benefit?

The AAT then considered whether special benefit could be granted to Gray for the period from November 1982 to February 1983. In *Kakouras* (1983) 17 *SSR* 172, the AAT had asked if, where

> an applicant had managed somehow to borrow a sum or sums of money in order to survive, should he or she not be granted benefit retrospectively in order to discharge an obligation that ought never had to be brought into existence? I should have thought that an affirmative answer would be demanded.

However, in the present case, the AAT noted that Gray had repaid the loan of $1000 and was now enrolled in a 3-year nursing course. Although it could be said that, after mid-November 1982, he was unable to earn a sufficient livelihood,

> yet to direct retrospective payment of special benefit would effectively constitute a grant of money to someone who, having made no claim, did in fact by various honourable means derive support and who is now no longer directly affected by the financial troubles which temporarily beset him.

(Reasons, para. 14).

The Tribunal concluded by observing that the circumstances surrounding Gray's visit to the DSS office in November 1982 were confused and that no finding of administrative error on the part of the DSS could be made.

Formal decision

The AAT affirmed the decision under review.

Handicapped child's allowance: late claim

HOLMES and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W.83/81)

Decided: 10 September 1984 by G. D. Clarkson, I. A. Wilkins and J. G. Billings.

The applicant's child, C, had been born in January 1978. In September 1980, C was diagnosed as mentally retarded but it was not until September 1981 that he began an intensive course of speech therapy. In September 1982, Holmes applied for a handicapped child's allowance which the DSS granted; but her application to have the payment of that allowance back dated was refused by the DSS. Holmes asked the AAT to review that decision.

Section 102(1)(a) gives the Director-General a discretion to back date payment of handicapped child's allowance, if the allowance is lodged more than six months after the date of eligibility in 'special circumstances'.

Misleading advice?

Holmes told the AAT that she had contacted the DSS several times during 1981 but, on each occasion, she had been told that she was not eligible for the allowance because of the nature of C's disability. But the AAT said that it could not accept the substance of that evidence and that it was more likely that she had contacted the Department and had been disappointed to receive a non-committal response.

Bureaucratic failure?

However, the AAT was told that, in October 1981, Holmes had contacted a section of the Mental Health Services of Western Australia, where a social worker had undertaken to enquire whether Holmes was eligible for a handicapped child's allowance. But because of oversight on the part of the staff of that agency, this enquiry was not followed up until September 1982, when the claim for handicapped child's allowance was made.

The AAT decided that Holmes' eligibility for handicapped child's allowance dated from the time when the child began speech therapy in September 1981. The AAT said that in ordinary circumstances the system adopted by the WA Mental Health Services would have resulted in a claim being lodged within the necessary six months period but, because of oversight in that agency, the claim had not been lodged for another 12 months. The AAT observed:

> The chance that those two factors would combine to delay the claim beyond February 1982 must be very small and leads us to conclude that the circumstances surrounding the delay in the application distinguish this case from the ordinary case, and are reasonably and properly described as special.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that back payment of handicapped child's allowance be made to Holmes from September 1981.

BYGRAVE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/136)

Decided: 12 October 1984 by J.D. Davies J, G.D. Clarkson and J.G. Billings.

Mary Bygrave had given birth to twins in September 1978. One of the twins, M, suffered from 'a hole in the heart', as a result of which she was a severely handicapped child from birth. Although Bygrave was qualified for a handicapped child's allowance from the birth of M, she did not apply for the allowance until April 1983. The DSS granted her the allowance from that date but refused to back-date her claim.

'Special circumstances'

Section 102(1) gives the Director-General a discretion to back-date payment of a handicapped child's allowance to the date of eligibility in 'special circumstances'.

Bygrave had migrated to Australia from England in 1968 and had no relatives in Australia. Since the birth of her children, she had received no assistance from their father and her sole income had come from social security benefits. Early in 1979, her shortage of funds had obliged her to move to a housing commission unit. Bygrave told the AAT that, although she had known of the allowance, she had assumed that it was confined to obviously disabled or mentally retarded children. No suggestion had been made to her by the children's hospital or the State Welfare Department that she could qualify for the allowance. And information sent to her in November 1981 by the DSS had incorrectly described the availability of the allowance.

On the basis of this evidence, the AAT decided that there were 'special circumstances' which had affected Bygrave's understanding of her right to the allowance and her ability to apply for the allowance. These circumstances included her responsibility for twin children, one of whom required intensive care; her shortage of funds; the fact that she had no relatives in Australia and had received no assistance from the children's father; the fact that she had lost contact with her friends and had been forced to move to a new locality; the fact that none of the organizations, from whom she had sought help, had told her of the nature of the allowance; and the fact that written information from the DSS had reinforced her misunderstanding about the allowance.

The discretion

However, the AAT decided that the discretion in s.102(1) should not be exercised in favour of making a back payment to Bygrave. **Davies J** said that, because Bygrave was seeking back payment for 4½ years (a lengthy period) there would have to be substantial reasons to justify the exercise of the discretion. In the present case, Bygrave had not incurred a debt or expended significant amounts of money caring for M, nor had she claimed that M's condition prevented her from taking employment. Many of Bygraves' difficulties were due to the fact that she had to raise twin daughters without adequate assistance.

Billings took the same approach – that there were not 'sufficiently substantial' reasons to justify the exercise of the discretion. On the other hand, **Clarkson** said:

> My own view has been that the circumstances relevant to the exercise of the discretion to allow back-payments are not so restricted and that, in any event, once an applicant has shown that eligibility existed for the relevant period and that special circumstances existed which explained the delay then a case for payment exists which should ordinarily be recognized by the Director-General of Social Security. The enquiry then becomes whether there are circumstances which warrant the applicant being deprived of back payments rather than whether reasons exist for making them.