Unemployment benefit: retrospective claim

TURNER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/53)

Decided: 23 December 1983 by A. N. Hall.

Noel Turner had been paid unemployment benefit from 26 September 1979. On 2 October 1979 he lodged with the DSS an application for continuation of unemployment benefit. This application (form 19B) was lost by the Department, and his benefit was cancelled from 3 October 1979.

Turner did not contact the DSS until January 1980 when the Department paid him benefit for the period covered by the lost form 19B, 3-16 October 1979. In February 1981, after investigation by the Ombudsman, the DSS made another payment of benefit for the period 17 October to 15 November 1979. (This payment was based on the fact that Turner had been in regular contact with the Commonwealth Employment Service up to mid-November 1979.)

Turner then sought payment of unemployment benefit for the period from 16 November 1979 to 'about August 1980'. That claim was rejected by the DSS and Turner applied to the AAT for review.

The legislation

According to s.107(1)(b) of the *Social Security Act* a person is qualified for unemployment benefit 'only if . . . the person resided in Australia . . . on the date on which he lodged his claim for the benefit'.

Section 116 reads:

> A claim for an unemployment benefit or a sickness benefit—
> (a) shall be made in writing in accordance with a form approved by the Director-General; and
> (b) shall be lodged with a Registrar or as prescribed.

Section 119 provides that the date from which benefit is payable is calculated from the date when the claim was made.

Lodgment of claim necessary

In Turner's case no fresh claim had been made for benefit following cancellation in October 1979. This, the AAT said, decided the present case:

> . . . the lodgment of a claim for unemployment benefit is a necessary step towards establishing a person's qualification for that benefit. It is necessary to know the date of lodgment of the claim in order to determine whether the residential qualification in s.107(1)(b) is satisfied. The date of lodgment is also relevant in determining the date from which the benefit is payable (s.119) . . . There is, I would have thought, an underlying assumption in these provisions that a person seeking unemployment benefit will apply for the benefit as soon as the required qualification can be established.

(Reasons, para. 24)

The remedy sought by the applicant, said the AAT, was some retrospective payment of benefit. However, no statutory basis could be found for this payment. In any event, if the claim was based on a DSS error, the correction of that error in January 1980 and the retrospective payment of another four weeks benefit in February 1981 was more than adequate compensation for that mistake.

Formal decision

The Tribunal affirmed the decision under review.

YILMAZ and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/60)

Decided: 19 January 1984

Hilmi Yilmaz asked the AAT to review a DSS decision rejecting his claim for unemployment benefit for the period between December 1982 and May 1983.

In 1979 Yilmaz purchased a 10 acre fruit farm at Renmark, on which he grew apricots, pears and grapes. In April 1982 he registered for employment with the Commonwealth Employment Service.

In December 1982 he applied to the DSS for unemployment benefits but his claim was rejected because the Department took the view that he was working full-time on his farm.

In February 1983 Yilmaz was offered casual fruit-picking but he refused this offer as he was then harvesting his apricots.

In May 1983 Yilmaz again applied for unemployment benefits. The State Department of Agriculture then told the DSS that Yilmaz could run his farm while working full-time; and the DSS granted his claim.

The legislation

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

Section 107(3) gives the Director-General a discretion to 'treat a person as having been unemployed . . . notwithstanding that the person undertood paid work during . . . that period . . .'

'Unemployed' despite farm work

The AAT took the view that Yilmaz's farm was neither a viable economic enterprise nor a serious business undertaking. As he had been making reasonable efforts to obtain employment, he was entitled to unemployment benefits.

The AAT said that his refusal to work in February 1983 did not defeat his claim. As the work 'was casual picking on other people's properties it was not unreasonable for him to take the view that he might as well pick fruit available on his own': Reasons, para. 8.

Moreover, the period (of four weeks) when he was picking his own apricots was

> one during which the discretion under sub-s.107(3) of the Act should be exercised having regard to the fact that the farm is regarded by the Department of Agriculture as no more than a hobby farm.

(Reasons, para. 11)

Formal decision

The AAT set aside the decision under review and substituted a decision that Yilmaz was entitled to unemployment benefits for the period between December 1982 and May 1983.

KALATHAS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/154)

Decided: 20 January 1984 by R. Balmford.

Nikolaos Kalathas asked the AAT to review a DSS refusal to pay him unemployment benefit at the married rate.

Kalathas had been granted unemployment benefit in October 1982 after being retrenched from a job which he had held for six years. At that time his wife and daughter were in Greece, having gone there in March 1979 after a Melbourne doctor advised the wife to seek psychiatric treatment in that country. They were currently living with the wife's parents and Kalathas was sending her $60 a month from his unemployment benefit.

His wife would have rejoined him in Australia in late 1982 had he not been retrenched. Kalathas was confident that his wife would return to Australia as soon as he found employment. He and his wife jointly owned a house in Melbourne.

The legislation

Section 112(2) of the *Social Security Act* provides for unemployment benefit to be paid at the married rate if the claimant is a married person and

> has a spouse who is resident in Australia and is, in the opinion of the Director-General, dependent (whether substantially or less than substantially) on the married person . . .

A 'settled abode' in Australia

The Tribunal pointed out that Part VII of the Act (which deals with unemployment and sickness benefit) contained no definition of 'resident' unlike other parts of the Act – see, for instance, *Nathanielsz* in this issue of the *Reporter*. Accordingly, the word had to be understood in its ordinary sense: a person resided where the person had her or his 'settled or usual abode'.

The Tribunal found that Kalathas, his wife and their daughter were 'a united family, temporarily, and regrettably, separated because of his wife's illness.' Despite the length of time Mrs Kalathas had spent in Greece, her 'settled or usual abode' remained in Australia. Her long absence was

entirely understandable in the context of Dr Moraitis' original recommendation, the absence of Greek-speaking psychiatrists in Australia and the fact that her parents still reside in Greece and are prepared to receive and accommodate her. I find on the evidence that Mrs Kalathas is, in fact, dependent on her husband within the meaning of Section 112(2); the fact that he, while living on unemployment benefit, has been sending $60 a month to Greece indicates his view of her status; in that regard, while she has no doubt been essentially supported by her parents in the period since he lost his job that does not, in my view, alter the fact of her dependence.

(Reasons, para. 14)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Kalathas should be paid at the married rate from 8 October 1982.

Invalid pension: permanent incapacity for work

KOROVESIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/30)

Decided: 11 November 1983 by R.K. Todd.

Mihalis Korovesis injured his back while assembling television sets in 1976, and was granted an invalid pension in November 1979. His pension was later cancelled on the ground that he was no longer 85% permanently incapacitated for work.

Korovesis applied to the AAT for review of that decision.

Medical evidence

The Tribunal was satisfied that Korovesis had a severe back condition. It accepted the evidence of an orthopaedic specialist that the injury required surgery and that no other treatment would be of any use. Korovesis had refused to undergo such a major operation. The possibility of surgery to alleviate the condition clearly raised the question of permanency of the incapacity.

Refusal to undergo surgery

The Tribunal considered *Fazlic* v *Millinbimbi Community Inc.* (1982) 38 ALR 424, a worker's compensation case. The High Court had stated in *Fazlic* that, in assessing payment of compensation to an injured worker who refused an operation, the issue was whether that refusal was reaonable 'judged in the light of the medical evidence given to the worker at the time and all the circumstances known to him and affecting him'.

The Tribunal concluded that the principle in *Fazlic* was not applicable here and refused to follow two earlier AAT decisions, *Coban* (1983) 11 *SSR* 114, and *Dragojlovich* (1983) 16 *SSR* 162. The basis of the decision in *Fazlic* was that in compensation law an injured person must take reasonable steps to minimise his or her loss. The Tribunal said:

> But the situation under the *Social Security Act* seems to me to be quite different. There is not I consider, a straight translation into the invalid pension context of the common law rules relating to mitigation of damage . . . [T]here is no element of compensation or redress of damage involved in the provisions of the [Social Security] Act . . . Those provisions relate to the objective question of a minimum level of support, to determining whether a 'safety net' should be placed under a person in crisis . . .
>
> In a case like the present the incapacity may be permanent because an operation would not improve the applicant, or it would make him worse, or simply because it is not performed. Even if he were deemed wilful in refusing to have it, the fact is that he cannot be compelled to have the operation. If the applicant as a result must be taken to have chosen a life of pain and exceptionally low income that is his decision. The Tribunal, if it finds that the applicant is permanently incapacitated for work within the meaning of the Act, cannot, as it seems to me, deny the benefits of social security legislation purely on the basis that the applicant has unreasonably refused to undergo an operation within the criteria laid down in *Fazlic's Case.*

(Reasons, paras. 17-18)

Rehabilitation and medical treatment

The Tribunal then went on to consider whether the Act required a claimant to carry out any 'positive conduct so as to obtain a pension'. Sections 135M and 135N state:

> 135M(1) The Director-General may, having regard to the age and to the mental and physical capacity of a person who is a claimant for a pension or is a pensioner, and to the facilities available to that person for suitable treatment for physical rehabilitation and suitable training for a vocation, refuse to grant a pension to that person or cancel or suspend that person's pension, unless that person receives such treatment or training.
>
> . . .
>
> 135N If, in the opinion of the Director-General, a person who is a claimant for a benefit or is a beneficiary should –
>
> (a) submit himself for medical, psychological or other like examination;
> (b) receive medical or other treatment;
> (c) undertake a course of training for the improvement of his physical or mental capacity;
> (d) undertake a course of vocational training; or
> (e) do any work suitable to be done by him,
>
> the Director-General may refuse to grant a benefit to that person, or may cancel or suspend that person's benefit, unless that person complies with the requirements of the Director-General in respect of any such matter.

The Tribunal noted that s.135M, the section relevant to claimants for a pension, 'is limited to treatment or training as described. It does not enable the grant of invalid pension to be made dependent upon medical treatment'. It should be contrasted with s.135N, which allowed the Director-General to make payment of a *benefit* (not a pension) conditional on the claimant undergoing 'medical or other treatment'. Section 135M and ss.135 and 135A

> reflect the legislative intention as to what should be the degree of administrative intervention in the making of decisions by doctor and patient as to what treatment a person should have. The attempt having been made to deal legislatively with the problem, I see no occasion to impose extra-legislative criteria . . .
>
> Surely it could not seriously be suggested that the Director-General might contemplate the draconian course of arranging a laminectomy under s.135, or making a payment of benefit under s.135N conditional upon a laminectomy being carried out. In the present case, of course, s.135M and not s.135N anyway is relevant, and it does not apply to a course of medical treatment. This being so, it does not now seem to me to be correct to impose such a course upon an applicant by what is essentially the 'back door', namely by a decision that an incapacity is not permanent because a person will not agree to have a major operation performed. That would in my opinion be to create a non-statutory doctrine having the effect of requiring persons to make a decision to undergo operative treatment outside the requirements of the Act. If the Director-General is to effectively impose such a requirement he must do so within and through the terms of the Act, which ought to be seen as the expression of public policy in the matter.

(Reasons, paras. 24-25)

Formal decision

The AAT set aside the decision under review and decided that the applicant was at all relevant times entitled to receive an invalid pension.

KOUTSAKIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/50)

Decided: 18 January 1983 by W. Prentice.

Drakoulis Koutsakis asked the AAT to review a DSS decision cancelling his invalid pension.

Although there was a conflict of medical opinion, the AAT found that Koutsakis suffered from a hernia, which was only moderately incapacitating, and from chronic anxiety and depression. His psychological state was so severe that it completely incapacitated him from working.

Refusal to undergo medical treatment

This psychological state would probably respond to psychiatric treatment; but Koutsakis flatly refused to undergo that treatment. He would not accept that his disability had a psychological base and insisted that it was physical.

The AAT said that, because Koutsakis' incapacity would probably respond to treatment, his incapacity for work could not 'be regarded as permanent' in the