Administrative Appeals Tribunal decisions

Unemployment benefit: residential address

HURRELL and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V84/165)

Dediced: 30 November 1984 by J. Dwyer.

Derek Hurrell had been granted unemployment benefit in October 1982. In August 1983, after he and his *de facto* wife had been evicted from the house they were renting, Hurrell arranged with the DSS for his next benefit cheque to be sent to his post office box address.

Hurrell received three cheques at this address; but the DSS then told him that, unless he could provide a full residential address, he would receive no further payments. The last payment of unemployment benefit was made to Hurrell by counter cheque on 26 September 1983. Hurrell asked the AAT to review the DSS decision to stop payment of his unemployment benefit.

A series of issues

In the hearing before the AAT, the DSS claimed that Hurrell's unemployment benefit had been cancelled, not because of his failure to provide a residential address, but because he had failed to lodge with the DSS a fortnightly income form (Form 19B).

Hurrell told the AAT that he had been temporarily incapacitated for work because of illness between 6 October and 20 December 1983; that, because he had no income, he had not been able to consult a doctor and, therefore, had not obtained a medical certificate; nor had he claimed sickness benefit during this period.

Hurrell also told the Tribunal that, from December 1983 on, his *de facto* wife lived with her sister, rather than with him, because he had no income and no accommodation.

Following an appeal to an SSAT, payment of Hurrell's employment benefit had resumed in April 1984 at the single rate. Hurrell told the AAT that he was paying $50 a fortnight from his single rate benefit to his *de facto* wife and they regarded their relationship as continuing. He also explained that the and his *de facto* wife had been married to each other, were divorced and were then reconciled.

The decision under review

After examining documents in the DSS file and considering the evidence which Hurrell had given about conversations with DSS officers, the AAT decided that payment of Hurrell's unemployment benefit had been stopped by the DSS because of his failure to provide a residential address. Not only were there several notations on the DSS file which demonstrated this, but the Unemployment and Sickness Benefit Manual of the DSS declared, in para 2.402, that 'the residential address of the claimant must always be obtained.'

An illegal decision

That decision, to refuse unemployment benefit to Hurrell until he provided a residential address, was without any legal basis: there was no requirement in the *Social Security Act* for a beneficiary to provide to the DSS her or his residential address. Accordingly, because the DSS decision was based on a legally irrelevant criterion, it was an unlawful and invalid decision:

> If the manual had not provided that a residential address must always be obtained but simply that the reason for using a residential address must always be obtained and considered to see whether it affects compliance with s.107(1)(c) (i) or (ii), there would have been no problem. In such a case Mr Hurrell's reason, that he had no residential address and was living temporarily in a friend's house while continuing to check his post box regularly and seek employment, would have been seen not to affect his qualification for unemployment benefits.

(Reasons, para. 34)

It followed that the decision to stop payment of benefit to Hurrell unless he provided a residential address was not lawfully made: *Green* v *Daniels* (1977) 13 ALR 1. Even if it had been a lawful decision, it was, the AAT said, 'a decision wihout merit and not the right decision to be made and therefore the decision to suspend should be set aside and payments reinstated': Reasons, para. 36.

Married or single rate?

Section 112(2) of the *Social Security Act* provides for payment of unemployment benefit at the married rate where the beneficiary is a married person, whose spouse is dependent on the beneficiary.

Section 106(1) defines 'married person' and 'spouse' to include a woman living with a man as his wife on a *bona fide* domestic basis although not legally married to him. The Tribunal said:

> 41. I am satisfied that persons can be living together even during prolonged periods of separation particularly where separation is forced on them by circumstances beyond their control. The test must be whether the persons themselves regard the *de facto* relationship as continuing despite the temporary physical separation.

The AAT noted that s.112(3) gave the Director-General a discretion to limit the married rate of unemployment benefit paid to a married beneficiary where the beneficiary and his spouse were separated.

The AAT said:

> The difficulty in applying these sections strictly in Mr Hurrell's case is that both the physical separation in December 1983 and any lack of dependency of Mrs Hurrell on Mr Hurrell . . . have been caused or contributed to by the Department's action in wrongly suspending payment of benefit of Mr Hurrell. In these circumstances it seems unjust and contrary to good administrative practice to allow these matters to affect the rate at which payment of benefit to Mr Hurrell is resumed. As the suspension of benefit was not on a ground for which there is warrant in the Act, the proper course is to restore payment of benefit at the rate at which it was being paid subject only to confirming that Mrs Hurrell received no benefit herself and did not have an income precluding her from being dependent on Mr Hurrell. After Mr Hurrell has received the arrears owing so he has the means to provide a home for his wife as well as to support her, enquiries should be made to see whether she has joined him. If not, payment should revert to the single rate.

(Reasons, para. 43)

Retrospective payment

The AAT then dealt with an argument raised by the DSS that there could be no retrospective payment of unemployment benefit to Hurrell because, during the period after September 1983, he had not lodged the fortnightly income statements (Forms 19B). The DSS said that unemployment benefits could only be granted each fortnight after the lodgement of a Form 19B; and that each grant of unemployment benefit was limited to a fortnightly period. This argument was supported by the decision in *Turner* (1983) 17 *SSR* 205.

But the AAT rejected that argument: although the DSS had adopted the administrative practice of paying unemployment benefit every two weeks, those payments should be seen as 'instalments relating to an entitlement rather than payments on separate claims.' The AAT explained:

> After a claim is made there is a continuing period of entitlement in respect of which one is paid by fortnightly instalments. The entitlement only ceases when a person is no longer qualified under s.107. Once entitlement has ceased, e.g. if a person returns to work or ceases to be available for work a new claim may be made in respect of any further period of unemployment. The Form 19B is the usual way of establishing a continuing compliance with s.107(1)(c) and hence entitlement, but nowhere does the Act indicate that it is the only way of establishing that compliance . . .
> 66. Once this analysis is accepted it is seen that no problem arises in regard to retrospective payments where Forms 19B are lodged late or where another means is used to satisfy the Director-General as to a person's compliance with the work test and other requirements of s.107. To impose a requirement that Forms 19B are the only way in which a claim can satisfy the Director-General of compliance with the work test could again the sort of error referred to by Stephen J in *Green* v *Daniels*.

Sickness benefit

The AAT noted that Hurrell had been temporarily incapacitated for work because of sickness between 6 October and 24 December 1983. During that period, the AAT said, Hurrell had been qualified for sickness benefit under s.108(1)(c)(ii) of the *Social Security Act*.

Although Hurrell had not lodged a claim for sickness benefit, this was an appropriate case in which the Director-General could exercise the discretion in s.145 of the *Social Security Act* and treat Hurrell's original claim for unemployment benefit as a claim for sickness benefit, so as to permit payment of that sickness benefit, along the lines adopted in *Dixon* (1984) 20 *SSR* 213.

Section 117(1) of the *Social Security Act* provided that a claim for sickness benefit should be supported by medical certificate; but gave the Director-General a discretion, 'in special circumstances', to dispense with that requirement. Here, the AAT said, there were sufficient special circumstances to dispense with the medical certificate. Those circumstances included Hurrell's financial inability to consult a doctor and the possibility that his illness was caused or aggravated by stress, contributed to by the DSS when it stopped payment of his unemployment benefit.

Special benefit

The Tribunal concluded by saying that, if Hurrell had not qualified for unemployment benefit or sickness benefit at any time during the period under review, he would have qualified for special benefit under s.124(1) of the *Social Security Act*, as a person 'unable to earn a sufficient livelihood'. Moreover, That special benefit could have been paid retrospectively, as had been decided in, eg. *Sakaci* (1984) 20 *SSR* 221 and *Ezekiel* (1984) 21 *SSR* 237.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with directions that Hurrell was qualified for unemployment benefit at the married rate from 22 September to 6 October 1983, and from 20 December 1983 until the date of this decision; and that Hurrell should be paid sickness benefit at the married rate from 6 October to 20 December 1983. (These directions were made subject to Hurrell lodging a claim for sickness benefit and subject to the Director-General being satisfied that Mrs Hurrell was not herself being paid benefit or pension or receiving disqualifying income.)

Overpayment: discretion to recover

NASMAN and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N84/323)

Decided: 20 November 1984 by B.J. McMahon.

Leila Nasman was a 34-year-old invalid pensioner (suffering from epilepsy) at the beginning of 1982. She was renting a private flat and receiving supplementary assistance under s.30A of the *Social Security Act*.

On 15 March, Nasman moved to a Housing Commission flat and began paying rent to the NSW Housing Commission. (The *Social Security Act* had been amended from 1 February 1982 so that supplementary assistance was no longer payable to a pensioner paying rent to a public housing authority such as the Housing Commission. However, a circular detailing this change, sent by the DSS to Nasman, had not been received by her.)

On the day that she moved to the Housing Commission flat, Nasman telephoned the DSS and informed an officer of her move. She subsequently visited a DSS office and completed a change of address form. However, she continued to be paid supplementary assistance until 30 June 1983, when a DSS review revealed that she had been overpaid. The DSS decided to recover this overpayment under s.140(1) of the *Social Security Act* and Nasman sought review of that decision from the AAT.

The legislation

Section 30B(1A) of the *Social Security Act* provides that a person receiving a supplementary allowance must notify the DSS after he or she begins to pay 'Government rent' – that is, rent to a Government authority such as the Housing Commission of NSW.

Section 140(1) provides that any overpayment of supplementary allowance, which would not have been paid but for a failure to comply with the Act, is recoverable in a court of competent jurisdiction from the person to whom the allowance was paid.

Section 140(2) gives the Director-General a discretion to deduct from a person's pension any overpayment of supplementary allowance, regardless of the reason for that overpayment.

No basis for s.140(1) recovery

The AAT said that, technically, Nasman's telephone call to the DSS (on 15 March 1982) had not been a strict compliance with s.30B(1A), because it was made *prior* to her first payment of Government rent. However, the AAT said, such a technical breach could not be treated as a failure on the part of Nasman to comply with the *Social Security Act* and, therefore, any overpayment of supplementary allowance made to Nasman could not be recovered under s.140(1).

The discretion to recover under s.140(2)

The AAT noted that the DSS could recover an overpayment under s.140(2) regardless of the cause of the overpayment.

However, s.140(2) gave the Director-General a discretion and, the AAT said, because of the 'extraordinary width' of the recovery power under that provision, 'the respondent should be even more hesitant to exercise his discretion adversely to an applicant in sub-section (2) situations':

> It goes almost without saying that any discretion must be reasonably exercised. It is subject even to judicial review if it is not. (See eg de Smith's *Judicial Review of Administrative Action*, 4th ed. at p. 346 et seq and Whitmore and Aronson's *Review of Administrative Action* at p. 223 et seq.)
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> There must be a correlation between reasonableness and width. The greater the absolute power the higher the duty to take account of all reasons why it should not be used. In the administration of social security legislation compassion is the better part of discretion. It follows that sub-section (2) must call for the application of more than usual [care].

(Reasons, p. 7)

The AAT noted that Nasman had received public moneys to which she was not lawfully entitled. While this was an important consideration, it was only a starting point, rather than the only consideration. Other factors supported an exercise of the discretion in favour of Nasman:

- There had been several administrative errors or delays on the part of the DSS, some of which had caused stress and worry to Nasman;
- Nasman's personal circumstances had not equipped her to understand the niceties of social welfare legislation and had left her without personal, financial or emotional support; and
- withholding any amount from Nasman's invalid pension would cause her financial hardship.

On the issue of financial hardship, the AAT examined Nasman's budget and noted that the whole of her pension was required for her living expenses. The DSS had argued that, if Nasman were to curtail her social activity (10-pin bowling), she could afford to repay about $2.50 a week. The AAT dealt with this argument as follows:

> The inference was that it was unreasonable for the applicant to pursue this frivolous interest while she owned money. It is hard to see how, looked at from the opposite point of view, such an argument could justify the respondent exercising his discretion adversely to the applicant.
>
> It do not consider it appropriate that the respondent (or this Tribunal) should make a value judgment on the way in which a pensioner spends her pension. If she is able to save in one area to spend in another area then that is entirely her own private affair. One is no more entitled to criticise a person for playing 10 pin bowling than one is for spending large amounts, for example, on