BUCKNELL and SECRETARY TO DSS (No. N84/175)
Decided: 12 April 1985 by A.P. Renouf

The AAT *affirmed* a DSS decision that, in assessing his income for the purposes of the age pension income test, donations made by him to registered charities could not be deducted from his income.

During the year in question, Bucknell had a gross income of $38 358, of which he had donated $30 000 to public institutions (such as the Australian Red Cross). These institutions were registered under the *Income Tax Assessment Act* and donations to them were deductible from a taxpayer's taxable income.

The AAT pointed out that the definition of 'income' in the *Social Security Act* was not related to the definition of 'income' in the *Income Tax Assessment Act* and that there was no basis for deducting voluntary contributions to approved public institutions from a pensioner's income for social security purposes.

Special benefit: student

CASPER and SECRETARY TO DSS (No. V84/356)
Decided: 27 March 1985 by H.E. Hallowes.

Gaye Casper had completed an honours degree in science in 1980. Although she was then offered a Commonwealth scholarship for postgraduate study in science, she chose to enrol for a medicine degree. Under guidelines administered by the Commonwealth Department of Education, she would not be eligible for a TEAS allowance until she completed 4 years of the medicine degree course (at the end of 1985). In 1984, she applied to the DSS for a special benefit; and, when the DSS rejected her application, she asked the AAT to review the rejection.

The legislation
Section 124(1) of the *Social Security Act* gives the Secretary a discretion to grant a special benefit to a person if -

> 'the Secretary is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).'

'Unable to earn a sufficient livelihood'
During 1984, Casper had received grants and a loan from her university totalling $4300; but she did not expect to receive more than $1800 from this source in 1985. Moreover, the medical faculty was most unlikely to allow her to engage in part-time work or to defer her studies.

The AAT said that, on this evidence, Casper was 'unable to earn a sufficient livelihood' within s. 124(1). Her personal commitment to her studies ('which she could not reasonably be expected to abandon untile she has exhausted all possible avenues of financial support') produced the inability to earn. Following the approach taken in *Te Velde* (1981) 3 *SSR* 23, that was a sufficient reason for the purposes of s. 124(1): Reasons, para. 16.

The discretion
However, the AAT decided that the discretion in s. 124(1) should be exercised against Casper:

> '26. Each case must be looked at on its own merits. Miss Casper has made a voluntary decision to place herself in a most difficult financial situation. She is atempting to gain a second financial qualification for employment. It may appear an inconsistent application of government policy if applicants ineligible for TEAS allowance because they are attempting a second qualification were to be supported by the public purse under the *Social Security Act*.'

Formal decision
The AAT affirmed the decision under review.

Unemployment benefit: work test

TIZZANO and SECRETARY TO DSS (No. V84/238)
Decided: 8 March 1985 by R. Balmford, G. Brewer and L. Rodopoulos.

Giovanni Tizzano opened a pizza shop in April 1983, after working as a machine operator in a factory for 3 years. In December 1983 he sold that business because it was larger than he could manage; and in January 1984 he took out a lease on smaller premises, which he then arranged to have fitted out as a pizza shop. This fitting out was done during normal business hours under Tizzano's supervision; and it was completed by 29 February 1984, when Tizzano opened his pizza shop. In the early part of this period, Tizzano attempted to find evening work as a pizza cook and later he sought a wider range of employment but was unsuccessful.

Meanwhile, Tizzano had applied to the DSS for unemployment benefit for the period from 11 December 1983 to 29 February 1984. When the DSS rejected that claim, Tizzano asked the AAT to review the rejection.

The work test
The central question before the AAT was whether Tizzano had met the requirements of s.107(1)(c) of the *Social Security Act*—had he been unemployed and willing to undertake suitable work, and had he taken reasonable steps to obtain work while setting up his pizza business?

The AAT referred to the Federal Court decision in *Thomson* (1981) 38 ALR 624 and noted that the various elements in the work test were connected. The Tribunal said that, although Tizzano had been 'engaged full-time in normal daytime working hours in the supervision of tradesmen setting up his business, he had specialised skills enabling him to be gainfully employed in the evenings.' Accordingly, he should be treated as 'unemployed' during that period: Reasons, para. 13.

Because the period in question was comparatively short, the AAT said, Tizzano's initial efforts to find work as a pizza cook and his later attempts to find other jobs were evidence of his willingness to undertake suitable work and of his having taken reasonable steps to obtain work.

Formal decision
The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that Tizzano had been qualified to receive unemployment benefit from 11 December 1983 to 29 February 1984.

ERREY and SECRETARY TO DSS (No. N84/345)
Decided: 3 April 1985 by R. K. Todd, H. D. Browne and G. P. Nicholls.

Catherine Errey was enrolled as a medical student in NSW. In 1983 she was granted 12 months leave from her studies; and in August she travelled to Roxby Downs to participate in a 'blockade' of the uranium mine there. After the blockade concluded, she remained camped close to the mine site (a relatively isolated area some 300 kilometers from Port Augusta in South Australia), in order to observe the environment and become acquainted with the local Aboriginal people.

Errey was granted unemployment benefit by the Port Augusta office of the DSS in September 1983; but the DSS cancelled that benefit from mid-November 1983 and refused to pay her a special benefit. Errey then asked the AAT to review those decisions.

Unemployment benefit

Errey told the AAT that, from November 1983 to February 1984, she had remained camped in the Roxby Downs area, apart from trips to Brisbane in December 1983 and to Adelaide in January 1984. She had checked newspaper advertisements and CES notice boards for job opportunities; and, in January 1984, she had applied unsuccessfully for 3 jobs, including one as Assistant Director-General in the Commonwealth Department of Health.

The AAT concluded that Errey had been 'unemployed' throughout the relevant period. She had not been 'undertaking work even intended to be remunerative while at Roxby'. The Tribunal was also prepared to assume that she had been willing to undertake work at that time, 'had she been presented with suitable work at Roxby Downs, as it were on a plate'.

But, the majority (Todd and Browne) said, she had not taken reasonable steps to obtain employment: her job-seeking efforts varied 'from token efforts through reading of newspapers and inspection of notice boards to utter unreality if not frivolity in the case of the application for appointment as Assistant Director-General . . .': Reasons, para. 22. Accordingly, she could not qualify for unemployment benefit.

Moving to a low employment area

The AAT referred to an argument raised by the DSS, that the fact that Errey had moved to a low employment area was enough to disqualify her from unemployment benefit.

While the concept of 'job mobility' might still have a part to play in the Australian social security system, it was, the AAT said, 'hard to see how any absolute proposition can be set up to the effect that persons should be expected not to move away from areas where there is employment to areas where there is none, or very little'.

On the other hand, the AAT said, there might be cases where the movement of a person to a low employment or isolated area demonstrated an unwillingness to undertake paid work—particularly where the person had in the past demonstrated that he or she was willing to move in order to find work. Errey's case might well be such a case; and perhaps, the AAT said, it should not have assumed that she had been willing to undertake paid work: Reasons, para.23.

Special benefit

The majority of the AAT decided that Errey did not qualify for special benefit during the period in question because she had not been 'unable to earn a sufficient livelihood' within s.124(1) of the *Social Security Act*. While she had lived in straitened circumstances, the AAT said, this was a case of a person who adopted a 'particular lifestyle in pursuance of a particular cause and who managed, with the help of others, to support herself in so doing'.

Even if she had been 'unable to earn', the majority said, it would not have been a proper exercise of the s.124(1) discretion 'to grant a special benefit to a person whose need for it arises directly from his own action leading to the termination of an unemployment benefit which would otherwise be payable to him', as an earlier Tribunal had put it in *Law* (1981) 5 *SSR* 52: Reasons, para. 24.

The minority view

The dissenting member of the AAT (Nicholls) agreed that Errey had been unemployed and accepted that she had been willing to undertake paid employment. He also decided that her efforts to obtain work had been 'reasonable though not exhaustive', given Errey's 'lack of formal qualifications and limited work experience, together with the state of the labour market'. He would have awarded her an unemployment benefit.

Formal decision

The AAT affirmed the decision under review.

SMITH and SECRETARY TO DSS (No. N84/250)

Decided: 29 March 1985 by A. P. Renouf.

Maxwell Smith owned an orchard of some 25 hectares, which had been severely affected by drought. In early 1983, Smith began to look for outside work in order to maintain himself and his family.

He was granted unemployment benefit in February 1985; but the DSS cancelled this benefit in January 1984 on the ground that he was committed to maintaining and restoring his orchard. Smith then asked the AAT to review that cancellation.

The work test

The review focused on the question whether Smith could satisfy the requirements of s.107(1)(c) of the *Social Security Act*. The AAT decided that he had been capable of undertaking and willing to undertake suitable work and had taken reasonable steps to obtain work. But had he been unemployed during that period?

Smith told the AAT that he had had a strong commitment to his property and had worked it 7 or 8 hours a day while looking for outside employment; but that he would have given first preference to another job if he had managed to find one—if necessary, he would have let his property run down.

However, the Tribunal said, the fact that Smith had been rehabilitating his property so that eventually it would serve as a livelihood for him and his family prevented him from being treated as unemployed; and the AAT referred to *McKenna* (1981) 2 *SSR* 13; *Te Velde* (1981) 3 *SSR* 23; and *Vavaris* (1982) 11 *SSR* 110.

Special benefit?

The AAT then pointed out that Smith may have been eligible for special benefit when his unemployment benefit was cancelled—as a person who was 'unable to earn a sufficient livelihood for himself and his dependants', under s.124(1) of the *Social Security Act*. The AAT noted that this option had been used in *Kirsch* (1984) 20 *SSR* 222 and *Watts* (1984) 21 *SSR* 237; and that the DSS could treat Smith's application for unemployment benefit as an application for special benefit (under s.145 of the *Social Security Act*). [However, the AAT did not adopt the course of exercising the s.145 power itself—a course adopted, for example, in *Whitehead* (1985) 24 *SSR* 285.]

Formal decision

The AAT affirmed the decision under review, but recommended to the Secretary that Smith's application for unemployment benefit should be treated as an application for special benefit.

Widow's pension: cohabitation

CHAPMAN and SECRETARY TO DSS (No. N84/241)

Decided: 8 January 1985 by A.P. Renouf.

Deanna Chapman was granted a widow's pension in 1973. In 1981 the DSS cancelled this on the ground that she was living with a man, H, as his wife on a *bona fide* domestic basis although not legally married to him. The DSS decided that this relationship had persisted from 1970 to 1981 and that, accordingly, Chapman had received payments of widow's pension to which she was not entitled, totalling $22 893. The DSS decided to recover that amount from Chapman. She asked the AAT to review that decision.

The legislation

Section 59(1) of the *Social Security Act* defines 'widow' so as to exclude a woman who is living with a man as his wife on a bona fide domestic basis although not legally married to him.

Section 140(2) allows the Secretary to the DSS to recover, through deductions from a current pension, any amount of pension which should not have been paid.

A marriage-like relationship?

Evidence given to the AAT showed that, between 1973 and 1981, Chapman had lived at several houses owned by H. Chapman claimed that she had lived there as H's housekeeper and that they had not had a sexual relationship.

Chapman explained that the main reason why she had continued to live in the same house as H was her fear of his physical violence - he had assaulted her and her children on several occasions, particularly when he was drunk. On one occasion, Chapman had moved to her parents' house following a violent incident and stayed there for 3 months; but she had returned to H's house because she was frightened of H's threats.