Administrative Appeals Tribunal decisions

Sickness benefit: 'loss of income'

OAKLEY and SECRETARY TO DSS (No.T5/17)
Decided: 7 November 1985 by R.C.Jennings.

Rodney Oakley had been granted sickness benefit in August 1981, after an injury to his back. He continued to receive this benefit (at the full rate) until 14 September 1984, when the DSS cancelled it on the ground that he was no longer incapacitated for work.

In October 1984, Oakley again claimed sickness benefit, which the DSS granted, accepting that his 1981 back injury now incapacitated him for work. However, because Oakley had 'nil income' in October 1984, the rate of sickness benefit which the DSS paid to Oakley was reduced to the rate of unemployment benefit which he would have been paid - significantly lower than the rate of sickness benefit which the DSS had been paying him up to September 1984.

Oakley asked the AAT to review these decisions.

The legislation
Section 108(1) of the *Social Security Act* sets out the qualifications for sickness benefit. A person may qualify by satisfying the Secretary that 'he [or she] was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he [or she] has thereby suffered a loss of salary, wages or other income' - s.108(1)(c)(i); or the person may qualify by satisfying the Secretary that he or she has a temporary incapacity for work 'and that he [or she] would, but for the incapacity, be qualified to receive an unemployment benefit" - s.108(1)(c)(ii).

At the relevant time, s.112(1) provided that the rate of sickness benefit payable to Oakley (who was unmarried and over 18 years of age) was $91.90 a week in October 1984; and that the rate of unemployment benefit payable to a person in Oakley's position was $81.10 a week.

Section 113 limits the rate of sickness benefit payable to a person. If the person has qualified under s.108(1)(c)(i), the sickness benefit is not to exceed the rate of salary, wages or other income lost by the person through incapacity. If the person has qualified under s.108(1)(c)(ii), the sickness benefit must not exceed the applicable rate of unemployment benefit.

The decision to cancel
The AAT agreed with the DSS that Oakley's sickness benefit should have been cancelled in September 1984. There was evidence that, at that time, he was working virtually on a full-time basis as a taxi driver so that Oakley 'by his observed conduct had shown himself to have capacity for work': Reasons, p.4.

Rate of sickness benefit
However, the AAT said that, when Oakley was re-granted sickness benefit in October 1984, the rate of that sickness benefit should not have been limited to the applicable rate of unemployment benefit.

This was because the October 1984 grant of sickness benefit was based on an incapacity for work flowing from the 1981 injury. That incapacity for work had originally produced a loss of wages in 1981 and, therefore, Oakley should be regarded as qualifying for sickness benefit under s 108(1)(c)(i), not (ii). The AAT pointed out that the higher rate of sickness benefit was available for persons who had been receiving income when they were incapacitated; and the lower rate was reserved for those who were not receiving income at that time. The AAT continued:

> 'The fact that the applicant fell into the latter category during the weeks which preceded his second claim does not justify ignoring the fact that his loss of wages derives from the accident which caused his incapacity for work in 1981. If an injured person engages in work in an effort to rehabilitate himself but fails because he cannot cope with the pain, he does not thereby deprive himself of sickness benefit at the rate at which he was being paid prior to such efforts. Indeed "recurring incapacity" is a condition expressly recognised by the Act in s.119(2A) and was conceded to be applicable in the present case in the letter to the applicant which granted his claim from the date it was made.'

(Reasons, p.8)

Formal decision
The AAT affirmed the decision to cancel Oakley's sickness benefit in September 1984; and set aside the decision to grant Oakley sickness benefit at the lower rate in October 1984, directing the Secretary to adjust the amount payable to Oakley on the basis that he was entitled to receive the higher rate.

Age pension: portability

DRACUP and SECRETARY TO DSS (No.Q85/41)
Decided: 29 October 1985 by J.B.K.Williams.

Mr and Mrs Dracup had migrated to Australia from the United Kingdom in 1953. They lived here until 1979 when they travelled to the United States, where they were granted permanent resident status. They returned to Australia on 6 August 1983 and claimed age pensions on 16 August 1983. The DSS granted those pensions on 5 September 1983.

In November 1983, Mr and Mrs Dracup told a DSS officer that they intended to leave Australia for the United States in February 1984 and confirmed this intention in January 1984. They told the DSS that, if they remained away from the United States for more than 12 months, they would lose their permanent resident status under American law.

However, in February 1984, Mr and Mrs Dracup told the DSS that they would not be leaving Australia until August 1984, 'after completing the necessary 12 months residence here'; and they confirmed that information in June 1984.

On 28 July 1984, Mr and Mrs Dracup left Australia, without telling the DSS. When the DSS subsequently learned of their departure, it cancelled their pensions. Mr and Mrs Dracup asked the AAT to review that cancellation.

The legislation
Section 83AB of the *Social Security Act* permits payment of a pension to a pensioner who is outside Australia.

However, s.83AD limits this right. According to s.83AD(1), a pension granted to a former resident of Australia, who returns to Australia, claims a pension and leaves Australia within 12 months of her or his return, is not payable while the pensions is outside Australia.

Section 83AD(2) gives the Secretary a discretion to waive the requirements of s.83AD(1) where the Secretary is satisfied that the person's reason for

leaving before the end of the 12 month period 'arose from circumstances that could not reasonably have been foreseen at the time of his return to, or his arrival in Australia . . .'

Section 20 provided that, for the purposes of Part III, a claimant should be deemed to be resident in Australia while an 'absent resident'.

According to s.6(1), an 'absent resident' was a person whose domicile was in Australia, unless the Secretary was satisfied that the person had a permanent place of abode outside Australia.

Not an 'absent resident'

The AAT said that it seriously doubted whether the concept of 'absent resident' was applicable to s.83AD. The purpose of the latter section, the AAT said, was -

> 'to prevent people formerly residing in Australia and who would not qualify for the grant of age pension by reason of not being physically present in Australia (see s.21(1)) from making fleeting return visits to Australia in order to qualify for a grant, and then departing again for overseas.'

(Reasons, p.7)

However, it was not necessary to decide this point because Mr and Mrs Dracup had not been 'absent residents' during their time out of Australia. They had sold their Australian home before going to America, where they had acquired permanent resident status and where their adult children lived. All these factors showed that Mr and Mrs Dracup had abandoned their Australian domicile and, moreover, that they had a permanent place of abode outside Australia.

Reason for leaving

Because Mr and Mrs Dracup were former residents of Australia (rather than current residents) at the time of their return, their pensions were not portable, unless they could take advantage of s.83AD(2).

Mr and Mrs Dracup gave 2 reasons for leaving Australia before the expiry of the 12 month period: first, that their daughter in America was expecting a child; and, secondly, that they needed to return early in order to avoid losing their resident status in America.

The AAT said that the second of these was the only substantial reason offered by Mr and Mrs Dracup. From the evidence before the Tribunal, it was a reasonable inference (the AAT said) that Mr and Mrs Dracup had been aware of the requirements of American law before their departure from the United States in August 1983:

> 'Accordingly, it is my view that the fact that their American residential status would be endangered if they remained out of the United States for more than 12 months was a circumstance that would reasonably have been foreseen at the time of their arrival in Australia.'

(Reasons, pp.10-11)

In any event the AAT said, this is not a case in which the discretion in s.83AD(2) should be exercised in favour of Mr and Mrs Dracup:

> 'In this case, the applicants left Australia and have envinced a clear intention of severing their former associations with this country. Their return here was made solely for the purpose of qualifying for age pensions. They evidenced a clear intention to leave as soon as possible after this purpose had been achieved. Further, the circumstances of the departure were such as to make it difficult to resist the inference that they intended to mislead the Department.'

(Reasons, pp.11-12)

Formal decision

The AAT affirmed the decision under review.

Recovery of overpayment: bankruptcy

STEWART and SECRETARY TO DSS (No.V85/239)

Decided: 15 November 1985 by Jenkinson J.

Garry Stewart asked the AAT to review a DSS decision to recover, through deductions from his current unemployment benefit at the rate of $1 a fortnight, an overpayment of unemployment benefits which totalled $1,926.

These overpayments had been made to Stewart between April and November 1981 and Stewart had subsequently been declared a bankrupt under the *Bankruptcy Act* 1966 (Cth). Stewart argued that the *Bankruptcy Act* debarred the DSS from recovering the overpayment through deductions from current unemployment benefit.

The legislation

At the time of the decision under review, s.140(1) of the *Social Security Act* provided that an overpayment made to a person, in consequence of the person's failure or omission to comply with any provision of the *Social Security Act*, was recoverable from that person, or that person's estate, as a debt due to the Commonwealth.

Section 140(2) provided that an overpayment, made for any reason, could be recovered, at the Secretary's discretion, by deductions by any pension, benefit or allowance which was currently being paid to the person who had received the overpayment.

Section 58(1) of the *Bankruptcy Act* provides that, where a person becomes a bankrupt, the person's property vests in the Official Trustee.

Section 58(3) provides that, after a debtor has become bankrupt, a creditor cannot 'enforce any remedy against the person or the property of the bankrupt in respect of a proveable debt' nor can the creditor commence or take any fresh step in legal proceedings to recover that debt.

Section 131 declares that a bankrupt who is receiving income is entitled to retain it for his own benefit. Some income can be, by court order, paid to the trustee of the bankrupt's estate; but, because of s.144(1) of the *Social Security Act*, a pension, allowance or benefit under the *Social Security Act* can not be paid to the trustee.

Recovery under s.140(2) not barred

The AAT said that the recovery of an overpayment under s.140(2) of the *Social Security Act* was not prevented by s.58(3) of the *Bankruptcy Act*.

It was not a 'remedy against the person . . . of the bankrupt' - because it did not involve physical restraint. Nor was it a 'remedy against the . . . property of the bankrupt' - because the 'property of the bankrupt' included only that property which vested in the trustee of the bankrupt's estate and s.131 of the *Bankruptcy Act*, in combination with s.144(1) of the *Social Security Act*, prevented unemployment benefits payable to a bankrupt person vesting in that person's trustee in bankruptcy.

In any event, the AAT said, the recovery of an overpayment under s.140(2) of the *Social Security Act* could not be described as the enforcement of a remedy by a creditor:

> 'The Secretary is the person by whose determination deduction from pension, allowance or benefit may be authorised. The Secretary does not make such a determination at the instance, or on the application, or at the direction, of the