

Formal decision

The AAT set aside the decision under review and remitted the matter to the

Secretary with a direction that Cowley had been qualified to receive invalid pension at all times since the begin-

ning of 1985 on the ground that he was permanently incapacitated for work.

Invalid pension: incapacity for work

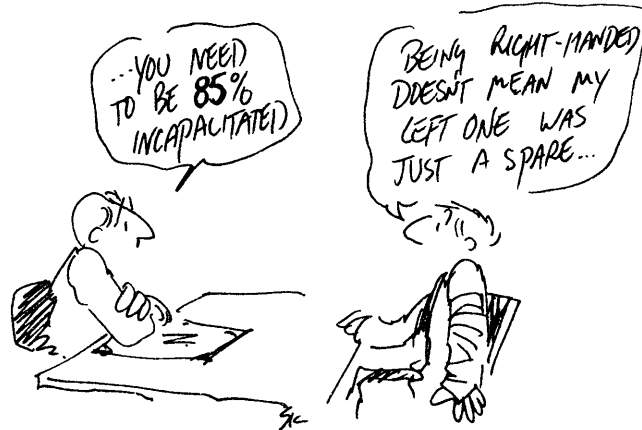
DONKERS and SECRETARY TO DSS (No. V85/501)

Decided: 2 July 1986 by J.R. Dwyer.

The AAT set aside a DSS decision to reject claim for invalid pension lodged by a 23-year-old man who suffered from a severe back disability.

Donkers had been educated to Form 4 standard before commencing employment as a labourer. He worked for 3 years before his back disability obliged him to give up working. He then completed Form 5 but was unable to complete Form 6 and could not proceed to tertiary studies. He was now incapable of undertaking heavy manual work and, in August 1985, the Commonwealth Rehabilitation Service decided to reject him for rehabilitation 'in view of the enormous waiting list'.

The AAT had no difficulty in deciding that Donkers was incapacitated for work, the only question being



whether that incapacity was permanent, given his relatively young age. The AAT regarded the decision by the Commonwealth Rehabilitation Service to reject Donkers for rehabilitation as

critical. It should be treated, the AAT said, 'as bringing to an end any realistic prospect that D's incapacity for work would not persist into the foreseeable future': Reasons, para. 38.

Unemployment benefit: work test

CHAPMAN and SECRETARY TO DSS

(No. V86/26)

Decided: 1 August 1986 by R.

Balmford, G. Brewer and L.

Rodopoulos.

Emily Chapman wished to study for a certificate in child care at a TAFE college. In order to meet the entry requirement of work experience in child care, she worked as a volunteer position in a child care centre for mentally retarded children, where she was paid \$22 a week. Later, she was paid a total of \$45 per week for undertaking additional cleaning work. She attended this centre full-time because she the only travel arrangements she could make were with full-time workers.

Chapman actively looked for other work in child care as it was essential that she obtain a paid position in child care for normal children. The applicant received no pay during periods in May and September when the home was closed.

In March 1984, Chapman's mother inquired at a DSS office about support for her daughter. She was told that, as her daughter was nearly 16, her unemployment benefit would the same amount she was receiving in pay - \$45. In May 1984, during the two week closure of the home Chapman was told that she was not eligible for benefit as she intended to return to work after two weeks. When the home closed in the September holidays Chapman registered with the CES and received unemployment benefit of \$33

from the DSS from then until the end of the year. Chapman applied to the AAT for review of the decision not to grant unemployment benefit at any earlier time.

The legislation

Section 107(1)(c) of the *Social Security Act* is set out in *Donaghey*, also noted in this issue of the *Reporter*. On 1 April 1984 the applicant satisfied the age and residence requirements in s.107(1)(a) and (b).

The issue before the AAT was whether she was eligible under s.107(1)(c) to receive unemployment benefit from 1 April 1984 to 10 September (when she began to receive the benefit).

If she did become eligible at that earlier time a further issue arose under s.135TA(1), which provides that payment of a benefit 'shall not be made except upon the making of a claim'. No formal claim had been lodged until September.

'Unemployed' and 'reasonable steps' satisfied

The AAT referred to the Federal Court decision in *Thomson* (1981) 38 ALR 624 and concluded that Chapman was 'unemployed' within the meaning in s.107(1)(c):

'She undertook the work at the Home consciously as voluntary work designed, she hoped, to assist in qualifying her to enter the course in which she at that time intended to enrol. Voluntary work was, she knew, not the required qualification, and she sought professional work in the same field . . .

The payment of \$22 per week was derisory . . . We are satisfied that, throughout the period she was "unemployed" . . . and that, with her mother's assistance, she took, throughout the period, reasonable steps to obtain work.'

(Reasons, para.16)

Other 'suitable' work

However, the AAT said that Chapman had been too narrow in her approach to seeking work, although she knew there were very few positions available in child care.

Unlike Thomson, her commitment to seeking work of the special kind was greater than her commitment to seeking work in general (see also *Tizzano* (1984) 25 SSR 300). In *Martens* (1984) 22 SSR 248 and *Donaghey* (this issue of the *Reporter*), the applicants, though limiting the field in which they sought work were limiting themselves to a very fertile field.

The conclusion was therefore that Chapman had not taken 'reasonable steps to obtain work' during the relevant period that was 'suitable to be undertaken by her and so had failed to comply with s.107(1)(c).

Formal decision

The AAT affirmed the decision under review.

THOMAS and SECRETARY TO DSS (No. W85/130)

Decided: 2 September 1986 by R.D.

Nicholson, N. Marinovich and K.J.

Taylor.

Michael Thomas was granted unem-

ployment benefit in 1979. In July 1984 Thomas left Western Australia with his wife and child in order to evade the police, who were seeking to arrest him for some criminal offences. Over the next 10 weeks, Thomas travelled around Australia, eventually returning to Western Australia. During that period he received no unemployment benefits because the DSS cancelled his benefits at about the time he left Western Australia, when he failed to lodge applications for continuation of benefit.

On his return to Western Australia, Thomas sought payment of unemployment benefits for the period of his absence and, when the DSS refused to make that payment, he asked the AAT to review the refusal.

The work test

The central question was whether Thomas met the requirements of the work test in s.107(1) of the *Social Security Act* during his 10 weeks absence from Western Australia.

He told the AAT that during that period he had applied for many jobs in various parts of Australia. He was offered one job in a service station in Western Australia but refused to take it because he was anxious to leave the State so as to evade the police. His other applications for work, in South Australia, Victoria, N.S.W., Queensland and the Northern Territory were unsuccessful. Thomas financed his travels from the proceeds of stolen goods and by fraudulently negotiating cheques.

On the basis of this evidence, the AAT decided that Thomas had been 'unemployed' during his travels. Even though he had some income, this came from illegal activities and 'would not be regarded as engagement in work or as employment within the colloquial or popular meaning of that word': Reasons, p.9.

The AAT also decided that, given the fact that Thomas was 'on the run from the law', his steps to find work were reasonable.

However, the AAT was not prepared to find that Thomas met the third requirement of the work test, namely that he be 'willing to undertake paid work', as specified in s.107(1)(c)(i). His refusal to take the service station job offered to him in Western Australia made it impossible for Thomas to meet this aspect of the work test. The AAT also noted that, during his travels, Thomas had not been 'genuinely willing to undertake paid work but only to do so within . . . limits he had set himself, that is, in a situation where he could avoid detection because the employment offered some sort of sanctuary to him and his family': Reasons p.10.

Formal decision

The AAT affirmed the decision under review.

DONAGHEY and SECRETARY TO DSS

(No. V85/40)

Decided: 1 August 1986 by R.

Balmford.

Michael Donaghey worked in the electronics industry. To further his career prospects he enrolled, between April and November 1984, in a computer maintenance course run by a commercial firm (at a fee of \$5850). He applied to the DSS for unemployment benefit but was refused. He asked the AAT to review that refusal.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified for unemployment benefit if that person satisfies age and residence requirements and if the person passes the 'work test' in s.107(1)(c) - that is, was 'unemployed', capable and willing to undertake suitable paid work, and had taken reasonable steps to obtain such work.

The AAT's view

Donaghey told the AAT that the course normally required 25 hours work a week but, as he had prior experience in the area, he had found that he did not have to spend as much time on the course as other students did.

Donaghey had actively sought employment over the period of the course but was only prepared to defer the course if a suitable job in the electronics field was offered. He did have two short part-time jobs over the period.

The Tribunal referred to the Federal Court decision in *Thomson* (1981) 38 ALR 624, which said that all the circumstances of the case must be examined, the activities of the applicant being one. Other considerations include the applicant's intention at the relevant time.

In the light of *Thomson* the Tribunal concluded that Donaghey had satisfied the requirements of the 'work test':

'While his commitment to completing the course was considerable, we accept that, at least after the initial period of about 6 weeks, he knew that, because of his previous experience, he could complete the course without giving it the full time commitment which was prescribed. (Contrast *Mathews* (1986) 31 SSR 395.) Further, we accept that, after the initial period, he would, if necessary, have deferred his course in order to accept a paid position, the hours of which were incompatible even with the reduced time which he gave to the course. We are satisfied that, throughout the period, he was "unemployed" for the purposes of the paragraph, and also that, throughout the period, he took reasonable steps to obtain work.'

(Reasons, para.11).

On the question whether his search for work in the field of electronics was wide enough to satisfy the requirements of s.107(1)(c), the Tribunal was referred to the decision in *Masters* (1984) 22 SSR 248, where the applicant had attended a course run by the same organisation and had restricted his search to work in a limited field. In upholding his entitlement to unemployment benefit the AAT had said that, 'having regard to the size and rate of growth of the computer segment of our economy, the number of jobs available in it, the mobility of employees and the consequent rate of availability of employment . . . genuine and assiduous enquiries in that field amount to reasonable steps to obtain suitable employment'.

The AAT decided that similar considerations applied in this case. For reasons of consistency alone the AAT was reluctant to differ from the decision in *Masters*.

Formal decision

The decision under review was set aside.

John W. Kirkwood Memorial Scholarship in Law

A scholarship fund in honour of John Kirkwood, to be known as the *John W. Kirkwood Memorial Scholarship in Law*, has been established at the University of New South Wales. Contributions are now invited to the fund which will be used to provide assistance to students suffering financial hardship.

Cheques should be crossed, marked 'Not negotiable', and made payable to the University of New South Wales, and sent with details of the donor's name and address, and reference to the scholarship fund, to:

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