

made unless there has been a claim for that benefit.

Section 124 of the Act states that special benefit may be paid to a person 'who is not a person to whom unemployment or sickness benefit is payable' and by reason of age, physical or mental disability or domestic circumstances, or for any other reason is unable to earn a sufficient livelihood.

#### Eligibility for unemployment benefit

The only issue in the case was whether the applicant was eligible for unemployment benefit for the relevant period. By the operation of s.124 such a qualification would bar him from claiming an entitlement to special benefit for the period claimed.

The applicant submitted that unemployment benefit was not payable to the applicant at the relevant time because a claim had not been made for that benefit as required by s.135TA. The DSS argued that unemployment benefit was 'payable' to the applicant if he had claimed it.

The Tribunal accepted the DSS argument. Section 135TA was merely procedural, if he had claimed unemployment benefit at that time then it would have been 'payable'. As s.124 only allows special benefit to be paid to a person to whom unemployment benefit is not payable the DSS had no power to pay special benefit for the period claimed. Section 124 was, said the AAT, 'a provision which must be interpreted having

regard to eligibility and without regard to procedure.' (Reasons, p.6)

This was not a case where the applicant was totally ignorant of his rights under the Act. As a former employee of the Department he was fully aware of them.

The AAT referred to the decision in *Law* (1982) 5 SSR 52 where the Tribunal had indicated that the words 'is not a person to whom an unemployment benefit or sickness benefit is payable' in s.124 referred to a person who is eligible for the benefit and not a person who is in receipt of the benefit. This supported the reasoning in the present decision.

#### Formal decision

The AAT affirmed the decision under review.

## Special benefit: student

### V.K. and SECRETARY TO DSS

(No. V86/369)

**Decided:** 9 February 1987 by R. Balmford

The applicant applied to the AAT to review a decision by the DSS to refuse his claim for special benefit made in March 1986.

#### The facts

The applicant was a student at a college of advanced education. He had left the family home in January 1985 due to conflict between himself and his father. He deferred his course at that time and received unemployment benefit. He resumed his course in February 1986 and applied for TEAS. This application was rejected due to the income of the applicant's parents. He then applied for special benefit.

The Tribunal also received evidence that it was not in the psychological interests of the applicant for him to return to the family home. Deferral of his course would also not be in his psychological interests.

#### The legislation

Section 124 of the *Social Security Act* provided that the relevant time that a person may receive special benefit where he/she is not a person to whom

unemployment benefit or sickness benefit are payable and who by reason of age, physical or mental disability or domestic circumstances, or for any other reason is unable to earn a sufficient livelihood.

Section 133 of the Act was amended in 1986 to read that a benefit is not payable to a person in receipt of a payment under a prescribed educational scheme or a person in a course of education on a full-time basis. Section 133(2) provides that a benefit granted prior to 1 July 1986 is not affected by that provision until 1 January 1987.

Thus as the claim for special benefit was lodged and rejected before the 1 July 1986 the AAT had to consider the period from the date of the claim until 31 December 1986 for the eligibility of the applicant for special benefit.

#### Was the applicant eligible for special benefit?

There was no doubt that the applicant was not a person to whom unemployment benefit was payable at the relevant time. He could not be regarded as unemployed while engaged in a full-time course of study.

The Tribunal was also satisfied that the applicant was unable to earn a

sufficient livelihood. The AAT referred to *Casper* (1985) 25 SSR 300 where it was accepted that a full-time student was unable to earn a sufficient livelihood during times of instruction and examination.

#### Exercise of discretion in s.124

In deciding whether the discretion to grant special benefit should be exercised favourably towards the applicant the Tribunal considered the status of the applicant as a full-time student and that he was ineligible for TEAS. As in *Casper* the Tribunal considered it inappropriate to support from the public purse an applicant for special benefit when the applicant is ineligible for TEAS.

It was also relevant to consider that the applicant, if successful in his application would merely repay a loan to his mother. Being ineligible for special benefit or AUSTUDY in 1987 he would probably have to enrol part-time and find work. There would be little significant impact on his present situation if his application was successful.

#### Formal decision

The AAT affirmed the decision under review.

## 'Dependent child'

### KOPCZYNSKI and SECRETARY TO DSS

(No. S85/133)

**Decided:** 11 February 1987 by J.A. Kiosoglous, B.C. Lock and D.B. Williams

The applicant had been in receipt of a widow's pension until December 1984 when she was transferred to an age pension. In May 1984 she applied for an additional benefit in respect of her student daughter. This claim was

rejected by the DSS and the applicant sought review by the AAT.

#### The legislation

Section 28(1AA) of the *Social Security Act* increases the standard rate of age or widow's pension where the claimant has a 'dependent child.' That term is defined in s.6(1) to include:

'(b) a student child, not being the spouse of the person, who is wholly or substantially dependent upon the person.'

A student child is defined as a person between the ages of 16 and 25 who is in full-time education.

#### 'Wholly or substantially dependent'

In 1984 the student daughter had received a TEAS allowance although the applicant provided \$200 in university fees and between \$300 and \$400 for books. During that year the applicant provided 'spasmodic' financial assistance in times of need.