Administrative Appeals Tribunal decisions

Income: 'earned, derived or received'?

SAS and SECRETARY TO DSS
(No. S85/102)
Decided: 6 March 1987 by J.A. Kiosoglous and J.T.B. Linn

Igor Sas applied to the AAT for review of a DSS decision to raise an overpayment of unemployment benefit. The amount sought by the Department was $855.40.

The applicant had been in receipt of unemployment benefit when he undertook voice over work for radio and T.V. commercials. This was done on a casual basis over 3 months. He did not notify the Department when he did the work although he did advise them when he received payment for the work.

Was there an overpayment?
Section 140(1) of the Social Security Act provided that where a payment occurred as a result of a failure to comply with a provision of the Act then the amount so paid became a debt due to the Commonwealth. Section 114 provided for the reduction of the rate of unemployment benefit where a recipient's income exceeded a certain amount. The Act also imposed an obligation to notify changes in income.

The issue was whether the applicant had received income thus imposing on him an obligation to notify the Department. This depended upon the definition of 'income'.

Section 6 defined 'income' to mean 'personal earnings, moneys, valuable consideration or profits earned, derived or received by that person.'

Was there money 'earned, derived or received'?
The applicant argued that he had not earned, derived or received the money for the voice-over work until he had actually received payment. The AAT accepted that submission.

The Tribunal referred to Sharp (1986) 33 *SSR* 426 where the AAT said that a person may be considered to have earned or derived money when they have a present legal entitlement to the money. By that the AAT said it was meant that

> 'there must in here in the future recipient of the moneys in question, a legal right to insist upon payment, and if necessary, to initiate legal proceedings to recover those moneys at the time of alleged "deriving" or "receiving".'

(Reasons, para.9)

To determine whether such a right existed for the applicant it was necessary to examine the contracts between him and the studios for which he did the work. Upon examination of the contracts the AAT concluded that payment was subject to various contingencies such as client approval and the use to which the tape would be finally put. As a result the amount actually received by the applicant could vary between each job. It could thus not be said that the applicant had any legal right to insist upon payment prior to actual receipt of the money.

As a result the AAT concluded that the applicant did not earn or derive the money until he had actually received it. Thus he had not failed to comply with the Act, having notified the DSS when he received the money. There was no overpayment made to the applicant.

Formal decision
The AAT set aside the decision under review.

Unemployment benefit: students

CRUGNALE AND SECRETARY TO DSS
(No. W86/236)
Decided: 16 March 1987 by J.O. Ballard

The AAT affirmed a DSS decision to refuse unemployment benefit to a university student. The Tribunal found that the applicant had a greater commitment to completing her university studies than obtaining work. This view was supported by evidence that suggested that during the academic year she was trying to obtain employment that was compatible with the times that she was required to attend university, such as work as an usherette which had been entered on her CES card.

Having regard to the criteria set out in Long (1986) 29 *SSR* 361 for assessing full-time students for unemployment benefit - the amount of time demanded by the course, the manner in which the course demands cut across the applicant's availability for full-time paid employment and the length of time that the applicant had spent in the course of study - the Tribunal could not describe the applicant as eligible for the benefit.

The applicant is described by the interviewing officer as 'Attractive, slim girl; excellent presentation and very well spoken; would be suitable to public contact.' In evidence she made it clear that she intends to get her degree in order to improve her situaution in life. I am quite sure she is not the sort of person who would take up unskilled employment as an usherette or a waitress as a lifestyle and that her intention to get work, while genuine, was related only to work she could consistemtly do while continuing with her studies. That does not entitle her to unemployment benefit.
(Reasons, para.7)

HANSEN and SECRETARY TO DSS
(No. S86/17)
Decided: 6 March 1987 by J.A. Kiosoglous

The applicant lodged a claim for unemployment benefit in March 1985. This claim was rejected by the DSS on the basis that the applicant was committed to his studies and so could not satisfy the work test in s.107 of the Act. The applicant asked the AAT to review the decision.

The legislation
Section 107(1)(c) of the Act provides that a person is eligible to receive unemployment benefit if they are 'unemployed', 'capable of undertaking and willing to undertake work' and during the relevant period they have taken reasonable steps to obtain work.

The facts
In 1985 the applicant enrolled in the two subjects he required to complete the second year of the science degree he commenced in 1983. He was rejected for TEAS as his workload was insufficient and he subsequently applied for unemployment benefit. During 1985 the applicant had periods of employment that totalled 7 weeks as well as a two month period of employment over the summer vacation. In 1986 the applicant enrolled in the third year of his course as a full-time student. He worked casually as a service station attendant in that year.

Commitment to full-time study?
The AAT referred to the Federal Court decision in *Thomson* (1981) 38 *ALR* 624 where it was said that students were not to be treated differently to other people in the application of s.107. Whether a student

satisfied the criteria in that section was a matter of degree with reference to the facts in the case. A full-time student was not as a matter of law to be regarded as 'unemployed'. The intention of the applicant was an important consideration. If the applicant had a commitment to full-time study that would take precedence over seeking employment, then he could not be described as 'willing to undertake' suitable paid work.

The Tribunal found that the applicant was not willing to undertake all suitable paid work available. Although the applicant was prepared during 1985 to abandon work that he considered suitable, that is non-manual work, his previous work experience indicated that manual work was also suitable for him. The AAT said:

> '...it is a reasonable inference from the applicant's evidence that he was prepared to abandon his studies only if work of a type more limited than the class of work for which he was otherwise generally suited presented itself in 1985. I conclude that he was not willing to undertake paid work within the full range for which he was suited. Accordingly, I find this requirement of s.107(1)(c) not satisfied.'

Other factors also worked against the applicant. Faced with financial need in 1985 the applicant refused to drop back his workload at University to enable him to qualify for unemployment benefit. This indicated a commitment to study over seeking work. Also, he only applied for unemployment benefit when his TEAS application was rejected. It appeared that he was primarily concerned with financing his studies, rather than gaining employment.

The case against the applicant was even clearer in 1986. He had a full workload and had one year to complete his degree. His commitment to study at that stage would render him unwilling to undertake work and prevent him from being described as 'unemployed'.

Formal decision
The Tribunal affirmed the decision under review.

SPEED and SECRETARY TO DSS (No.W87/28)
Decided: 5 June 1987 by J.O. Ballard.

Oliver Speed had been a full-time university student up to 14 December 1986, when his final examination results were published. On 20 November 1986, the date when he sat for his last examination, Speed claimed unemployment benefit. The DSS refused to pay S benefit before 1 January 1987 because he was receiving a TEAS allowance for the 1986 calendar year. Speed asked the AAT to review that decision.

The legislation
At the time of the DSS decision, s.133 of the *Social Security Act* prevented payment of unemployment benefit to a student enrolled in a full-time course for a period during which a TEAS allowance was paid to the student.

Regulation 37(1) of the *Student Assistance Regulations* 1973 provided that, where a student completed an accredited course during November or December, the student's TEAS allowance terminated on 31 December in that year.

An ambiguity
The AAT said that s.133 was ambiguous: it was not clear whether it referred to a course for a full year. This ambiguity was enough to justify looking at the Second Reading speech on the Bill by which that section was added to the *Social Security Act*, in accordance with s.15AB of the *Acts Interpretation Act* 1901.

The Second Reading speech said that the policy of s.133 was -

> 'that [full-time students] should look to and be covered by education allowance rather than what are, primarily, work-force related benefits.'

(Reasons, para.11)

This made it clear that s.133 had been intended to prevent double benefits - to prevent a person receiving TEAS and unemployment benefit for the same period. Accordingly, unemployment benefit should not be paid for any period for which a TEAS allowance had been paid.

Formal decision
The AAT affirmed the decision under review.

Cohabitation

KERSHAW and SECRETARY TO DSS (No. N86/710)
Decided: 6 April 1987 by A.P. Renouf, J.H. McClintock and M.T. Lewis

Maureen Kershaw asked the AAT to review a DSS decision to recover an overpayment of $3,128.80 in widow's pension. Mrs Kershaw had been granted the pension in 1977 as a deserted wife. In 1984 the DSS decided to cancel the pension on the basis that the applicant and her husband had reconciled. The dispute centred on the time of the reconciliation. The DSS said that it took place in June 1984, the applicant maintained that it occurred in November 1984. Pension was paid until November and the Department claimed an overpayment for the period between June and November.

When did reconciliation occur?
The applicant married her husband in 1960. Her husband was in the navy and was constantly at sea. Between 1960 and 1976 their relationship was 'turbulent'. In 1976 the husband left the navy and found local employment. In 1977 the applicant and her children left for Sydney to live alone. There was little contact until 1980 when her husband began to visit, seeking reconciliation but always failing. In 1983 the applicant moved closer to her husband in order that a reconciliation may be facilitated. Closer contact occurred but a resumption of their marriage still did not occur.

Later in 1983 the applicant's husband became ill with cancer. This made a reconciliation difficult as the applicant's husband thought that he was dying. After an operation for the cancer the husband requested that he come to live with the applicant. The applicant agreed as he needed care, but did not consider that at that stage a reconciliation would occur. Eventually the husband moved to alternative accomodation.

In June 1984 the applicant took her husband back in after he was advised to leave work for medical reasons. The evidence was that this was not seen as any resumption of their marital relationship, but based on the need of the applicant's husband for some support. Later in the year they took an overseas trip together although the trip was filled with conflict between them. It was not until they returned in November that the relationship improved to the point that a complete reconciliation took place.

Did a marital union exist?
The AAT had difficulty in characterising the relationship of the applicant with her husband. A strong bond clearly existed, divorce had never been considered, yet there had been long periods of separation. The only evidence that contradicted the applicant was that of a DSS social worker who gave evidence that the applicant told him in December 1984 that she had reconciled with her husband in June 1984.

The AAT commented:

> 'We appreciate the unenviable position of the respondent when confronted with a direct conflict between the statements of a recipient of benefit and of one of his officers who, in our view, is very unlikely to have made an error of the kind in question. We find ourselves confronted with the same