

## Unemployment benefit or special benefit: eligibility

TREANOR AND SECRETARY TO DSS

(No. S86/134)

Decided: 13 March 1987 by R.A. Layton.

Patrick Treanor applied to the AAT for review of a decision to refuse unemployment benefit or special benefit.

### The facts

The applicant was in receipt of a superannuation pension from Ireland. Half of that pension was paid to his first wife in Ireland as maintenance. The remainder of the pension was paid to the applicant and the DSS regarded that amount as income. When the income test was applied to the applicant the rate at which unemployment benefit was payable was nil.

The amount which the applicant received from that pension was approximately \$70 per week. He had no other income from the date he applied for unemployment benefit in October 1985 until September 1986 when he received a lump sum reimbursement from the Irish Tax Department. During that period he sold clothes and scavenged in bins in order to survive. At the time of the hearing he was receiving \$175 per week from the pension as tax deductions were no longer being made in Ireland. However, he was liable for Australian taxation at the rate of \$66 per week on that sum.

### Gross or net income from pension?

The applicant argued that only the net amount he received from the superannuation pension should be used

to calculate the rate of unemployment benefit. The Tribunal disagreed. The only allowable deductions would be those incurred in gaining the income. The whole of the pension had to be assessed, not its full payment less maintenance and taxation.

Of course, part of the amount that the applicant received as a tax reimbursement should not be counted again as it had already been taken as part of his income.

### Was the applicant eligible for special benefit?

Section 124 of the Social Security Act then provided that a person who was not in receipt of any other pension or benefit, to whom unemployment or sickness benefit was not payable and who could not earn for themselves a sufficient livelihood may be granted a special benefit. Section 125 then provided that the rate of special benefit shall not exceed the rate of unemployment benefit that would be payable to the person if they were qualified to receive it.

### Was unemployment benefit 'payable' to the applicant?

The threshold question was whether the applicant was a person to whom unemployment benefit was not payable. Under s.124 if that benefit was payable then he could not be eligible for special benefit.

The Tribunal referred to the decisions in Law (1982) 5 SSR 54, Conroy (1983) 14 SSR 143 and Guven (1984) 17 SSR 173 where the word 'payable' was defined as meaning 'qualified to receive'. The Tribunal did

acknowledge in law that it was seen to be an open question.

The AAT regarded this interpretation as correct. It was reinforced by the wording of other sections. In particular s.125 which used the phrase 'qualified to receive'.

The Tribunal was concerned that such an interpretation appeared to defeat the purpose of the section. However, even if the section could be interpreted differently the AAT could see another barrier for the applicant. Section 125 required that the rate of special benefit should not exceed the rate of unemployment benefit that would be payable to the applicant. The rate of any special benefit in this case would therefore be nil.

### Ex gratia payment and reform

Finally, the Tribunal commented on the applicant's plight:

'It is anomalous to me that throughout this applicant's appalling financial plight, which was caused through no fault of his own, between 17 October 1985 and August/September 1986, he was forced to exist on \$70 per week (less \$38 per week for subsidised rental) and yet he remained ineligible for a Special Benefit. These circumstances would, in my view, suggest that an ex gratia payment would be appropriate. Consideration should also be given as to whether legislative amendment is required.'

(Reasons, para.29)

### Formal decision

The Tribunal affirmed the decision under review.

## Unemployment benefit: unemployed

DEX AND SECRETARY TO DSS

(No. S85/99)

Decided: 26 February 1987 by J.A. Kiosoglous and J.T.B. Linn.

The applicant had been refused unemployment benefit and sought review by the AAT of that DSS decision. The applicant had commenced a business in partnership with others. At the date of lodgement for continuation of benefit no income had been earned from the business and he only spent about one hour per day at the shop seven days per week. His claim was rejected on the basis that he was self employed.

The applicant continued to seek employment during the time he was attempting to establish the business. These efforts, combined with the applicants limited involvement with the business enabled the Tribunal to

find that he was capable of undertaking and willing to undertake paid work, and that he had taken reasonable steps to obtain such work as required by s.107 of the Social Security Act.

### Was the applicant 'unemployed'?

The only difficulty was in deciding whether the applicant fulfilled the final criteria in s. 107 of being 'unemployed'. The issue was whether being involved in a small business he could be described as unemployed.

The AAT referred to the decision in Vavaris (1983) 11 SSR 110 where the distinction was drawn between being 'underemployed' and 'unemployed'. A person could not be described as unemployed simply because the business is yet to build up and there is little time taken up by the business.

This approach was contrasted with that in Guse (1982) 6 SSR 62. In that case the AAT found that an uneconomic farm could not be regarded as a serious business undertaking. The farm activities carried on in that case occupied only a little of the applicant's time and did not prevent him from being available for full-time employment.

### Two competing principles

In deciding the case the Tribunal referred to two competing principles. First, that unemployment benefit was not intended as an income supplement for those undertaking unprofitable ventures. Second, the mere fact that a claimant engages in a minor business venture does not of itself prevent the person from being eligible for unemployment benefit.