# 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 alllowable 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 apalling 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.

Having regard to the facts in the case, the AAT found that the business venture appeared to be one undertaken by three people who would immediately leave it if suitable paid work came along. His involvement did not prevent him from seeking paid work, and as another partner had done before, if suitable work presented itself the applicant would have in all likelihood left the business.

In those circumstances the Tribunal concluded that the applicant was unemployed at the relevant time. He thus satisfied all the criteria in s.107 and was qualified to receive unemployment benefit.

**Formal decision**
The AAT set aside the decision under review.

**HOANG AND SECRETARY TO DSS (No. V86/557)**
**Decided:** 5 May 1987 by J.R. Dwyer, L. Cohn and D.M. Sutherland.

The applicant sought review of a DSS decision to recover an overpayment of unemployment benefit. The basis of the decision was that the applicant was not 'unemployed' during the relevant period as he was self employed as a piece worker. He was thus not eligible to receive unemployment benefit at that time.

The applicant had also registered his name as a business name. This was taken by the DSS as evidence of his self employment. The overpayment was calculated from 28 August 1985, the date of registration of the business name. The applicant stated that he did not receive any payment from the company for which he was doing the piece work until 6 November 1985.

The applicant conceded the overpayment from 15 October 1985 when he stated that he first began work from home for the fashion companies that gave him the piece work. But there was no evidence as to the amounts he received from the companies or the periods during which he did work for them.

The AAT was not convinced that the applicant had made real efforts to obtain work between August and October. He also invested a considerable amount of money in the business he operated from home in that period. He deposited a large amount of money in his bank account in December, which averaged out to $770 per week for the 11 weeks since he began the business. The AAT commented that this suggested that he acquired considerable expertise in a short space of time.

This did not necessarily lead to the conclusion that the applicant had been self employed from the date of registration of the business name in August. The Tribunal commented:

> '...we are of the view that the mere registration of a business name does not establish that Mr Hoang had commenced to carry on a business on his own account. Some more evidence would be required before such a finding could be made. Mr Hoang was helpful in providing documentary evidence of his purchase of the sewing machines which clarified the ambiguities in his own evidence. The Secretary did not provide any evidence that Mr Hoang was engaged in any work for which he expected to receive payment prior to 15 October 1985. The fact that the first of the two sewing machines was not delivered until 10 October 1985 means that until that date Mr Hoang had only the overlocker on which to earn money by piece work. The evidence as to whether Mr Hoang's efforts to find suitable work during the period 28 August 1985 to 15 October 1985 was not very strong but we are satisfied that until Mr Hoang started his piece work business he was making efforts to find paid employment.'
> (Reasons, para.18)

**Formal decision**
The AAT set aside the decision under review and remitted the matter for reconsideration after finding that the applicant was eligible for unemployment benefits between 28 August 1985 and 15 October 1985, that from 15 October he was self employed and not eligible for that benefit and that as a consequence an overpayment occurred from that date.

# Overpayment: notification of income

**NUNN and SECRETARY TO DSS (No. S86/140)**
**Decided:** 6 March 1987 by J.A. Kiosoglous and D.B. Williams

The applicant asked the AAT to review a DSS decision to recover approximately $5,000 in overpaid age pension. The central issue was whether the applicant had given adequate notification to the Department as to income she was receving from the estate of her late husband.

**The legislation**
Section 45(1) of the *Social Security Act* provided:

> 'Where the average weekly rate of the income received in any period of 8 consecutive weeks by a pensioner who-
> (a) is not married...
> ...
> is higher than $30 per week and is higher than the average weekly rate of the income last specified by him in a claim, statement or notification under this Part, the pensioner shall, within 14 days after the expiration of that period, notify the Department of the amount of the income received by him in that period.'

**The facts**
The applicant had been in receipt of age pension since July 1983 following the death of her husband. She had notified the DSS of income she received from savings accounts and gas and electricity bonds. In October she received the first payments from her late husband's estate. Her husband's will had specified that the residue of his estate was to be held by a trustee company to pay the net annual income to the applicant for her life.

Upon receipt of this payment the applicant contacted the DSS and told them that she had received money from her husband's estate. She was advised that the Department was not interested in the payment, but only in what that money earned. The applicant's daughter also gave evidence that she had inquired as to whether the receipt of money from the estate affected her mother's pension entitlement but was told that the Department was not interested in the estate money.

The DSS only discovered that the money being received by the applicant was income for the purposes of the Act in December 1984. An Entitlement Review Form prepared by the trustees of the estate and lodged at that time expressly stated that the applicant was receiving income from a life interest. The Department then raised the overpayment.

**Was there sufficient notification?**
The Tribunal assumed that the DSS had misunderstood the nature of the money received by the applicant when the inquiries had been made by the applicant and her daughter. It was probably thought that they were referring to a capital sum and not income. The question then became one of whether the applicant had given sufficient notification for the purposes of s.45(1) of the Act. While the applicant argued that it was the responsibility of the DSS to investigate the matter further after the applicant had contacted it, the DSS contended that s.45 requires more specific notification.

The Tribunal set down some broad guidelines for dealing with cases such as this:

> 'The question in this type of case