Administrative Appeals Tribunal decisions

Overpayment: place of birth

STARK and SECRETARY to DSS
(No. N88/409)
Decided: 6 September 1988
by C.J. Bannon.

William Stark was born in the USA and is a citizen of that country. At an early age his parents took him to live in New Zealand where he remained until he came to Australia in July 1980. He entered Australia on a 3-month temporary visa, but overstayed that visa whereupon he became a prohibited non-citizen under the *Migration Act*.

In October 1986 he was arrested by immigration officials and shortly thereafter the DSS cancelled his sickness benefit but instead paid him special benefit. The Department then sought recovery of the amounts paid by way of sickness benefit and unemployment benefit since his arrival in Australia on the basis that he was not entitled to them as he was not a resident within the meaning of the Act. Stark asked the AAT to review that decision.

Was Stark an Australian resident?

The AAT rejected the DSS submission that Stark was not a resident within the meaning of the Act.

Relying on the High Court decision in *Federal Commissioner of Taxation v Miller* (1946) 73 CLR 93, the AAT held that 'resident' as used in the *Social Security Act* bore the ordinary and popular meaning. It referred to the place where a person normally had his or her home and ate and drank. At all material times, Stark was a resident of Australia.

However, as a prohibited non-citizen Stark was prevented by s.31B(2) of the *Migration Act* 1973 from legally undertaking paid work, though he had in fact at various times been employed driving taxis.

Was Stark eligible for unemployment benefit or sickness benefit?

The AAT ultimately accepted the DSS submission that Stark had received benefits to which he was not entitled on the basis that the statement on each of his claim forms, that he was born in New Zealand, was a false answer since he was in fact born in the USA.

The AAT held that the statement as to his place of birth was a 'material statement', involving a 'material deception'. It suggested that, had he not made those statements, his overstayed status may have been revealed earlier. Accordingly,

> 'the making of false representations means the Department of Social Security is entitled, pursuant to s.181(1) [now s.246(1)] of the *Social Security Act*, to recover the moneys paid to Mr Stark as a debt due to the Commonwealth.'

(Reasons, p.9)

Earlier, the AAT had rejected an argument that, even if Stark was not entitled to sickness benefit or unemployment benefit at the relevant times, he was nonetheless entitled to special benefit on the basis that his claims for the benefits to which he was not entitled could, under s.159(5) be treated as claims for special benefit.

The AAT held that there was no evidence upon which the Secretary could determine that Stark was unable to earn a sufficient livelihood, within the meaning of s.124.

The discretion to recover the overpayment

The AAT held that there was a recoverable overpayment of $17 457. At the time of the hearing, the DSS was deducting $30.40 per fortnight from Stark's continuing benefit. In lieu of the decision to recover the full amount, the AAT directed that the DSS continue to recover at that rate until further order.

The AAT noted that a District Court action arising out of a motor vehicle accident was pending and ordered that, if it was finalised, the matter should come back before the Tribunal to determine what amount if any of the capital should be returned to the Department.

Formal decision

The AAT affirmed the decision that there had been a recoverable overpayment.

[R.G.]

Unemployment benefit: full-time student

AMOAH and SECRETARY TO DSS
(No. 4710)
Decided: 31 October 1988
by E.T. Perrignon.

Sam Amoah asked the AAT to review a decision that he had been overpaid $1505 in unemployment benefits.

Amoah had been granted unemployment benefit in April 1987. On 1 June 1987 he commenced a course at Control Data Institute. He did not notify on his unemployment benefit continuation forms that he was undertaking the course. When the DSS discovered this, his unemployment benefit was cancelled and an overpayment raised for the period 1 June 1987 to 9 September 1987.

The legislation

Section 136(1) of the *Social Security Act* provides that 'a benefit is not payable to a person . . . in respect of any period during which . . . the person is engaged . . . in a course of education on a full time basis'.

Was Amoah eligible for unemployment benefit?

The course involved attendance for afternoon sessions between the hours of 1 and 6 pm five days a week and 20 field training sessions of normal working hours. Amoah stated that he did not in fact attend more than about 65% of the sessions over the 3-month period during which he completed the course.

There was no dispute that the course in question was a course of education within the meaning of s.136 but it was submitted that it was not a full time course.

The AAT rejected that submission and held that the requirements for daily attendance coupled with the expectation that up to 3 hours per day would be spent on private study indicated that the course was full time, notwithstanding that Amoah was able to complete the course without attending all the sessions.

Was there a debt due to the Commonwealth?

Section 181(1) [now s.246(1)] provides that 'where in consequence of a false statement or representation...an amount has been paid by way of pension, allowance or benefit under the Act which would not have been paid but for the false statement or representation ... the amount so paid is a debt due to the Commonwealth'.

The AAT held that Amoah's failure to indicate on his fortnightly continuation forms that he was enrolled in and attending the course was a false statement or representation within the meaning of s.181(1); and that the amount of unemployment benefit in issue would not have been paid but for the false statement or representation. Accordingly, the amount in issue was a debt due to the Commonwealth.

Should the debt be recovered?

Section 186(1) [now s.251(1)] gives the Secretary a discretion to write off or waive a debt due, or to allow the debt to be paid in instalments.

The AAT considered Amoah's financial situation, which 'was at all relevant times, and still is, precarious'. He had a number of large debts and had undertaken the course 'in an endeavour to improve his skills'. He had been forced to borrow $4500 to do the course. Despite these considerations, the AAT declined to waive the debt.

Formal decision

The AAT affirmed the decision that there was a recoverable overpayment but varied the decision under review by deferring the question of recovery for one year from the date of the AAT's decision.

[R.G.]

Unemployment benefit: leave without pay

ROACH and SECRETARY TO DSS
(No. 4744)

Decided: 15 November by M.D. Allen.

Vicki Roach was granted unemployment benefit by the DSS for the period 23 January to 17 February 1986. During that period, Roach was on leave without pay from her employment and was attempting to find casual work.

The DSS then decided that Roach should not have been paid unemployment benefits and decided to recover the amount paid to her. She asked the AAT to review that decision.

The review hinged on the question whether Roach was 'unemployed' during the period in question. The Tribunal pointed to the decision in *Vijh* (1985) 27 *SSR* 328 and concluded that, because Roach's contract of employment with her employer had still been in existence, it could not 'be said that she was unemployed as opposed perhaps to under-employed': Reasons, para.10

Accordingly, Roach had not been 'unemployed' within the meaning of that term as used in s.107(1)(c)(i) of the *Social Security Act* and she had received payments of unemployment benefits to which she was not entitled.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Unemployment benefit: de facto relationship?

LAWRANCE and SECRETARY TO DSS
(No. 4722)

Decided: 4 November 1988

by J.A. Kiosoglous.

The applicant sought review of a DSS decision to reject his claim for unemployment benefit on the basis that he was a 'married person' within the meaning of s.3(1) of the *Social Security Act* and that his income, combined with that of his *de facto* spouse, precluded payment pursuant to s.122.

The facts

Lawrance, a 33-year-old man with tertiary qualifications, was employed mainly in the theatre. He met J, a freelance theatre director in late 1981 and a friendship developed in the course of their working relationship.

The nature of their work meant that both travelled a great deal. About 12 months after they met Lawrance moved into J's rented house while she went overseas. Upon her return he remained living there and shared rent and costs with her.

The couple lived together until February 1987, when J moved to Adelaide to take up employment with the State Theatre Company. In July 1987 Lawrance also moved to Adelaide having gained employment there. He shared accommodation with J and they shared costs.

After moving to new rented accommodation together, they obtained a loan in joint names in about May 1988. They used it to purchase a house as tenants-in-common. Loan repayments were shared as equally as possible and Lawrance said he was keeping a record of the amount each contributed in case the house was sold. He told the AAT they bought the house to enable them to move out of the rental market, which neither could have done alone. Whenever they lived in Adelaide, they occupied the house. He also said they had no joint bank accounts.

Since they began sharing accommodation they had enjoyed a sexual relationship. Lawrance considered the relationship to be exclusive but had not asked J how she considered it. He said he would be hurt if she did not consider it to be exclusive. There were emotional ties and support between them and he did not want them to part. He stated they had never held themselves out as being married nor in a *de facto* relationship.

In her evidence, J said the principal concern in her life was her career. She did not consider herself to be anybody's wife or surrogate spouse. Details of domestic arrangements were also given to the AAT.

The decision

In deciding that the parties were residing under the same roof on a *bona fide* domestic basis and *affirming* the decision under review, the AAT discussed the factors enumerated in the case of *Tang* (1981) 2 *SSR* 15.

It then listed relevant factors under the following headings: permanence, exclusiveness, resource pooling, expense sharing, holding themselves out as married, perceptions of relationship, sexual relationship, social life, and obligation. The evidence was discussed separately against each heading and the Tribunal made it clear the list was not meant to be exhaustive.

[B.W.]