Administrative Appeals Tribunal decisions

Unemployment benefit: student

O'BRIEN and SECRETARY TO DSS
(No. 5014)
Decided: 3 March 1989
by K.L. Beddoe.

Kerry O'Brien had been granted unemployment benefits by the DSS. She enrolled in a three week intensive course in basic conversational Japanese, offered by a private language school.

The DSS cancelled O'Brien's unemployment benefit for the duration of this course and O'Brien asked the AAT to review that decision.

The legislation

It was accepted that O'Brien had been qualified for unemployment benefit, in the terms of s.116(1) of the *Social Security Act*, during the period in question.

The question raised in this matter was whether s.136(1) of the Act prevented the payment of unemployment benefit to O'Brien while she was undertaking the course in Japanese. Section 136(1) declares that unemployment benefit is not payable to a person during any period when *(inter alia)* -

> '(b) the person is engaged . . . in a course of education on a full-time basis.'

Not a full-time course

The course in which O'Brien had enrolled required her to attend the language school between 9 a.m. and 4 p.m., 5 days a week in 3 successive weeks.

The AAT referred to the Federal Court's statement, in *Harradine* (1988) 47 *SSR* 615, that thephrase'engaged . . . in a course of education on a full-time basis' was to be read as a whole and focused attention on 'the character of the study'. The AAT accepted that O'Brien was engaged in a course on a full-time basis. However, it was necessary to consider the character of that course, which a reasonable person would not characterise as a course of education on a full-time basis:

> '11. The ordinary meaning of "a course of education on a full-time basis" is a course of education which lasts for at least one academic semester or perhaps an academic year. Some support for this view is found in s.136(2) which provides that a person who is enrolled in a course of education shall be taken to be engaged in that course from the day on which the person commences that course until the person completes or abandons the course, including during periods of vacation, but not including periods of deferment.'

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that O'Brien was not a person engaged in a course of education on a full-time basis during the 3 weeks in question.

[P.H.]

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BYRT and SECRETARY TO DSS
(No. 4976)
Decided: 20 March 1989
by R.A. Layton.

Patrick Byrt had been granted unemployment benefit by the DSS. On 29 February 1988, he began to attend a graduate diploma course in legal practice. However, he did not formally enrol for that course until 22 April 1988, because of doubts as to whether he was eligible to enrol.

Byrt attended the diploma course for some 6 hours a day, 5 days a week, between 29 February and 27 October 1988, when he successfully completed the course.

The DSS cancelled Byrt's unemployment benefit when he started attending the diploma course and granted him a supporting parent's benefit from 31 March 1988, on the basis that he had the custody, care and control of his 13-year-old son.

Byrt applied to the AAT for review of the DSS decision, claiming that he should have been paid unemployment benefit or special benefit during the period from February to October 1988.

The legislation

The central question in this application for review was whether Byrt was disqualified from receiving unemployment or special benefits by s.136(1), which provided that

> 'a benefit is not payable to a person . . . in respect of any period during which —
>
> . . .
>
> (b) the person is engaged . . . in a course of education on a full-time basis.'

The first period

The AAT first dealt with the period when Byrt had attended the diploma course without being formally enrolled. The Tribunal noted that, in *Harradine* (1988) 47 *SSR* 615, the Federal Court had said that the question whether a person was engaged in a course of education on a full-time basis was primarily a question of fact and that the character of the person's study had to be examined. The Tribunal accepted that there were 3 matters to be taken into account when deciding if a person was engaged in a course of education on a full-time basis:

> '(1) whether or not the person had enrolled in such a course of education;
>
> (2) whether the course of education had the character of a full-time course;
>
> (3) whether the person pursued the course at a normal rate of progress.'

(Reasons, para. 20).

The Tribunal noted that Byrt had not enrolled in the course until 22 April 1988:

> 'although he voluntarily attended all classes, the applicant had not, prior to his enrolment, completed the formal prerequisite to engagement on such a course of education, and as this requirement was not fulfilled, the applicant could not be said to have engaged in a course of education on a full-time basis. He was merely attending on a voluntary and unofficial basis at the invitation of the Institute . . .'

(Reasons, para. 21).

The second period

Turning to the period from the date of Byrt's formal enrolment to the completion of the course, the AAT noted that the course was clearly treated by the Institute which offered it as a full-time course and that Byrt had successfully completed the course within the prescribed time. The AAT rejected Byrt's submission that he had not been engaged in the course on a full-time basis because it had not occupied his full time and had not been fully committed to the course:

> 'I do not consider that individual and personal considerations such as personal commitment, personal interest, the degree of attention given to or motivation to attend the course, nor any other qualitative features of the degree of concentration and energy applied to the course, are of any relevance. The character of the course must be looked at from an overall objective perspective, and not from the individual's perception of that course. In all of the circumstances, I find the classification of the course of education one which aptly falls within the description "full-time".'

(Reasons, para. 23).

It followed that, during the period from 22 April to 27 October 1988, Byrt had not been eligible for unemployment or special benefits — the term 'benefit' in s.136(1) referred to a benefit as defined in s.115 of the Act, namely, unemployment, sickness or special benefit.

Formal decision

The AAT set aside the decision under review and decided that Byrt was entitled to unemployment benefit until 21 April 1988.

[P.H.]

Unemployment benefit: failure to register with CES

SECRETARY TO DSS and DUNNE (No. 5063)

Decided: 4 May 1989 by G. L. McDonald.

The Secretary applied for review of a decision by the Social Security Appeals Tribunal, directing payment of unemployment benefit to Dunne from 29 April to 9 June 1988.

Dunne had been receiving unemployment benefit between May 1987 and March 1988. She worked between March and 22 April 1988.

Dunne then went to the CES and was advised, or at least understood, that she required an 'Employer Separation Certificate' before she could register with the CES. Her employer was slow in supplying this and she eventually registered with the CES on 2 June, and lodged her unemployment benefit claim on 10 June 1988.

The DSS decided that Dunne was eligible for unemployment benefit from and including the 7th day from her re-registration with the CES, according to s.125 of the *Social Security Act*.

The SSAT decided, on review of Dunne's case, that she should be eligible from 7 days after she had left her employment, relying on s.116(2) of the Act.

The legislation

Section 125(1) of the *Social Security Act* provides that an unemployment benefit is payable to a person from the 7th day 'after the day on which he became unemployed or after the day on which he made a claim for unemployment benefit, whichever was the later'.

Section 125(2) provides that, if a person lodges an unemployment benefit claim within 14 days of being registered with the CES (or within such further time as the Secretary considers reasonable), the day on which the person became registered can be treated as the relevant date for the purposes of s.125(1).

Section 116(1)(d) of the Act provides that registration with the CES is one of the preconditions to eligibility for unemployment benefit. However, s.116(2) gives the Secretary a discretion to waive this requirement where the Secretary is satisfied that a failure to register with the CES should be disregarded, 'having regard to circumstances beyond the person's control'.

Discretion to waive registration not available

The DSS argued that, before the s.116(2) discretion could be invoked, a failure to register with the CES must be the *only* reason why a claimant is ineligible for unemployment benefit; she must have complied with the Act in all other respects. Here, Dunne had not registered a claim for unemployment benefit with the DSS until 10 June and therefore had not complied with s.158(1) and s.159(1).

The AAT accepted the DSS argument, and decided that Dunne was not eligible to receive unemployment benefit until 9 June, 7 days after her registration with the CES.

Formal decision

The AAT set aside the SSAT decision and remitted the matter to the Secretary, with a direction that Dunne was not qualified to be paid unemployment benefit until 9 June 1989.

[J.M.]

Family allowance: children overseas

QUAN HUE HUYNH and SECRETARY TO DSS (No. 4971)

Decided: 16 March 1989 by Purvis J, J.R. McClintock and G.R. Taylor.

Quan Hue Huynh lived with her husband and their 7 children in Vietnam up until 1978. In that year, 4 of the children, including the eldest child, left Vietnam and were placed in a refugee camp in China, where they remained for the next 8 years.

Huynh and her husband left Vietnam with the remaining children and arrived in Australia in 1982. In January 1983 Huynh learned that her other 4 children were in China. She established contact with the eldest child, Q, sent him money for the support of the children, and instructed him on the steps he was to take for their care.

In April 1984, Huynh claimed family allowance for the 3 youngest children, then living with Q in the refugee camp in China. The DSS rejected these claims but eventually granted family allowance from November 1985, when the Chinese Government issued exit visas for the 3 children to enable them to travel to Australia.

Custody, care and control

The question at issue in the present case was whether Huynh was eligible for family allowance for the 3 children living in China for the period between April 1984 and November 1985.

The AAT said that Huynh's eligibility for family allowance depended on whether she had the 'custody, care and control' of the 3 children and intended to bring them to live in Australia as soon as it was reasonably practicable to do so. These requirements, the AAT said, were spelt out in the former s.96 of the *Social Security Act*.

The eldest child, Q, told the AAT that until early 1983 he had assumed responsibility for the care of the 3 youngest children living with him in the Chinese refugee camp. However, once his parents had re-established contact with him, they had assumed