

s.34(2), this also exhausted the Tribunal's powers. Similarly, if both parties consent to dismissal, an order to dismiss an application under s.42A(1) also exhausts the Tribunal's jurisdiction.

Nicholson told the Tribunal that, although his solicitors were acting on his instructions in withdrawing his appeal, he had not understood the effect of dismissal. According to the Tribunal:

'... that makes no difference. His reasons for withdrawal, his understanding of that effect, are of no relevance. What is involved is a fundamental question of statutory interpretation. The Tribunal has only those powers which are expressly conferred upon it and when its powers have been exhausted in respect of a particular decision, then the matter is at an end.'

(Reasons, para.19)

Formal decision

The Tribunal accordingly directed that it had no jurisdiction to review the decision.

[J.M.]

Unemployment benefit: living in remote area

ATKINSON and SECRETARY TO DSS

(No. 5002)

Decided: 5 April 1989 by J.A. Kiosoglous.

Atkinson sought review of a DSS decision to refuse unemployment or sickness benefit during the period 25 June to 6 October 1987. The DSS considered he did not qualify for unemployment benefit as he was living in a remote area of low employment prospects, and by remaining there was not taking reasonable steps to secure suitable paid work. As he did not suffer a loss of salary, wages or other income because of an incapacity for work, the delegate argued, the only possibility of paying him sickness benefit was to hold that but for his incapacity he would have qualified for unemployment benefit. The delegate also considered that the claim for sickness benefit lodged on 1 October 1987 was outside the 5-week period which would prohibit payment of arrears.

The legislation

During the relevant period, s.116(1) of the *Social Security Act* dealt with eligibility for unemployment benefit, s.117(1) with sickness benefit and s.121(1) (a) and (b) with the amount payable as sickness benefit, and s.125(3) with the 5-week rule.

The facts

The applicant was a qualified diesel fitter who, in January 1987, left his home in Queensland where he had been unemployed for 10 months, to seek work in Mintabie, South Australia. He had been told Mintabie, an opal mining centre, contained a heavy concentration of earth-moving equipment and there was plenty of work there for persons with his qualifications. On arrival he discovered the company which had offered him work had been involved in a dispute and there was no work for him. He remained in Mintabie in receipt of unemployment benefits for 6 months and told the AAT he searched for work every day. He gave details of his work efforts.

On 20 May 1987 his benefit was suspended because he failed to attend an interview with a field officer of the DSS. The interview was to have been a discussion about his work efforts because he had remained in an area of low employment prospects. He denied having been notified of the meeting and said he had remained because there was more potential work for someone of his qualifications at Mintabie than in Queensland and elsewhere, and he had insufficient money to move elsewhere. The area was not one of low employment prospects for him.

On 9 August 1987 Atkinson suffered a back injury. He lodged a claim for sickness benefit which was rejected on the grounds that, pursuant to s.117 and 121, he had not shown he had suffered a loss of income, and by remaining at Mintabie he was ineligible for unemployment benefit and thus ineligible for sickness benefit.

The DSS also contended that Atkinson had been engaged in opal mining in Mintabie. He said that in walking about looking for work he did some 'noodling', i.e. looking for opals in rubble and tailings. There was evidence that he had applied for and received an explosives and mining permit. Atkinson remained adamant that he had never been engaged in serious efforts to mine opals.

The decision

The AAT was satisfied that, until he injured his back, the applicant was

unemployed and qualified for unemployment benefits. It took into account his particular expertise and abilities in finding that Mintabie was not an area of low employment prospects for him. It also concluded that the casual mining work he had done was undertaken in the hope of finding permanent paid employment.

As he would have qualified for unemployment benefit he also satisfied the requirements of s.117(1)(c)(ii) for sickness benefit. However, as his application for sickness benefit was outside the statutory 5-week period the claim could not be backdated, pursuant to s.125(3).

Formal decision

The AAT set aside the decision under review and decided that Atkinson should receive unemployment benefit between June and August 1987, and sickness benefit for the next month.

[B.W.]

Unemployment benefit: postponement

SECRETARY TO DSS and BOON-KIAT FOO

(No. 5139)

Decided: 15 June 1989 by G.L. McDonald.

Boon Kiat Foo had come to Christmas Island to work in the phosphate mine in 1974. The mine closed early in 1986, and Foo returned to Malaysia, after receiving a redundancy payment, apparently with the intention of marrying and returning to Christmas Island.

In May 1988, Foo returned to Christmas Island at the invitation of members of the Bahai community living there, in the expectation of finding work on the Island. After his arrival on the Island, Foo applied for and was granted unemployment benefits. Several weeks later, the DSS decided to postpone payment of unemployment benefits to Foo for 12 weeks. Foo appealed to the SSAT against the DSS decision. The SSAT set aside the suspension of Foo's unemployment benefits; and the DSS then appealed to the AAT.

The legislation

Section 116(1)(c) of the *Social Security Act* requires an applicant for unemployment benefits to satisfy the DSS that, amongst other things, he has taken 'reasonable steps to obtain [suitable] work'.

Section 126(1)(d) authorises the DSS to suspend payment of unemployment benefit to a person who 'is not taking reasonable steps to obtain employment'. According to s.126(3), the maximum period of suspension is 12 weeks.

Inconsistent administration

The DSS explained that it had suspended payment of Foo's unemployment benefits because of a general policy that a person who had accepted a redundancy payment on the closure of the phosphate mine and later returned to Christmas Island should serve a 'non-payment period of 12 weeks'. The DSS argued that this policy was justified by s.126(1)(d) because a person who returned to Christmas Island should be regarded as failing to take reasonable steps to obtain employment, the Island being an area of poor employment opportunities.

However, the AAT pointed out that the DSS had granted unemployment benefits to Foo following his return to Christmas Island in May 1988. In granting those benefits, the DSS must have been satisfied that Foo had met the requirements of s.116(1)(c), including the requirement that he had taken reasonable steps to obtain work. The evidence in this case supported that finding: Foo had lived on Christmas Island for some 12 years and regarded the Island as his home, and he was a 'well-known and well-liked member of the community there'. Although there were limited work opportunities on the Island, there were some prospects for employment there. Looking at Foo's move to the Island in context, it could not be said that he had failed to take reasonable steps to obtain employment. Accordingly, the application of the policy to suspend payment of benefits could not be supported by s.126(1)(d) and was inconsistent with the DSS's decision that Foo had met the requirements of s.116(1)(c).

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Invalid pension: incapacity for work

SUMANOVICH and SECRETARY TO DSS

(No. 5166)

Decided: 21 June 1989 by R.A. Balmford.

Kornelij Sumanovich asked the AAT to review a decision by DSS to cancel Sumanovich's invalid pension from September 1987.

The facts

Sumanovich was born in Yugoslavia in 1941 and had been in Australia for 28 years. In Yugoslavia he had served his apprenticeship as a carpenter and in Australia worked in that trade.

He had not worked since an industrial accident in March 1978 and was granted an invalid pension in May 1985, on the basis that he suffered minor muscular back pain which made him unfit for heavy labouring but not other types of work, and a 'personality problem', which led to alcoholism and 'sick role behaviour'. The DSS concluded that Sumanovich's attitude, his alcoholism and psychiatric condition made him unattractive to employers.

In September 1987 the DSS cancelled Sumanovich's pension. At the hearing, Sumanovich's GP said that Sumanovich's only significant medical problem was his back pain which prevented him doing heavy work, but he could do light duties.

A psychiatrist said he was not suffering from any psychiatric illness.

An orthopaedic specialist, Dr Stephens, found Sumanovich had long standing degenerative changes in his lumbar spine consistent with his age, and a small crack in the lamina at the back of the vertebrae. He was fit for sedentary work but should avoid lifting. Both doctors noted Sumanovich had complained of symptoms inconsistent with any significant organic problems.

The AAT accepted Dr Stephens' conclusion that:

'the fact is that for 10 years he hasn't worked, he has no intention of working as far as I can see, he has settled into the role of a chronic invalid, and how he could be convinced otherwise I frankly do not know'.

The legislation

The AAT said that, at the date of grant of invalid pension, the relevant sections of the *Social Security Act* were

ss.23 and 24. These were repealed and new provisions substituted with effect from 1 July 1987 by the *Social Security and Veterans' Entitlements Amendment Act 1987*. Thus, at and since the date of cancellation of Sumanovich's invalid pension the relevant provisions have been ss.27 and 28.

The significant distinction between the new and old provisions is s.27(b). Section 28 of the new provisions is identical with s.24 of the old provisions.

The AAT continued:

...

'the essential qualification for invalid pension continues to be that the claimant is "permanently incapacitated for work"... It is to be assumed that, when legislation is re-enacted after considered interpretation by superior courts the legislature has approved that interpretation... In order to ascertain the effect of the expression "permanently incapacitated for work", it is therefore necessary to turn to the authorities which established the meaning of that expression for the purposes of the old provision. If Sumanovich is found to be "permanently incapacitated for work" in accordance with those authorities, it will be necessary to consider, as a separate issue, whether "that permanent incapacity, or at least 50% of permanent capacity is directly caused by a permanent physical or mental impairment" in terms of paragraph 27(b).'

(Reasons, para. 9).

The authorities

The Tribunal said the leading authority on the concept of permanence was the Federal Court case of *McDonald* (1984) 18 SSR 188, where Woodward J said:

'In my view the true test of a permanent, as distinct from temporary, incapacity is whether in the light of the available evidence, it is more likely than not that the incapacity will persist in the foreseeable future.'

The assessment of incapacity for the purposes of s.24 was considered by the AAT in *Panke* (1981) 2 SSR 9, which was approved by the Full Federal Court in *Annas* (1985) 29 SSR 188.

In *Panke*, Davies J said the term 'permanent incapacity for work' must be construed having regard to the scope and object of the *Social Security Act* which is concerned with the economic effects of a disabling medical condition. The AAT said it followed that incapacity for work denoted incapacity to engage in remunerative employment. This involved an ability to attract an employer who was prepared to engage and to remunerate the disabled person.

The assessment of the incapacity for work, the AAT said, involved first an evaluation in purely medical terms of the physical or mental impairment of the applicant and, secondly, the