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

assessment of what work was suitable to be undertaken by the applicant.

This assessment involved consideration of the whole person and the cumulative impact upon him of such matters as the nature and extent of his disabilities, his capacity to sustain his work effort throughout a normal working day or week, his age, his previous work experience, and the types of paid work available in the community which a person with those characteristics may reasonably be expected to be able to perform.

The Tribunal's assessment

The AAT took into account Sumanovich's back condition, lack of training other than as a carpenter, lack of skill in English, compensation history, adoption of sick role, lack of motivation and unjustified complaints of sundry conditions.

Taken cumulatively, the AAT found, these were likely to have the effect that Sumanovich could not attract an employer and was thus incapacitated for work. The situation was permanent.

In considering s.27(b), the AAT noted that the word 'impairment' was not defined in the Act. After referring to the *Macquarie* and *Shorter Oxford* dictionaries, the AAT concluded that it described a changing for the worse, diminishing in value, or deterioration from a previous unimpaired or less impaired state.

Sumanovich's back condition was, the AAT said, indubitably a 'physical impairment' which had deteriorated. His workers' compensation history, his time out of the workforce and adoption of sick role derived from his back condition. Using the evidence before the AAT and the AAT's general knowledge of the labour market (as authorised in *Ersoy* (1988) 41 *SSR* 525), it found that 50% of the permanent incapacity was directly caused by a permanent physical or mental impairment, and accordingly Sumanovich was qualified under the new provisions to receive an invalid pension.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that Sumanovich had been permanently incapacitated for work since the cancellation of his invalid pension in September 1987.

[B.W.]

Invalid pension: measuring incapacity and impairment

ZANOS and SECRETARY TO DSS (No. 5084)

Decided: 15 May 1989 by R.A. Balmford.

Phillip Zanos injured his back in 1979, when he was 22 years of age. After a laminectomy in 1980, he was obliged to stop working in 1982 and was granted an invalid pension in 1983. At that stage he had no work qualifications and he commenced studying for a diploma of primary education, with a view to qualifying as a teacher. He expected to complete this course at the end of 1989.

In November 1987 the DSS decided to cancel Zanos' invalid pension. An appeal to the SSAT was unsuccessful and Zanos then appealed to the AAT.

The legislation

Section 18 of the *Social Security Act* provides that a person who meets age and residence requirements will qualify for an invalid pension if the person is 'permanently incapacitated for work'.

According to s.27, a person will be regarded as 'permanently incapacitated for work' if (a) the person is at least 85% permanently incapacitated for work and

> '(b) that permanent incapacity, or at least 50% of that permanent incapacity, is directly caused by a permanent physical or mental impairment of the person.'

Measuring incapacity for work

Zanos suffered constant pain and discomfort from his back condition which had deteriorated since 1981. This pain and discomfort was more acute after physical activity. Zanos also suffered total incapacity, lasting 2-4 weeks, at least once every three months. The general medical opinion was that Zanos could carry out clerical duties if he were able to change from sitting to standing from time to time, and that he would be able to work as a teacher, once he qualified. However, the recruitment procedures of the Ministry of Education required all candidates to undergo a medical examination for physical fitness.

The DSS had made an assessment of Zanos' incapacity and impairment by following a standard procedure developed after s.27(b) was added to the *Social Security Act*.

This procedure required a person's physical or mental impairment to be assessed in percentage terms, on the basis of 'impairment tables' in which various disabilities were rated in percentage terms, according to their effect on the person's physical and mental functioning.

A DSS publication, 'Guide to the Assessment of Impairment for Invalid Pensions', set out tables for various disabilities and indicated the percentage of impairment which might be attributed to each disability.

The DSS procedures indicated that a person would meet the requirement of s.27(b) (that is, at least 50% of the person's permanent incapacity for work would be treated as due to a permanent physical or mental impairment) only if the person's impairment had been rated at 30% or more, using the DSS tables. Alternatively, if the rating was below 30%, the person would still be regarded as meeting s.27(b) if the person's impairment was the major factor causing incapacity.

The AAT said that there was nothing in the *Social Security Act* which justified a percentage assessment of incapacity for work or of impairment, apart from s.27(a) which referred to at least 85% permanent incapacity for work. (That reference, the AAT said, had been described in *Howard* (1983) 13 *SSR* 134 as 'an ameliorating provision', because it allowed a person to qualify for invalid pension even where the person could obtain some part-time work.)

There was nothing in the *Social Security Act*, the AAT said, equivalent to the provisions of the *Veterans' Entitlements Act* 1986, which allowed assessment of incapacity in multiples of 10% and which required a Guide to be used in assessing incapacity.

The adoption of a similar approach by the DSS, where that approach was not supported by the *Social Security Act*, showed, the AAT said, 'considerable confusion of mind in the person who drafted the form': Reasons, para. 48. The AAT continued:

> '49. [Section] 27(d) of the Act comes into operation once a person has been found to be permanently incapacitated for work in terms of [s.] 27(a). The percentage referred to in [s.] 27(b) is the percentage by which the person's impairment contributes to the causation of the person's incapacity. It is a percentage of causation. It is not a percentage of impairment. Assessment, by any means, of a