Federal Court decisions

Compensation award: preclusion

McKENZIE v SECRETARY TO DSS

Federal Court of Australia

Decided: 2 June 1989 by Davies, Wilcox and Foster JJ.

This was an appeal, under s.44 of the *AAT Act*, from a decision of the AAT. The AAT had affirmed a decision made by the DSS that, because McKenzie had received a lump sum payment of compensation on 16 July 1987, he was precluded from receiving pension (for which he had applied in August and October 1987) through the operation of s.153(1) of the *Social Security Act*.

The question raised by this appeal was whether the retrospective amendments made to s.153(1) by the *Social Security Amendment Act* 1988 had the effect of covering McKenzie's case.

The legislative history

As it stood between 1 May 1987 and 16 December 1987 (that is, at the time when McKenzie received his compensation award and then applied for a pension), s.153(1) of the *Social Security Act* had applied a preclusion period where a person 'who is receiving a pension receives . . . a lump sum payment by way of compensation'. In that form, the sub-section would have applied the preclusion period only to those persons (like McKenzie) who were receiving a pension under the *Social Security Act* at the time when they received their lump sum payment of compensation. It would not have covered those persons who delayed claiming a pension until after receiving their lump sum compensation payment.

From 16 December 1987, s.153(1) was amended prospectively so as to apply the preclusion period where a person received a lump sum payment by way of compensation at a time when the person was 'qualified to receive a pension'. However, this second form of s.153(1), not being retrospective, did not apply to McKenzie's case — he had received his compensation payment before December 1987.

By the *Social Security Amendment Act* 1988, s.153(1) was amended so as to insert a phrase into that sub-section; and it was declared that this amendment 'shall be taken to have commenced on 1 May 1987'.

The effect of this retrospective amendment to s.153(1) was unclear, because the form of s.153(1), as it stood between 1 May 1987 and 16 December 1987, could not easily accommodate the phrase which, according to the *Social Security Amendment Act* 1988, was to be inserted in it.

The Federal Court's solution

In their joint judgment, **Davies, Wilcox** and **Foster JJ.** noted that the 1988 Amendment Act had proposed the insertion of a phrase 'or has received (whether before or after becoming so qualified)' in the 'Principal Act'. The Federal Court said that, in adopting that course, 'Parliament followed the usual Australian practice of textually amending the Act.'

The court referred to Pearce's *Statutory Interpretation in Australia* (2nd edition), p. 218, where it is noted that, in Australia, amending Acts 'do not provide that the original Act is to be read as if some change were made in it but provide that the original Act is physically altered as a result of the amendment made.' The court continued:

> 'In other words, one engrafts the terms of the amendment upon the Principal Act as it stands at the time of the amendment. It follows that, in the ordinary case, where an amendment is made retrospective, the whole of the provision, as amended, is given retrospective effect.'

(Reasons, p. 6)

That is, the reference in the Amendment Act to the Principal Act was a reference to the post-16 December 1987 version of s.153(1). The effect of the Amendment Act was to amend that post-16 December 1987 version and then make that amended version operate from 1 May 1987.

The Federal Court noted that there were 'internal indications' that this was what Parliament had intended when it passed the 1988 Amendment Act: any other reading made little sense, the judges said.

It followed, the Federal Court said, that s.153(1) of the *Social Security Act* should be read as providing, with effect from 1 May 1987, that a person was precluded from receiving a pension where the person, 'who is qualified to receive a pension receives or has received (whether before or after becoming so qualified) . . . a lump sum payment by way of compensation'.

As McKenzie had received a lump sum payment by way of compensation after 1 May 1987 and had subsequently been found to be qualified to receive a pension, he was caught by s.153(1).

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

Unemployment benefit: full-time student?

HARRADINE v SECRETARY TO DSS

Federal Court of Australia

Decided: 5 June 1988 by Wilcox, French and Von Doussa JJ.

In 1987 Harradine was enrolled as a full-time law student at Adelaide University. He also, between February and September of that year, worked as a high school teacher.

Harradine attended only 35 hours of law classes in this period. When his teaching contract expired he applied for unemployment benefit. His claim was rejected by the DSS on the ground that he was a full-time student and thus ineligible for unemployment benefit because of s.136 of the *Social Security Act*.

Harradine appealed to the SSAT, which recommended that the decision be reversed. The DSS did not accept this recommendation and Harradine unsuccessfully appealed to the AAT. He then appealed to a single judge of the Federal Court who dismissed his appeal: *Harradine* (1988) 47 *SSR* 615. This note concerns Harradine's further appeal to the full Federal Court.

The legislation

Section 116(1) of the *Social Security Act* sets out the basic requirements of

eligiblity for unemployment benefit, in particular the 'work test'. An applicant must satisfy the Secretary that

- 'he was unemployed and was capable of undertaking, and was willing to undertake, paid work that, in the opinion of the Secretary, was suitable to be undertaken by the person',
- 'he had taken ... reasonable steps to obtain such work', and
- that he was registered with the CES.

Section 136, first introduced into the Social Security Act in 1986 and amended a number of times, often retrospectively, provided (at October 1987) that unemployment benefit was not payable if — 'the person is engaged .... in a course of education on a full-time basis'.

Section 136(2) provided:

> 'For the purposes of paragraph (1)(b), 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 that course, including during periods of vacation but not including periods of deferment.'

The AAT decision

During the AAT hearing, the DSS had conceded that Harradine met the requirements of s.116, and had relied on s.136, arguing that if a person was enrolled in a course and the institution regarded the student as enrolled on a full-time basis, then the person was ineligible for unemployment benefit. The Tribunal had concluded that Harradine was 'engaged in a full-time course of study'.

French J noted that the AAT did not indicate why it reached this conclusion. The judge who dealt with the appeal from the AAT, according to French J, had seen the AAT's conclusion that Harradine was enrolled on a full-time basis as one of fact, open on the evidence, so that no error of law had been involved in the Tribunal's decision.

French J said it was unclear whether the judge had been informed of the DSS's concession that Harradine fulfilled the requirements in s.116. He concluded that

> '[w]hatever elements of fact underpinned the Tribunal's conclusion it could only properly have been based upon the construction of s.136 for which the respondent contended'

(Reasons, p.9).

It was necessary therefore to consider the proper construction of s.136.

Construction of s.136

French J considered the ordinary meaning of the words used in s.136. He stated that 'engaged' in the phrase 'engaged ... in a course of study on a full-time basis' meant to 'take part in':

> 'It connotes activity and must be taken to refer to the activities of students enrolled in the relevant course. The question then arises whether the words "on a full-time basis" describe the nature of the engagement or the nature of the course.'

(Reasons, p.12).

The DSS argued that the phrase must refer to the nature of the course, and that s.136(2) provided that enrolment in and commencement of a course was enough for a person to be regarded as 'engaged in that course'. French J, however, took the view that s.136(2) did not assist in ascertaining the meaning of 'full-time basis' in s.136(1).

He concluded that the natural meaning of the words was a description of the student's activity and thus a decision as to whether a particular student was engaged full-time in a course of study was a question of fact. The question was *not* to be answered merely by looking at how the course was classified by the institution but rather by what the student did.

French J said that the effect of s.136(2) was to direct the decision-maker 'not to treat the engagement as other than full-time because he takes a vacation': Reasons, p.14. Consequently, the Tribunal had wrongly construed the section, and the only conclusion open on the facts was that Harradine was not engaged full-time in his course.

Von Doussa J considered a further argument made by the DSS. It had argued that one of the reasons s.136 had been added to the legislation was to simplify decision-making, removing the need to make decisions 'based on the circumstances and subjective intentions of particular claimants': Reasons, p.7.

This administrative complexity, it was argued, had been introduced as a consequence of the Federal Court's decision in *Thomson* (1981) 38 ALR 624. In that case the Tribunal and the Federal Court had decided that, before the addition of s.136, a person undergoing a full-time course could still be considered to be unemployed for the purposes of s.116 (then s.107). Although in the usual case a full-time student would have a commitment to the course that would preclude them from being considered 'unemployed', in other cases the person could have a continuing commitment to the paid workforce.

Von Doussa J did not accept the DSS argument that s.136 had been introduced to provide a simple objective test because of the effect of the decision in *Thomson*.

- First, he noted that s.136 had been introduced some years after the *Thomson* decision.
- Secondly, when s.136 was introduced it did not contain a provision like s.136(2) on which the DSS based its argument as to the effect of s.136 (see above).
- Thirdly, any suggestion that s.136 was part of a general tendency of amendments to the Act to enhance the objectivity of decision-making (the DSS had cited amendments to ss.116, 126, 127, 136 and 137) could not be accepted as the whole scheme of unemployment benefits still required a series of 'numerous individual decisions' (*Thomson* at 628).
- Fourthly, it was wrong to assume that there was any likelihood of achieving objective certainty if the decision as to full-time enrolment was to be made by education institutions and—

> '[i]t is hardly likely that the legislature would intend eligibility to turn on the decision of a particular institution conducting the course of study from which no appeal would lie.'

(Reasons, p. 9).

Von Doussa J also dealt with the argument that the Court's interpretation of s.136 would render it otiose. He suggested that this argument rested on a misunderstanding of the *Thomson* decision.

That decision recognised that there might be people who were engaged full-time on a course of study, yet who were unemployed for the purposes of the Act. Section 136 would render these people ineligible for unemployment benefit.

Similarly, **French J** noted that the DSS would be able to avoid making the assessments required under s.116 as to the applicant's efforts to seek work, readiness to abandon the course etc.

Formal decision

Given that the Department had conceded that Harradine had fulfilled the requirements in s.116, the Court concluded that he had to be regarded as eligible for unemployment benefit. Rather than remitting the matter to the Tribunal to make the order, given that there was no further factual dispute, the Court ordered that Harradine's claim for unemployment benefit should be allowed.

[J.M.]