

Administrative Appeals Tribunal decisions

Compensation award: discretion to disregard

HULLS and SECRETARY TO DSS (No. 6134)

Decided: 24 August 1990 by S.A. Forgie and J.A. Kiosoglous.

Paul Hulls was injured in a motor vehicle accident in December 1984, while travelling from his workplace. His medical expenses and some compensation payments were paid by his employer, Australia Post.

In March 1988, he resigned from Australia Post and was paid unemployment benefits (\$3615) between April and August 1988.

In July 1988, Hulls settled a common law action for damages arising out of the motor vehicle accident for \$70 000. From this amount, \$25 191 was paid to Australia Post to cover the medical expenses and weekly compensation paid by Australia Post, and \$11 966 was paid to his solicitors to cover their costs and disbursements.

The DSS then decided that the \$70000 was lump sum payment by way of compensation, so as to trigger s.153(2) of the *Social Security Act*. The preclusion period was calculated as the period from 9 April 1988 to 24 February 1989; and the DSS then decided that Hulls was liable to refund the \$3615 paid by way of unemployment benefits.

Hulls asked the AAT to review the DSS decision.

The legislation

Section 153(2) of the *Social Security Act* provides that where a person has received a lump sum payment by way of compensation and has received, during the lump sum payment period, payments of pension, the Secretary may decide that the person is liable to refund the payments of pension received during that period.

Section 152(1) defines 'pension' to include unemployment benefits.

Section 152(2)(a) defines a payment by way of compensation as including a payment in settlement of a claim for damages, being a payment made after 1 May 1987 in whole or in part 'in respect of an incapacity for work'.

Section 152(2)(e) requires the lump sum payment period to be calculated on the basis of 'the compensation part of the lump sum payment'.

Section 152(2)(c)(i) defines the compensation part of a lump sum payment, where the payment is made in settlement of a claim on or after 9 February 1988, as 50% of the lump sum payment.

Section 156 gives the Secretary a discretion to treat the whole or a part of a lump sum payment as not having been made, 'if the Secretary considers it appropriate to do so in the special circumstances of the case'.

A compensation payment within s.153

The AAT decided that the payment received by Hulls was at least in part, a payment for incapacity for work; and that, because the payment was received as a consequence of a settlement made on or after 9 February 1988, the lump sum payment period would normally be calculated by reference to 50% of that payment.

The payment had apparently not made a separate allowance for legal costs, so that Hulls' legal costs could not be excluded from the calculation.

Discretion to disregard part of payment

However, the AAT decided that it was appropriate to exercise the s.156 discretion, to disregard the receipt of all or part of a lump sum payment of compensation, so as to exclude the amounts paid out of the payment on account of medical expenses, weekly compensation and legal costs.

The Tribunal said that the deduction of those payments from Hulls' award, for payment to his former employer and to his solicitors, was not unique or unusual; but their deduction did constitute 'special circumstances' which made it appropriate to treat those parts of the settlement moneys as not having been made to the applicant.

This had the effect of reducing the compensation award received by the applicant to \$32 842; and it was to that figure that the 50% formula in s.152(2)(c)(i) should be applied. Carrying out the calculation in s.152(2)(e) (dividing \$32 842 by average weekly earnings of \$477), the lump sum payment period should be 34 weeks, the AAT decided.

Formal decision

The AAT set aside the decision under review and substituted a decision that the lump sum payment period ran from 9 April to 3 December 1988. It

adjourned consideration of the amount recoverable from Hulls pending receipt of evidence as to the amount of pension paid to Hulls during that period.

[P.H.]

Unemployment benefit: 'unemployed'

McAULIFFE and SECRETARY TO DSS (No. 5953)

Decided: 7 June 1990 by J.A. Kiosoglous, D.B. Williams, and J.T.B. Linn.

The applicant asked the AAT to review a decision to cancel his unemployment benefit and a decision to raise an overpayment of \$10 265.70 in unemployment benefit paid between August 1986 and July 1987. The reason for the cancellation was that he was not unemployed but engaged in a business of real estate and building during the relevant period. As the applicant had also failed to advise the DSS of his earnings the overpayment was raised.

The facts

McAuliffe was a qualified real estate agent and also held a builder's licence. He was employed by Telecom as a technician until 1984 when he took part-time employment as a real estate agent. In 1986 he failed in a city fitness centre business venture, incurring heavy debts. He gave up the business in mid-1988.

He applied for unemployment benefit in August 1986. After that date McAuliffe looked for work. He also used his real estate licence to conduct a business from his home and attended to a building operation registered under his building licence during this period. McAuliffe gave evidence to the Tribunal that this operation was in his name to assist a friend. He said that he received commission of \$2000 to \$3000 during the time he was in receipt of unemployment benefit. In October 1986 he successfully tendered for the right to build a house for the South Australian Housing Trust.

McAuliffe had interpreted a DSS form, which required him to provide

income details and which stated that 'income includes net profit from businesses', as not requiring him to provide details of ventures that provided a negative return. He told the AAT that none of his operations was providing a net return after he paid interest on his large overdraft.

The DSS submitted that McAuliffe was not unemployed as required by s.116, and had failed to keep the Department informed of any paid employment and business activity as required under s.133 of the *Social Security Act*. It was also submitted that the applicant had breached s.246 in making false statements.

The legislation

Section 116 of the *Social Security Act* provides that an applicant for unemployment benefit must be 'unemployed', capable of undertaking and willing to undertake paid work suitable to the applicant, and have taken reasonable steps to obtain such work.

Section 133 provides that a beneficiary who commences paid employment or commences to carry on a profession, trade or business on his own account or as a member of a partnership shall notify the Department.

Section 246 of the Act states that, where an amount has been paid by way of pension, allowance or benefit as a consequence of a false statement or representation or in consequence of a failure or omission to comply with any provision of the Act, and it would not have been paid but for the false statement or representation or failure or omission, then the amount paid is a debt due to the Commonwealth.

Section 251 of the Act gives the Secretary to the DSS a discretion to write off debts and waive the right of recovery.

The AAT's finding

The AAT questioned McAuliffe closely in relation to his bank overdraft. The answers he gave indicated that he did not tell his bank manager that he was in receipt of unemployment benefit when he requested an overdraft. McAuliffe also agreed with the AAT that, when he applied for a loan from his bank, the bank recorded in its documents that he was engaged in a real estate building business on a full-time basis. However, McAuliffe told the AAT that the bank had simply assumed this to be the case.

In determining whether McAuliffe was to be regarded as 'unemployed', the AAT referred to the principles set down in such decisions as *McKenna* (1981) 2 SSR 13, *Te Velde* (1981) 3 SSR 23, *Weekes* (1981) 4 SSR 37, *Whyte* (1981) 4 SSR 37, *Martens* (1984) 22 SSR 248

and *Brabenec* (1981) 2 SSR 14. The conclusion of the Tribunal on the evidence was that McAuliffe's -

'operation of several bank accounts and the manner by which the applicant used his builder's licence to arrange for the construction of units, together with the evidence relating to the commission he eventually received for the sale of a property, and his tenders and operations for the SAHT, all constituted a form of business activity which made him ineligible for payment of unemployment benefit during the period . . .'

[Reasons, p.10]

The AAT also found that McAuliffe had not complied with s.133 by failing to inform the DSS of his business activities. As a consequence of these findings the sum paid in unemployment benefit was a debt due to the Commonwealth.

There was no evidence as to McAuliffe having difficulty in repaying this debt and the AAT thus found no reason to waive recovery or write off the debt under s.251 of the Act. The AAT referred to the principles in *Doyle* (1985) 26 SSR 313 and *Daugalis* (1989) 49 SSR 640 on this point.

Formal decision

The AAT affirmed the decision under review.

[B.S.]



OGSTON and SECRETARY TO DSS

(No. 5866)

Decided: 4 May 1990 by J. Handley, G. Woodard and G. Brewer.

The applicant asked the AAT to review a DSS decision to raise an overpayment of \$14 182.24 in unemployment benefit paid to the applicant on the basis that he was not 'unemployed' during the relevant period.

The facts

In July 1982 Ogston left his job as a printer and registered with the CES in a Victorian regional centre. He received unemployment benefit from August 1982. A few months later he replied to a newspaper advertisement that offered a printing business for sale in Melbourne. This business was not operating at the time and the owner agreed to allow Ogston to manage the business until it had become re-established. Ogston's aim was to either purchase a share in the business at that stage or install himself as manager with a new owner. In the meantime, the owner also allowed him to use the business address in Melbourne while looking for work.

At first, Ogston was rarely at the business premises in Melbourne, but he began to spend between 4 and 20 hours

per week there after 3 or 4 months. His role was to supervise, sub-contract work to other printers or to liaise with potential customers. Ogston ceased to receive unemployment benefit in December 1984 when an anonymous person informed the DSS that Ogston was working.

Ogston told the Tribunal that he was willing and capable of undertaking paid work at all relevant times. He gave evidence of his working for a 6-week period in a job provided by the CES during this period as well as a number of attempts to seek work on his own initiative. He also did not receive any income from the printing business, a point which was conceded by the Department.

Was the applicant 'unemployed'?

Section 116 of the *Social Security Act* requires that as part of the qualification for unemployment benefit the applicant be 'unemployed'.

The AAT referred to the evidence which indicated that the printing business had changed its name and that the documentation that did so referred to Ogston as proprietor of the business name.

The Tribunal also noted that Ogston appeared on finance documents for the lease of a car for the business as being in partnership with the owner of the printing business.

The forms also stated that Ogston was employed by the printing business and that both he and the owner were paid \$1500 per month. Ogston denied having completed these forms. But the Tribunal noted that Ogston opened bank accounts for the business upon which only he could draw cheques.

The AAT accepted that Ogston was unemployed from August 1982 until late 1982 when he became involved with the printing business. The 'vexed' issue for the AAT was what to make of Ogston's involvement in the business after that time.

The evidence that turned the case for the AAT was the fact that Ogston controlled the expenditure of the business. After the date (March 1983) upon which he opened the bank accounts for the business that he alone could operate, he could not be regarded as unemployed.

From that date, the AAT regarded Ogston as being committed to the printing business. It was his underemployment in the business that allowed him to seek work elsewhere during the relevant period. There was little evidence that he had taken reasonable steps to obtain work. The AAT commented:

'A person who commences self employment cannot be regarded as unemployed in the initial stages of the development of the business and prior to the business becoming profitable.'