

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.'

In those early stages of a developing business that person is either underemployed or by reason of devoting time and effort to the business not unemployed.'

(Reasons, p.12)

In support of this approach, the AAT referred to the decisions in *Te Velde* (1981) 3 SSR 23; and *Vavaris* (1984) 5 ALN 13.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

SULLIVAN and SECRETARY TO DSS

(No. 6083)

Decided: 3 August 1990 by R.K. Todd.

Mr Sullivan appealed from a decision that he was not qualified to receive unemployment benefit in the period 5 September 1988 to 17 November 1988 because he was not 'unemployed' in terms of section 116 of the *Social Security Act* and that he was therefore liable to repay an overpayment of \$2201.

During that period, Sullivan and his wife operated a bread delivery run, having recently purchased a van and the rights to the run financed by a second mortgage loan of \$45 000 over their home. The bread run, which was never profitable, was eventually surrendered at a capital loss in March 1989 after the cancellation of the applicant's benefits.

During the relevant period, Sullivan and his wife both continued to look for full or part time employment. The operation of the business involved some 42 hours per week work. Sullivan considered himself to be unemployed because the business was running at a loss throughout this period.

The question before the Tribunal was whether the applicant was unemployed and available for work while operating the bread run.

Legislation

To qualify for unemployment benefits, the applicant had to satisfy, among other things, s.116(1)(c)(i) of the *Social Security Act*. This provision requires that he satisfy the Secretary that, throughout the relevant period, he was unemployed and was capable of undertaking and willing to undertake suitable paid work.

Section 168 deals with the cancellation, suspension or variation of benefits and sets out the method for determining the relevant dates of effect. Section 168(3) provides:

'If, having regard to any matter that affects the granting of a claim for, or the payment of, a pension, benefit or allowance under this Act, the Secretary decides that the claim should be granted . . . the Secretary may, by determination, grant that claim . . .'

Commitment to the business

The term 'unemployed' is not defined in the Act. The Tribunal referred to earlier AAT decisions (*McKenna* (1981) 2 SSR 13, *Te Velde* (1981) 3 SSR 23) and the Federal Court decision of *Thomson* (1981) 38 ALR 624, in which the basic meaning of the term had been taken to be 'not being engaged in work of a remunerative nature'. These cases added the rider that the status of 'unemployed' might not extend to a self-employed person showing a commitment to pursuing an activity which is not yet effective to earn him a livelihood.

The AAT found that Sullivan and his wife were at the relevant period committed to their goal of achieving self-sufficiency in their business. That commitment was evidenced by the financial risk assumed, by their willingness to offer their home as security and by the hours devoted to the business. The fact that the business was not profitable did not mean that the applicant was unemployed within the meaning of section 116 (*Weekes* (1982) 5 SSR 37, *Vavaris* (1982) 11 SSR 110).

Special circumstances

Sullivan argued that there should be some leniency in special circumstances such as his own, to enable him to receive benefits until the business returned a profit that would render him independent of government assistance.

The Tribunal held that the phrase 'having regard to any matter' in s.116(3) of the *Social Security Act* did not permit the Secretary to consider whether special circumstances exist to justify the exercise of a discretion to grant payment of unemployment benefit. There was no other provision in the legislation allowing for such assistance in unprofitable business ventures.

[P.O.C.]

Unemployment benefit: 'reasonable steps' to find work?

PATERSON and SECRETARY TO DSS

(No. 6072)

Decided: 8 June 1990 by J.P. Barry J. John Paterson, a 37-year-old man, worked as a university tutor in marine biology from 1979 to 1986 and as a university research officer in the same discipline in 1986 and 1987. He then worked for a commercial aquarium but

left this employment when his employer demanded that he work 7 days a week. He was subsequently granted unemployment benefit but, in September 1989, the DSS decided to cancel this benefit on the basis that he was not taking reasonable steps to obtain employment.

Paterson asked the AAT to review that decision.

The evidence

Paterson was a qualified marine biologist, who, according to the AAT, was 'somewhat eccentric' and 'fairly obstinate . . . frequently motivated by principle', who was committed to a theory that the Triton shell was the natural predator of the Crown of Thorns starfish. This is the topic on which he had been carrying out research during his university employment.

Paterson maintained that he had limited work capacity, in that he was physically incapable of undertaking labouring work and was temperamentally unsuited to office work. He had been registered with the CES throughout the relevant period, but that agency had not referred him to any potential employers. According to evidence from the senior employment officer at the Townsville CES, Paterson had limited work skills and there were some 3-4000 unemployed people in the Townsville region.

In his evidence to the Tribunal, Paterson stressed that there was a limited range of work which he could undertake but said that, if a job such as taxi driving were to be offered to him, he would leap at the opportunity.

The AAT's assessment

The AAT accepted that Paterson had made some attempt to find work, including applications to firms of solicitors for work as an articulated clerk. On the basis of that evidence and the Tribunal's general impression of Paterson's sincerity, the AAT decided that Paterson had not unreasonably restricted himself in his attempts to find work and that he should be regarded as being willing to take employment which was suitable for him and as having taken reasonable steps to obtain such work, so as to qualify for unemployment benefits under s.116(1) of the *Social Security Act*:

'The applicant has never been referred to a position by the CES. There is no evidence that he has refused to accept any work offered to him. His obsession is the Crown of Thoms. He believes that it is in the national interest that his theory be accepted. He has serious limitations for other forms of employment but, as a finding of fact, I would not be prepared to hold that he is not seeking suitable employment.

This is not a case where he suggests he is a lion tamer or a merchant seaman at Alice Springs. Society must accept its citizens with all their limitations; physical, intellectual and emotional. The applicant has an excellent com-