Discussion

The AAT found that it was more likely than not that the benefits paid between 1982 and 1984 were all paid to some person or persons unknown (not being Farrar) as a result of fraud on the part of that person or those persons. Since there had been no payment to Farrar, there was no amount to be recovered from him.

Formal decision

The AAT set aside the decision under review and substituted a decision that Farrar was not liable to repay any overpayment of benefits in relation to the period August 1982 to April 1984.

[P.O'C.]

Sickness benefit: otherwise qualified for unemployment benefit

KELVIN WALKER and SECRETARY TO DSS

(No. Q89/145)

Decided: 21 June 1991 by Bulley, J.

This was the rehearing by the AAT of the application following the decision of Spender J. of the Federal Court given 30.10.91 to set aside the AAT's decision of 31 January 1991 and to remit for rehearing.

The AAT and the SSAT had affirmed the Department's decision to refuse sickness benefits. The applicant had claimed sickness benefit on 8 November 1988. In support of his claim he had furnished a medical certificate stating that he was suffering from chronic anxiety depression and would be unfit for work up to 13 January 1989.

The applicant had received sickness benefits from 1979 until October 1987, when he worked for 10 days under contract as a supervising diver. He then registered with the CES, but did not claim any further benefit until 8 November 1988. Whether he was unemployed and seeking work in that intervening period was one of the issues raised by the Department.

The Department's case was that the applicant had not established that he was incapacitated for work, nor that he was genuinely willing to work and genuinely seeking work. However the Federal Court found that this case had not been put to the applicant in cross-examination by the respondent.

The legislation

Section 117(1) relevantly provided that a person is qualified to receive sickness benefit if the person satisfies the Secretary that throughout the relevant period he was temporarily incapacitated for work by reason of sickness or accident and that he would, but for the incapacity, be qualified to receive unemployment benefit.

To be qualified for unemployment benefit the person had to satisfy the Secretary that

> '(i) throughout the relevant period 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; and
>
> (ii) he had taken, during the relevant period, reasonable steps to obtain such work' (s.116(1)(c).

The rehearing by the AAT

On the rehearing, the applicant was cross-examined and the Department's case put to him. The AAT was impressed by his responses and found that he was not involved in any work-related activity after October 1987 due to illness. The tribunal accepted Walker's evidence that

> '... he had a genuine willingness to work, to undertake work, and to seek work - a willingness not able to be fulfilled only due to his incapacity to work because of his illness.'

The AAT set aside the decision under review and substituted a decision that Walker be paid sickness benefit from 20 October 1988.

[P.O'C.]

Unemployment benefit: reducing employment prospects

SECRETARY TO DSS and CLEMSON

(No. A91/89)

Decided: 2 August 1991 by P.W. Johnston.

Sandra Clemson was working in Sydney until 27 February 1991, when she was retrenched. The following day she moved to Young because she did not wish to continue to live with her parents and because her boyfriend and his parents lived in Young.

On 8 March 1991, Clemson lodged a claim for unemployment benefits at the Orange Regional Office of the DSS. The DSS decided that Clemson had reduced her employment prospects by moving her place of residence and imposed a 12 week non-payment period on her.

On review, the SSAT set aside that decision; and the DSS asked the AAT to review that decision.

The legislation

Section 116(6A) of the *Social Security Act* 1947 provided that a person was not qualified for unemployment benefit 'on a day on which the person reduces his or her employment prospects by moving to a new place of residence without sufficient reasons for the move'.

Section 126(1)(aa), with s.126(4), had the effect of providing that unemployment benefit was not payable to a person for a period of 12 weeks where the person 'has reduced his or her employment prospects by moving to a new place of residence without sufficient reasons for the move'.

The range of reasons which are accepted as sufficient for moving residence was set out in s.116(6B) of the Act. Those reasons did not include the reasons which prompted Clemson's move to Young.

The SSAT's decision

The SSAT had allowed Clemson's appeal and set aside the DSS decision on the ground that neither s.116(6A) nor s.126(1)(aa) was intended to apply to a person who changed her or his place of residence prior to claiming unemployment benefits.

The SSAT said that the meaning of the provisions was obscure because there was 'no relationship in time expressed in the sections between the change of residence on the one hand and making of the claim for UB on the other', so that s.15AB of the *Acts Interpretation Act* 1901 permitted reference to the explanatory memorandum and the Minister's second reading speech which had accompanied the Bill which added the provisions to the *Social Security Act*.

The explanatory memorandum had referred to the DSS cancelling a person's unemployment benefit from the day of the person's move to a new place of residence, as did the Minister's sec-

ond reading speech. These references made it clear, the SSAT had said, that the provisions only applied to persons who moved while in receipt of unemployment benefits and not to persons who claimed benefit after moving.

The AAT's decision

The AAT said that it was in broad agreement with the reasons of the SSAT. The Tribunal noted the absence of a clear statutory indication of a date of commencement for any non-payment period, while the length of that period, as imposed by s.126(4), was mandatory —12 weeks.

Adopting the approach of the SSAT, the AAT said, would avoid the difficulties associated with the two most likely ways of applying the provisions to persons who moved before claiming benefit.

If the provisions required the 12-week period to run from the date of a person's move (prior to lodging a claim), the DSS would be determining that benefit was 'not payable during a period when it was not payable in any case. Though possible, such an interpretation involves what Wittgenstein has described as "nonsense on stilts"': Reasons, para. 10.

Alternatively, commencing the period on the date of a person's claim would be arbitrary, given that there might be a substantial time between the move and the claim and the person may have been diligently looking for work throughout that period. The AAT preferred to avoid reading the provisions as imposing such a sanction or penalty.

The AAT agreed with the SSAT that this was an appropriate case in which to refer to the explanatory memorandum and the Minister's second reading speech to resolve the ambiguity; and read those instruments 'as confirming the view that s.126(1)(aa) only affects someone who moves after submitting a claim': Reasons, para. 14.

The AAT concluded its Reasons with the observations that its conclusions 'cannot be asserted as categorically correct'; that 'the relationship between the various components of the statutory scheme [is] equivocal'; and that, assisted by the Minister's Second Reading Speech, it had 'leaned towards the interpretation [of] those provisions most beneficial to the applicant': Reasons, para. 27.

The AAT also observed that it was comforted by the fact that its reading of the provisions was the least restrictive of freedom of movement of subjects. The right to freedom of movement was recognised in various international conventions; and the common law had an 'evolutionary capacity ... to accommodate these emerging international standards'. Resort to these principles or standards 'lends weight to the particular interpretative choice otherwise indicated by the reasoning process': Reasons, para. 28.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Unemployment benefit: living with parent

SECRETARY TO DSS and GIBSON (No. 7311)

Decided: 13 September 1991 by R.K. Todd, T.E. Barnett and S. Hotop.

Paulette Gibson was granted unemployment benefit in October 1989. She was then living in Queensland, where she had been a ward of the state until the age of 18 years.

In February 1991, Gibson re-established contact with her mother, from whose custody she had been removed as a 1-year-old baby, and began to live with her mother. The DSS then decided that, as Gibson was at least 18 and under 21 years of age and living with her mother, the rate of benefit being paid to her should be reduced.

On review, the SSAT set aside that decision. The DSS asked the AAT to review that decision.

Living with her parent?

Section 118(1)(b) of the *Social Security Act* 1947 provided for the payment of a lower rate of benefit to a person between the ages of 18 and 20 without a dependent child who 'is living at a home of his or her parent or parents'.

Gibson claimed that, although she was within the critical age range, did not have a dependent child and was living with her natural mother, she was not subject to this provision.

She based this argument on the fact that she had been separated from her mother between the age of 12 months and 18 years, during which period she had been a ward of the state.

The SSAT had treated this removal of Gibson from her mother as ending her mother's status as a 'parent' for the purposes of the *Social Security Act*. The SSAT relied on what it saw as the purpose of s.118(1)(b)— to extend the financial obligations of parents to their children beyond the age of 18 years; and concluded the word 'parent' did not include a 'biological parent' who had no financial responsibility for a child by reason that the child had been made a state ward.

The AAT rejected this approach:

> 'It is simply not legally possible to embark on this kind of search for the purpose of legislation where the meaning of the provision in question is abundantly clear on its face. If words used in an Act of Parliament are not clear, or there is some inconsistency apparent between them and another part of the Act, then we would be entitled to use various approaches to try and work out what the purpose of the provision is. But there is, in our opinion, in fact no doubt about the meaning of the expression "living at a home of [her] parent".'

(Reasons, para. 7)

On the basis of the definition in the *Macquarie Dictionary*, and any other dictionary to which the Tribunal might properly have access, the AAT said, Gibson's 'natural mother was unquestionably her "parent"': Reasons, para. 8.

Formal decision

The AAT set aside the decision of the SSAT and decided that the rate of benefit payable to Gibson should be calculated on the basis that she had turned 18 but not 21 years of age and was living at the home of her parent.

[P.H.]