Administrative Appeals Tribunal decisions

Compensation preclusion: special circumstances

MILLWARD and SECRETARY TO DSS

(No. W90/195)

Decided: 28 November 1990 by T.E. Barnett.

Mr Millward applied to the AAT for review of a decision precluding him from receiving invalid pension for 50 weeks as a result of a $55 530.83 compensation settlement. The only issue discussed by the AAT in its reasons for decision was whether there were 'special circumstances' that justified treating whole or part of this compensation payment as not having been made, pursuant to s.156 of the *Social Security Act*.

Applicant's arguments/facts

The Tribunal accepted as fact all the matters put by Millward.

The solicitor who handled Millward's compensation claim was 'not the full bottle' on invalid pension matters and failed to warn him about the lump sum compensation preclusion period. Neither did Millward's treating specialist, who suggested he terminate his employment and apply for invalid pension. After settling his compensation claim, Millward attended at a regional office of the DSS and told the counter officer that he intended using all his lump sum to build his own home, but again was not advised about the preclusion period.

Following this, Millward spent all but $5000 of the compensation lump sum on building a new simple home with no unnecessary luxuries. (Millward had been forced to sell his previous home because it was on steep and uneven ground which he could no longer negotiate because of his leg injuries.)

The cost of the new home left Millward and his wife with extremely limited funds which would not have been enough to support them until the preclusion period expired.

Following the settlement, Millward's health deteriorated substantially leading to increased medical expenses. His wife had also been very ill since the settlement and was not fit for employment.

'Special circumstances'

The AAT considered the factors regarded as relevant in *Krzywak* (1988) 45 *SSR* 580 and concluded that special circumstances existed in this case. In doing so the Tribunal said it had -

> 'been most influenced by the deteriorating health and the financial hardship and also by the fact that the applicant's pressing need to build a house arose from the fact that it was the accident itself which forced him to sell off his previous home and that his decision to invest in a new home was a reasonable and responsible one granted his belief in the entitlement to invalid pension'.

(Reasons, p.7)

As far as the various failures to advise him about the preclusion period were concerned, the AAT was not influenced by the treating specialist's omission but regarded the lack of warning from the solicitor and departmental officer as amounting to 'inadequate professional advice of a similar nature to wrong legal advice which was considered in . . . *Krzywak*': Reasons, p.7.

Formal decision

The AAT set aside the decision under review and substituted a decision which reduced the preclusion period by 10 weeks.

[D.M.]

Unemployment benefit: recovery of overpayment

SECRETARY TO DSS and SMITHERMAN

(No. 6591)

Decided: 21 January 1991 by P.W. Johnston.

Kevin Smitherman was receiving unemployment benefit when, on 6 March 1990, a delegate cancelled his payment and determined that $1072.85, representing unemployment benefit paid for the period 26 December 1989 to 19 February 1990, be recovered from him.

Smitherman asked the SSAT to review this decision and the SSAT affirmed the decision to cancel benefit but 'purported to set aside the decision to raise and recover the overpayment and instead, substituted the decision that recovery of the amount of the overpayment be waived'.

The Secretary appealed to the AAT concerning the second decision and Smitherman asked that the cancellation be reviewed.

Background

In October 1989, Smitherman (who was receiving unemployment benefit) approached a DSS office to enquire as to his position if he accepted a job offer from an estate agent, working on a part time commission basis only. He was informed that he would continue to qualify for unemployment benefit and he then attended a course for 2 weeks prior to commencing employment. He subsequently returned his fortnightly continuation forms and declared his employment as part-time by marking the appropriate place on the form.

On 20 February 1990, he received a notice of cancellation. After querying this, he was interviewed and made a statement in which he said that he had been employed since January 1990 on a part-time basis but had not earned any income. A recommendation was made for his benefit to continue.

However, his employer completed an Employment Verification Report in which he indicated that Smitherman had been employed since 21 December 1989 on a full-time basis.

On 22 February 1990, benefit was cancelled with effect from 2 December. Smitherman made another statement and benefit was restored on 1 March but cancelled again on 6 March 1990. At this time, the delegate determined that the amount paid for the period 26 December 1989 to 19 February 1990 should not have been paid and raised an overpayment.

Smitherman told the AAT that he had worked part time, had a desk, a seat, a telephone and some 'Home Open' signs and was entitled to receive 35% of the office commission for any property he sold. He was available at the clients' convenience and he stated that during the time he was employed by the agent, he was looking for other work.

However, a letter from his employer stated that employment was full-time, though with flexible hours, and had commenced on 15 December 1989.

The legislation

Section 116(1)(c) of the *Social Security Act* provides that a person is qualified to receive unemployment

benefit if s/he satisfies the Secretary that throughout the relevant period s/he is unemployed, capable of undertaking and available for suitable paid work and has taken reasonable steps to obtain such work.

Section 116(1)(d) requires the person to be registered with the Commonwealth Employment Service.

The Secretary has a discretion under s.116(4) to treat a person as unemployed by disregarding work undertaken during a period.

Section 168(1) empowers the Secretary to cancel or suspend a benefit or decrease its rate of payment and, where appropriate, to set a date from which such a determination comes into effect.

Section 246(1) provides that, where an amount has been paid in consequence of a false statement or representation or failure or omission to comply with any provision of the Act, that amount is a debt due to the Commonwealth; while s.251(1) provides a power to waive, write off or permit payment of debts by instalments.

The issues

A number of issues arose for the AAT's determination:

(1) Was Smitherman 'unemployed'?
(2) Was this an appropriate case in which to exercise the discretion under s.116(4)?
(3) If the answers to both (1) and (2) were 'no', was Smitherman overpaid because of a false statement or failure or omission to comply with the Act, i.e. was there a debt under s.246(1)?
(4) If so, should the Tribunal waive the right of the Commonwealth to recover the debt?

'Unemployed'

The AAT considered a number of decisions discussing the meaning of 'unemployed' (see e.g. *McKenna* (1981) 2 *SSR* 13, *Weekes* (1981) 4 *SSR* 37 and *Vavaris* (1982) 11 *SSR* 110) and concluded that, since Smitherman was available for engaging in the business of real estate sales and had the opportunity to earn remuneration by way of commission, he was not unemployed. Accordingly, the AAT affirmed the decision to cancel unemployment benefit.

Discretion to disregard paid work

The Tribunal next decided that this was not an appropriate case in which to exercise the discretion under s.116(4). That section was more appropriately concerned with one-off jobs of no great duration, whereas here the employment relationship was a continuing one of indefinite and possibly long term duration.

False statement or representation?

The question here was essentially whether Smitherman, by denying that he was engaged in full-time employment, had made a false statement or representation or whether there had been a failure or omission to comply with a provision of the Act.

After a lengthy discussion of the relevance of a person's belief in the truth of a statement, and the fact that such a belief will not of itself relieve the person of responsibility (see *Salvona* (1989) 52 *SSR* 695), the AAT noted that the forms which were completed by Smitherman were themselves ambiguous. They did not define 'part-time' work, which could have a number of meanings (two of which are referred to in the *Macquarie Dictionary*: less than normal working hours and not one's chief occupation).

The AAT concluded that if a person responds to a question about part-time work 'in a way that is grounded in some plausible basis, that answer is not necessarily "false"'.

After discussing cases concerning the distinction between employees and independent contractors, the AAT stated that the —

> 'critical factor seems to be whether in terms of his total situation the respondent was entitled to pursue activities other than those of the real estate business . . . If he was not exclusively tied to the agency, and could devote time to seeking and possibly obtaining other work, he could quite plausibly . . . take the view that he was engaged only "part-time".'

(Reasons, para. 36)

The AAT further stated that the answer given by Smitherman on the form could not be conclusive: what was required was that the information be placed in the context of any other supplementary information that was furnished.

Having regard to the other information provided by Smitherman (such as in his statements and request for information about his continuing entitlement), he did not make a statement or representation which could categorically be described as false.

The AAT then considered whether there had been any breach of s.159(1), the section dealing with claims. Although the omission of details from a form could constitute a breach of s.159(1) (and accordingly give rise to a debt under s.246(1)), no such omission had occurred here.

No overpayment

It followed, therefore, that no debt arose under s.246(1) and any overpayment that had occurred was not recoverable [Smitherman had ceased to receive unemployment benefit so no recovery was possible under s.246(2)].

That would have been sufficient to dispose of the application had the SSAT not set aside the decision and then gone on to consider s.251. Because that was the decision before the AAT, and 'out of abundance of caution', the AAT considered the exercise of the power under s.251.

The relationship between s.246(1) and s.251(1)

The AAT considered a number of authorities on s.251 and, in particular, on the jurisdiction of the SSAT and AAT to consider that power in cases where there was no clear primary decision made under that section (see e.g. *Daugalis* (1989) 49 SSR 640 and *Salvona* (1989) 52 *SSR* 695).

Despite the varying views, the AAT was disposed to the view that 'it does in fact lie within the competency of this Tribunal to exercise the applicant's discretion conferred by that provision even if the applicant himself has not exercised it in the instant case'.

The AAT described the provisions of s.246(1) and s.251(1) as —

> 'intimately interconnected and not of a disparate character. Even though separately located in the Act they are different segments of a linear process of decision-making and are collectively part of a continuum. In this respect, one can regard . . . the broad decision to raise and seek recovery of an overpayment as the primary decision, and decisions to implement that previous decision as secondary.'

(Reasons, para. 46)

The discretion

The AAT next considered the factors relevant to the exercise of the s.251 discretion.

While the recovery provisions are designed to protect the revenue, that is not an exclusive concern. Smitherman was found to be a truthful witness, and there had been no conscious attempt to mislead the DSS. He had only recently recommenced employment and would have difficulty repaying the debt.

For these reasons, and given the ambiguity of the employment situation, the AAT concluded that, if an overpayment existed, its recovery should be waived. The AAT did point out that logically this decision was precluded by its earlier decision that there is no recoverable overpayment but considered it appropriate to frame a decision conditionally in the alternative in this case.

The formal decision

The AAT affirmed the decision to cancel unemployment benefit; set aside the decision to raise an overpayment and, in the alternative, if there was a debt due to the Commonwealth, affirmed the decision of the SSAT to waive the right of the Commonwealth to recover the debt.

[R.G.]

Unemployment benefit: requirement to attend course

SECRETARY TO DSS and STANIK (No. 6627)

Decided: 7 February 1991 by P.W. Johnston.

The DSS asked the AAT to review a decision of the SSAT which set aside a DSS decision to cancel the unemployment benefit of Stanik for the period 6 March to 20 March 1990.

The facts

Stanik, a 46-year-old man, had little formal education and had mostly worked in basic labouring jobs. He had not worked for over 10 years. His lack of work was apparently aggravated by a back condition. His situation had been reviewed by the DSS and CES to ascertain whether he would benefit from a training course under the 'New Start Programme'. It was decided that he would benefit from attending a literacy course, but Stanik refused to report for the course.

As a consequence, the DSS considered that he had failed the work test and he was advised that his unemployment benefit had been 'stopped' because he had refused the referral to the training program. It was not made clear whether the stopping of the benefit was for a fixed period or for a limited time. The letter to Stanik advising him of this decision stated that it was made in accordance with s.170 of the *Social Security Act*. The Record of Decision held by the DSS stated that the decision was to cancel unemployment benefit 'due to CES advice of activity test'. The Record of Decision also referred to Stanik being unable to meet s.116(1)(d) of the Act.

When Stanik sought review of the decision by a Review Officer, the matter was described to that officer by the original decision-maker as a decision 'to cancel and postpone benefit due to failing activity test'. When Stanik was advised the original decision had been upheld by the Review Officer, the letter referred to ss.126(1), 126(2), 170(1) and 170(2) of the Act.

Subsequently, the SSAT set aside the decision of the DSS. The exact nature of the DSS decision was not clear as it had been described as cancellation, stoppage and postponement of unemployment benefit.

Did the SSAT have jurisdiction?

The DSS first raised a jurisdictional issue: was the SSAT competent to review the DSS decision?

Counsel for the DSS referred to s.182, which defined the powers of the SSAT. Section 182(4) provides that the SSAT may exercise all the powers and discretions that are conferred by the Act on the Secretary when reviewing a decision. Section 182(5) states that the reference in s.182(4) to powers and discretions conferred by the Act does not include a reference to powers and discretions conferred by a number of sections, including s.170.

Section 170(2) provides that, where in the opinion of the Secretary a person receiving a pension or eligible for a pension should undertake a course of vocational training or another course to which the person has been referred by the CES, pension or benefit shall not be granted or shall cease to be payable unless the person complies with the reasonable requirements of the Secretary with respect to any such matter.

Section 170(3) states that, where a person receiving job search allowance and requested to attend an office of the CES fails to attend without a reasonable excuse, the allowance ceases to be payable to the person.

DSS counsel then submitted that, where a person failed to attend a course as required by the CES, s.170(2) operated automatically to stop payment of the benefit and in that event s.126(1)(ca) came into effect. Section 126(1)(ca) reads:

> '(1) . . . where:
>
> . . .
>
> (ca) a person refuses or fails, without sufficient reason, to comply with a requirement made of the person under section 170;
>
> . . .
>
> an unemployment benefit is not payable to the person in respect of such period as is determined by the Secretary in writing (which may be a period commencing before the day on which the determination is made).'

The DSS submission was that, as ss.126 and 170 were linked in the way indicated, and given that s.182(5) excluded the SSAT from exercising the 'powers and discretions' conferred by s.170, the SSAT was precluded from reviewing the reasonableness of the DSS decision to postpone Stanik's unemployment benefit. This submission was based on the view that to allow such a review would require the SSAT and the AAT to evaluate the actions of an outside body, in this case the CES. It was submitted that the legislature could not intend that the tribunals would interfere with the relationship between the DSS and the CES in this way as neither tribunal could undertake responsibility for administration of such joint arrangements.

The AAT rejected the submission for two reasons. The first reason was that:

> '. . . whilst s.182(5) clearly prevents either review tribunal from exercising any of the powers or discretions of the applicant under s.170, it is inappropriate to describe the mental action of the applicant's delegate in forming an opinion of the specified kind as entailing either a power or discretion.
>
> 'The exercise of a power entails the grantee of the power doing something which he or she is authorised to do by virtue of that conferral. In the case of s.170(2) the applicant merely forms an opinion. Nothing substantive is done. So far as exercise of a discretion is concerned, the formation of an opinion is something which is self-executing. It is not the case that one either forms an opinion or does not according to an element of choice. One simply forms an opinion having regard to a certain factual situation.
>
> 'One can clearly see the difference between forming an opinion and exercising a power and discretion if reference is made to subsection (3) of s.170. That provision clearly confers a discretionary power on the applicant to request a person to attend an office of the CES. It is that kind of discretionary power that is the object of the preclusion in s.182(5). In that latter situation, the kind of policy consideration referred to by [counsel for DSS] clearly would have a sensible operation. It would be quite inappropriate for the SSAT or the AAT to enter upon making requests of that kind where ongoing inter-agency arrangements of an administrative kind are entailed.'

(Reasons, p.8)

The second reason for rejecting the submission, said the Tribunal, related to the power of the SSAT to review decisions under the Act. Section 177(1)(a) confers the power to review decisions on the SSAT, the power being expressed in terms of a power to review 'a decision of an officer under this Act'. Section 177 is subject to s.178, which states that the SSAT cannot review certain decisions, but these decisions do not include decisions under s.172. Section 178 stood in contrast to s.182(5), said the AAT. Section 178 restricted the decisions that