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

could be reviewed by the SSAT, s.182(5) placed a restriction on the exercise of powers.

The SSAT thus had jurisdiction to review the decision. The SSAT decision was not a nullity and the AAT could therefore review the decision.

What was the decision to be reviewed?

Section 15 of the *Social Security Act* effectively requires that a decision be in writing. The AAT also referred to s.3(3) of the *Administrative Appeals Tribunal Act*, which defines 'decision', as well as discussions of the definition in *DSS v Chaney* (1980) 31 ALR 571 and in *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11.

The conclusion reached was that 'the reviewable *content* of such a decision may and in this case, does, . . . embrace not only the particular determination necessarily evidenced in writing but also determinations anterior to it. Taken together, these constitute part of a single administrative process . . .': Reasons, p.11.

Thus, in order to identify the precise 'decision' to review, it is necessary to consider the statutory framework in which the decision was made. In this case the first step towards cancellation or postponement of unemployment benefit is in s.170(2)(c)(ii) which first requires the DSS to form an opinion that a person should undertake a course. Part of this opinion must be based on the question of whether the course is one that the person could reasonably undertake. The next step is the failure of the person to comply with the reasonable requirements of the DSS with respect to undertaking the course.

If the requirements are reasonable and the person fails to comply, then the benefit ceases to be payable. But this requires further action before the benefit is affected. It is not an automatic event, which would mean that there is no reviewable decision. Also, the period of cessation of benefit is then to be found in s.126(2). Section 126(2) and (3), which provide a range of periods of postponement, did not apply in this case; although it was accepted that the otherwise unlimited discretion in this case to postpone was in practice limited by Departmental practice to the formula contained in s.126(2) and (3).

The AAT commented that the combined operations of ss.170 and 126 did not of themselves complete the picture. They only gave rise to a 'situation of non-entitlement to benefit'. It still required administrative action to complete the situation. Thus s.168 was relevant. Section 168 provides that where the Secretary decides that a pension, benefit or allowance should be cancelled or suspended or that the rate is more than it should be, the Secretary may, by determination, cancel, suspend, or decrease the rate of the payment.

Application to present case

The evidence showed that Stanik had attended a meeting with a DSS officer and two CES officers. At that meeting it was put to him that he should undertake a literacy course, but he made it clear that he did not want to participate in such a course although he was prepared to attend other courses. He was told of his obligations to attend the course or face cessation of benefit.

There was no file note to indicate whether the DSS officer had considered whether the course was one which Stanik could reasonably undertake, which is a preliminary step towards cancellation of benefit. A report was later received from a CES officer that Stanik had not attended the course and on 8 March 1990 the DSS officer recorded the decision to cancel the benefit based on failure of the activities test. It is this decision which the Tribunal found to be the operative decision for review.

Evaluation of the evidence

The AAT found that at the interviews attended by Stanik he was informed that he should attend the literacy course, but that the purpose of attending was not made clear to him. The purpose appeared to be to enable him to read job advertisements, but this was based on incorrect information that he could not read or write at all.

The AAT also referred to a secondary purpose in requiring his attendance at the course: this was to further job skill enhancement. Again, this was not clearly communicated to him, and in part this was probably due to his opposition to the idea which made communication difficult.

The Tribunal considered the overall utility in requiring Stanik to undertake the literacy course. It questioned whether the course would have greatly improved his employment prospects. He was 46 years old, had a bad back and had been employed in labouring jobs. Without a great deal of further training, a basic literacy course would be unlikely to have a marked effect on his job prospects.

Was the refusal to attend the course reasonable?

The ultimate question was whether it was reasonable for Stanik to refuse to attend the course. The Tribunal found:

> '. . . having regard particularly to his age, his stage of life, his health, and the basic level of such labouring skills as he has, he did in fact have a sufficient reason to fail to comply with the referral. Put another way, his refusal to do so was not simply a stubborn and belligerent act of defiance; it was in fact quite a reasonable response, even if expressed in unfortunate language for which there was no real excuse. The amount of effort that the respondent himself, and the collective government agencies (TAFE, CES and the [DSS]) would have had to put in for what would seem to be a fairly marginal improvement in his employment skill would not seem to be reasonably justified. No detailed consideration seems to have been given as to whether the proposed course would have made a *real* impact on his overall situation.'

(Reasons, pp.24-5)

Thus the AAT could conclude that the decision to cancel the unemployment benefit lacked foundation and the SSAT's decision was affirmed.

However, the AAT took the matter further. The problem in fact went back to the original decision of the DSS. There had been a failure to make the determinations required by the Act. There had been no decision made as to whether the course was one which the person could reasonably undertake even though this decision may have been implicit in the DSS officer's actions. There was also no explicit evidence that there had been a decision as to whether or not the respondent's failure to attend the course was reasonable. And there was no written determination under s.126(2) stating the period of postponement.

The AAT acknowledged that what had occurred was based on the Departmental Manual that placed reliance on the advice received from the CES and considered the provisions of the Act as self-executing. But, said the AAT, 'the Manual does not reflect the specific requirements of the legislation. There is a great deal of redundancy in the legislative scheme but in the end it must be that against which the departmental actions are measured. In the result, it may be that the applicant sees a need to redraw the Manual in the relevant respects': Reasons, p.27.

The AAT then concluded that, as the DSS had not directly addressed the question of whether Stanik's refusal to attend the course was reasonable or unreasonable, and as there was no specific determination in writing of the period for which the benefit would cease, the original decision was a nullity due to the

failure to comply with the Act. Also, the cancellation of the benefit for 2 weeks by entry into the DSS computer program did not constitute a determination in writing under s.126(2), as it was found by the AAT that there had been no independent exercise of the DSS officer's mind prior to that entry.

Formal decision

The AAT affirmed the decision of the SSAT that unemployment benefit be paid to the respondent for the period 6 to 20 March 1990.

[B.S.]

Assurance of support debt

IBARRA and SECRETARY TO DSS (No. 6629)

Decided: 7 February 1991 by O'Connor J, H. E. Hallowes and J. McGirr.

Ibarra asked the AAT to review a decision of the SSAT, which set aside a DSS decision to recover an assurance of support debt and substituted for it a decision to write off the debt under s.251 of the *Social Security Act*, subject to recovery at a future date.

The facts

In 1988, while Ibarra was in receipt of unemployment benefit, he signed an assurance of support in respect of his parents' application to migrate to Australia. Although on benefit at the time, he stated on the assurance that his taxable income was $26 000 and his wife's $28 000.

When Ibarra's parents first arrived in December 1988, they lived with him and his wife and he supported them. However, as a result of conflict between his wife and parents, the parents moved out of the house shortly after their arrival.

Ibarra then completed an application for special benefit for them on which he stated 'our maintenance guarantor cannot give support to us because he is currently unemployed' and referred to heavy repayment commitments on their house.

Ibarra was then interviewed and signed a statement in which he acknowledged that he would have a debt to the Commonwealth if special benefit was granted to his parents.

Benefit was granted to Ibarra's parents at the hostel rate but shortly afterwards, his parents sought an increase on the grounds that since 2 January 1989 they had commenced paying rent. Ibarra was again contacted and informed that he might be liable to repay any amounts paid to his parents and would be contacted at regular intervals concerning his capacity to pay.

On 29 September 1989, Ibarra was informed that there was a debt of $7452.87, increasing at $225.40 per week. Ibarra asked the SSAT to review this decision.

The legislation

Section 246(2A) of the *Social Security Act* allows the Secretary to recover an assurance of support debt by withholdings from a person's pension, benefit or allowance; while s.251 provides the Secretary with a discretion to waive, write off or recover a debt by instalments, including, by s.251(4), an assurance of support debt.

Section 3(1) defines an assurance of support debt [see *Mathias* in this issue of the *Reporter: p.823*].

Jurisdiction to review

The AAT considered the central question to be whether there was a decision which was reviewable by the AAT.

Ibarra submitted that the primary decision maker had no power to make the decision but the AAT found that the officer had delegated to him the Secretary's power under s.246(2A).

It was also submitted that the delegate's powers were restricted by monetary limits under s.251 but the AAT found this not to be an issue as no action had been taken under that section.

After noting that the AAT's jurisdiction under s.205 of the *Social Security Act* was to review decisions which had been reviewed by the SSAT, the AAT considered which aspects of the decision were reviewable.

The AAT referred to the decisions of the Federal Court in *Hangan* (1982) 11 *SSR* 115 and *Hales* (1983) 13 *SSR* 136, the effect of which is that 'once the decision is made that the threshold legal and factual requirements are satisfied, then it is not necessary to wait until action occurs before the matter can be reviewed because at that stage there is a reviewable decision': Reasons, para. 22. The AAT accordingly held that the decision made under s.246(2A) was reviewable:

> 'While the tribunal is not saying that each of the conclusions of fact which the Secretary or his delegate must make in order to recover under s.246(2A) can be made the subject of separate and independent applications for review it is of the view that in the proper practice of administrative review, all components of the administrative decision must be assessed in reaching the final decision. Although under s.246(2A) of the Act the Secretary is compelled to take action if he declines to take action under sub-section 251(1), in our view that action must be founded on the Secretary or his duly authorised delegate being satisfied that the legal and factual elements of recoverability exist.'

(Reasons, para. 23)

In this case, the elements of which the Secretary was required to be satisfied were that —

- there was a valid and relevant assurance of support agreement;
- moneys had been paid to the person who was the object of the agreement;
- there was a current unsatisfied debt owed by the assurer;
- the debt was of a certain amount;
- action under s.251(1) should not be taken; and
- the moneys should be deducted at a particular rate from each instalment.

The discretion under s.251(1)

The AAT determined that each of the other preconditions had been satisfied and went on to consider the discretion in s.251(1).

Having found that the debt did not arise as a result of innocent mistake, there was no inordinate delay or error on the part of the DSS, there were no relevant compassionate circumstances, and Ibarra and his wife had assets in excess of $125 000, the AAT declined to exercise the discretion.

Also noted was Ibarra's youth, education and fluency in English, a recent workers' compensation settlement of $30 000 paid to the his wife and pending motor vehicle accident claims for both of them.

Formal decision

The AAT set aside the SSAT decision and remitted the matter to the Secretary to determine the appropriate deduction from each payment of the applicant's pension/benefit in accordance with s.246(2A).

[R.G.]