

Special benefit: unable to earn

MD and SECRETARY TO DSS
(No. Q88/452)

Decided: 12 June 1991 by D.P.Breen.

MD had been paid special benefit after his unemployment benefit was cancelled. The AAT was asked to review a DSS decision to cancel his special benefit. It was accepted that, if MD did qualify for special benefit, he did so under paragraph 24.1302 of the DSS guidelines which stated:

'The following groups of persons who may be accepted as persons with chronic labour force disadvantages may qualify for special benefit:

...

a person suffering from a psychiatric illness who, owing to his or her illness, will not seek medical attention, who is clearly unable to work or seek work.'

Psychiatric evidence

The decision of the AAT was primarily concerned with the psychiatric evidence that the Tribunal sought at an earlier hearing of this matter. MD had been for some time out of work and 'he was consumed with a passion to pursue his perception of what justice owed him' in respect of commercial dealings he had had with a particular company. He had purchased a drilling machine from the company on the strength of assurances that he would benefit commercially. When the machine did not deliver these benefits he was certain he was the victim of shady dealings.

The AAT asked a psychiatrist to prepare a report. The report was equivocal as to whether MD suffered from a psychiatric illness. The report leaned towards the view that he suffered from 'a form of psychiatric illness' but conceded that this was not clearcut. The psychiatrist was reluctant to describe MD as psychiatrically ill as that term would be commonly used by psychiatrists. But the strength of the forces driving MD together with the vexed nature of what constitutes such an illness allowed the psychiatrist to suggest that he could be said to suffer from such an illness. The report also stated that treatment at this stage would not assist MD.

The DSS argued that the discretion to grant special benefit had to be exercised very cautiously and not 'so broadly as to allow payment to someone who has adopted a course of action, quite deliberately, which prevents him from earning an income even though that choice might

be explicable by reason of the person's personality and past conditioning': Reasons, pp.5-6.

The AAT noted that the DSS advocate was 'somewhat dismissive' of the psychiatrist's report. The Tribunal commented that the impact of this dismissal was to a large extent lost because the DSS advocate had decided not to cross-examine the psychiatrist when given the opportunity.

The AAT concluded:

'All in all, on what I have read in letters written by Mr D, in what I have seen of him in the witness box in particular (on two occasions), and in the hearing room during general phases of proceedings, and on what I glean from the face value of the [psychiatric] report (having nothing other than its own face value by which to interpret it), I am of the view, that, whilst short of a diagnosable psychiatric illness carrying a label recognised in DSMIII, Mr D is obsessed to the point of extreme psychological disturbance with his pursuit of a remedy for the injustice he considers to have been done to him. I am also of the view that the expression "psychiatric illness" where it appears in paragraph 24.1302 of the departmental guidelines should be read widely, having regard to the scheme of the Act to which the guidelines are directed.'

(Reasons, p.6)

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with the directions that

- (1) the applicant remains eligible for payment of special benefit,
- (2) he is eligible on the basis that he is a person suffering from a psychiatric illness who, owing to his illness, will not seek medical attention but is clearly unable to work,
- (3) Mr D will continue to be obsessed with the pursuit of justice against a company called Ingersoll-Rand until the processes of law, by which he seeks it, have been exhausted, and
- (4) payment of special benefit should continue to be made to his wife.

[B.S.]



Special benefit: residence

SECRETARY TO DSS AND
SRITHARAN

(No. V91/195)

Decided: 12 June 1991 by B.M. Forrest.

The respondent was a 52-year-old Sri Lankan man, married with 4 children. He held a current temporary entry permit, and had a pending application for refugee status, lodged shortly prior to the hearing.

He applied for special benefit on 30 August 1990. The application was refused, but the SSAT had substituted a decision that special benefit be granted from 10 December 1990 (the date of his application to the SSAT), finding that the respondent was a 'resident of Australia' within the meaning of s.129 of the *Social Security Act 1947*.

The issue was whether the applicant was residentially qualified for special benefit. This involved considering what legislation applied to him.

The legislation

At the time that the respondent lodged his claim on 30 August 1990, s.129(3)(a) provided that benefit was not payable unless he was a 'resident of Australia'.

After the respondent lodged his claim, and prior to the delivery of the SSAT decision on 15 January 1991, s.129 was amended by s.53 of the *Social Security Legislation Amendment Act 1990* (No. 6 of 1991) which was given royal assent on 8 January 1991. The new provision substituted a requirement that a claimant for special benefit fall within one of six categories; the only category potentially applicable to the Sritharan was that of 'an Australian resident'.

Retrospective operation of the new provisions

It was conceded by counsel for Sritharan that he did not meet the residence requirements of the amended s.129(3). Counsel argued that the amending Act should not apply for the period prior to 8 January 1991 (date of royal assent). He further submitted that Sritharan was a resident of Australia for the purposes of the Act prior to 8 January 1991; he therefore had an accrued entitlement to benefit and the amending Act provisions should not be construed as interfering with those rights.

Counsel also argued that the effect of giving the amending Act retrospective operation would be to require Sritharan to repay special benefits received.

The AAT reviewed the authorities on retrospective operation of legislation, and concluded that a reading of ss. 2, 4(a) and 53 of the amending Act conveyed a clear meaning that s.129(3)(a) of the Act, as amended by s.53 of the amending Act, was to have retrospective operation in that it was taken to have effect on and from 1 August 1990. There was no ambiguity in the provisions of the amending Act relating to commencement.

The AAT dismissed the argument that an overpayment had occurred if the amending Act operated retrospectively. There was nothing in the amending Act that fulfilled the preconditions in s.246 *Social Security Act 1947* for the giving of a right to the Commonwealth to recover benefits paid to Sritharan.

[P.O'C.]



Unemployment and sickness benefit: self employment

RICHARDS and DEPARTMENT OF SOCIAL SECURITY

(No. N90/61)

Decided: 5 April 1991 by B.J. McMahon.

Kenneth Richards asked the AAT to review a decision which affirmed the raising of an overpayment of \$45 492.74 paid as unemployment benefit and sickness benefit over the period 1 June 1984 to 16 January 1989.

Richards had worked as a carpenter and builder but in 1979 had a back operation. Shortly after, he and his wife bought a block of land at Thirlmere on which they built a house where he lived with his family from the end of 1982.

Richards commenced receiving unemployment benefit in October 1982 and this continued until he transferred to sickness benefit on 10 November 1986. He remained on that benefit until 25 May 1988, when he transferred back to unemployment benefit, which he received until 16 February 1989.

In 1984, Mrs Richards decided to start a retail fruit and vegetable shop and a lease for premises and a loan were taken out in Mr and Mrs Richards' joint names.

According to evidence presented at the AAT, Richards accompanied his wife to the shop every day between 1984 and 1986, but would leave there to go to the CES or look for work. Although his back prevented him from doing any heavy work, he occasionally delivered orders, took orders on the telephone, moved light stock and he hosed down the outside of the shop every day. Occasionally, he served in the shop but this did not occur on a regular basis.

Towards the end of 1986, Richards had a further operation and transferred to sickness benefit. Neither at this time, nor on his return to unemployment benefit in 1988, did he inform the DSS of the existence of the business.

When the DSS learned about the shop, an overpayment of \$45 492.74 was raised on the basis, first, that Richards was not unemployed while in receipt of unemployment benefit and, secondly, that he had not suffered a loss of income through illness for those periods in which he received sickness benefit.

On review, the SSAT affirmed the decision to raise the overpayment but varied the decision to recover by writing it off for a 12 month period from 31 October 1989. Richards then asked the AAT to review the decision.

The legislation

Section 116 of the *Social Security Act* at the relevant time set out the qualifications for unemployment benefit. Central among these was the requirement in s.116(1)(c) that the person be 'unemployed'.

In addition, a person must also satisfy the Secretary that s/he was capable of undertaking and willing to undertake suitable paid work, had taken reasonable steps to obtain suitable work and must be registered with the CES.

Sickness benefit was available to a person who had a temporary incapacity through which s/he had suffered a loss of salary, wages or other income (s.117).

Section 163 imposed notification obligations on recipients of benefits.

Section 246(1) provided that, where an amount had been paid in consequence of a false statement or representation or failure to comply with a provision of the Act, the amount paid was a debt due to the Commonwealth.

Finally, s.251 provided the Secretary with a discretion to waive, write off or allow payment by instalments of debts owed to the Commonwealth.

Was Richards unemployed?

The AAT canvassed a number of previous decisions involving people engaged in businesses or self-employed (see e.g. *Vavaris* (1983) 11 SSR 110; *Weekes* (1981) 4 SSR 37 and *McKenna* (1981) 2 SSR 13) and noted that a person may be underemployed without being unemployed:

'The proper question to ask is whether the person in question is so seriously engaged in the conduct of a business as to lead to the conclusion that he is not unemployed.'

(Reasons, para. 25)

The AAT concluded that, whatever the evidence (which was to the effect that the business was entirely run by Mrs Richards), 'a proper legal analysis of the situation would show that at all relevant times the applicant and his wife were in partnership': Reasons, para. 26.

The AAT also noted that, apart from the legal analysis, the factual position also appeared to be that the shop was run as a family business.

The AAT decided that Richards was not unemployed, even though it accepted the evidence that Richards looked for work during the period. On that basis, the decision to raise an overpayment of unemployment benefit was affirmed.

The AAT also decided that for the periods over which sickness benefit was received, there had been no loss of income demonstrated.

Should the debt be recovered?

The AAT quoted extensively from the Full Federal Court decision in *Hales* (1983) 13 SSR 136; and noted that the Federal Court there considered the fact that the respondent had received public moneys to which she was not entitled a paramount consideration on the question of whether a debt should be waived.

The AAT concluded that the overpayment arose through deliberate acts by Mr and Mrs Richards, who had chosen not to notify the DSS of the existence of the business because they were not making a profit and feared they would lose the benefit on which they depended. Even though they had no assets and a number of debts, since both Mr and Mrs Richards were in regular employment, the AAT considered that there was some prospect of recovery.

Formal decision

For these reasons, the AAT affirmed the decision under review.

[R.G.]