Unemployment benefit: over-payment

BROWN and SECRETARY TO DSS
(No. 7391)

Decided: 18 October 1991 by P.W. Johnston.

Peter Brown sought review of a decision of the SSAT on 13 July 1989 to affirm a DSS decision to raise an overpayment of unemployment benefit. The decision to recover the overpayment was varied by the SSAT so that the amount equivalent to the Family Income Supplement that would have been payable to Brown be waived. Brown applied out of time to the AAT for review and represented himself at the hearing.

The facts

The overpayment occurred between 30 July and 26 December 1984. Prior to July 1984, Brown attempted to establish himself in business as a real estate agent. He needed to work for 2 years for a principal before he could obtain a licence. Brown commenced working for an estate agent in Canberra in July 1984 whilst his family remained in Taree, NSW. Brown was on commission only and did not receive a substantial payment until November. He did not advise the DSS that he had commenced working. In December 1984 it became apparent that Brown would receive regular commissions so he advised the DSS that he was working.

The DSS decided to raise an overpayment and advised Brown by letter dated 26 March 1985 that he had to repay $3689.16.

The law

The first issue for the Tribunal was whether the overpayment had been correctly raised. At the time when unemployment benefit was paid to Brown, s.107(1) of the *Social Security Act* 1947 applied. To be qualified to receive unemployment benefit, Brown had to satisfy the Secretary that he was unemployed, as well as being capable and willing to undertake suitable paid work. The AAT identified the relevant issue for it to decide as whether Brown was 'unemployed'.

Brown had indicated to the DSS in 1986 that his expenses were greater than his income. Therefore in Brown's opinion he could not be employed as he was earning no income and 'unemployed' meant not in 'paid work'.

This concept has been dealt with in a number of decisions of the AAT which had been provided to Brown before the hearing.

The AAT described 'unemployment' as a status covering a wide range of circumstances. The reference to 'paid work' in the section establishes a second qualification to be satisfied, that is, to be capable and willing to undertake suitable paid work.

The AAT referred to the Federal Court case of *McAuliffe* (1991) 63 *SSR* 892, in which Von Doussa J discussed the relevant principles applicable to the concept of 'unemployed' as outlined in various decisions of the Federal Court and the AAT. The AAT quoted extensively from the decision and concluded that 'unemployed' had the popular meaning of not being engaged in remunerative work:

> '[T]he purpose of unemployment benefit is not to provide a guaranteed income subsidy: it is payable in rather restricted circumstances and the requirement of being unemployed is fundamental.'

(Reasons, p.11)

Therefore, the AAT stated, Brown was not 'unemployed' despite his own strong belief that he was. He had been engaged in work as a real estate agent for which he received remuneration which was not adequate to meet his needs. As Brown had not notified the DSS of his change of circumstances as required by s.135TE of the 1947 Act as it then was, the overpayment was correctly raised.

The AAT then considered whether it was appropriate to apply waiver or write off in this case. A tense relationship had developed between Brown and the DSS. Since the overpayment had been raised, the DSS had been attempting to recover the amount by sending letters to Brown, often to an incorrect address. The DSS alleged that Brown had been evasive by not providing his correct address whenever he moved. After reviewing the evidence, the AAT rejected this allegation. Delay was also caused by the DSS being unable to locate its file. The AAT concluded that Brown could not be held responsible for the delay in the matter being heard by the SSAT. However, the delay by Brown in seeking review by the AAT was caused by Brown's stubborn belief that he should not have to repay the amount sought.

Before deciding whether this was a suitable case for waiver the AAT referred to the criteria set out in *Director-General of Social Services v Hales* (1983) 47 ALR 281. There was no deliberate fraud by Brown, although he had received public moneys to which he was not entitled. Even though Brown's financial circumstances had fluctuated over the years, the AAT did not believe that this was an appropriate case to apply the waiver provisions other than to the amount already waived by the SSAT.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

[*Note:* The AAT did not refer to the Ministerial Directions on waiver gazetted on 24 July 1991 when considering whether waiver should apply in this case.]

Date of effect of rate increase

MOLINE and SECRETARY TO DSS
(No. 7539)

Decided: 29 November 1991 by R.A. Balmford, H.D. Browne and T.R. Russell.

Mr and Mrs Moline were in receipt of age pension at the married rate.

From 4 April 1990 to 3 July 1990 Mr Moline was unable, as a result of illness, to live with his wife because he was in hospital. During that period it seemed that their inability to live together was likely to continue indefinitely.

The DSS was not advised of this situation until 20 August 1990 and refused to increase Mr and Mrs Moline's pensions to single rate pensions for the period April-July 1990. The DSS decision was affirmed by the SSAT and the Molines sought review by the AAT.

The legislation

Married pensioners were entitled to a rate of pension (the married rate), which was lower than the single person's rate. However, s.33(2) of the *Social Security Act* 1947 permitted payment at the single rate where the Secretary was satisfied that the living expenses of a married couple were likely to be greater because they were

unable to live together as a result of illness or infirmity and that inability was likely to continue indefinitely.

Section 168(3) of the *Social Security Act* 1947 gave the Secretary power to determine that an increased rate of pension be paid. Where that determination was made following advice of changed circumstances, s.168(4)(c) stated that the determination took effect on whichever was the later of the day the advice was received or the day on which the change occurred.

Arrears not payable

The AAT decided that the applicants met the requirements of s.33(2) and were *prima facie* entitled to the single rate of pension for the period 4 April 1990 to 3 July 1990. However, by the time they notified the DSS of their changed circumstances they were again able to live together and were no longer entitled to the single rate. Payment could not be made at the increased rate for the period 4 April 1990 to 3 July 1990 because of s.168(4)(c).

The AAT pointed out that 'the existence of qualifying circumstances alone does not give rise to entitlement to payment' under the scheme of the *Social Security Act* 1947: Reasons, para. 11. There was no entitlement to payment pursuant to s.33(2) until a formal determination to that effect was made under s.168(3) and 'entitlement commences only on the date on which the determination takes effect, which date is established by paragraph 168(4)(c)': Reasons, para. 10. In this case that was 20 August 1990, which was after the period during which the applicants met the requirements of s.33(2).

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Invalid pension: intellectual impairment/ educational handicap

MARTIN and SECRETARY TO DSS

(No. 7607)

Decided: 20 December 1991 by M.T. Lewis, J. McClintock, and J. Kalowski.

Martin asked the AAT to review a decision of the SSAT which affirmed a DSS decision to reject his claim for invalid pension. The claim was rejected on the grounds that, although Martin had a permanent incapacity, it was less than 85% and his physical impairment did not directly cause at least 50% of his incapacity.

The legislation

The AAT had to determine which was the relevant legislation — the *Social Security Act* 1947 or the 1991 Act. It followed the case of *Simek* (reported in this issue of the *Reporter*) and applied the 1991 Act.

The facts

Martin was 33 at the time he applied for invalid pension. He sustained a low back injury at work in February 1985 and was paid compensation until liability ceased in November 1987. On 19 October 1987 he lodged a claim for sickness benefit for chronic back strain. In June 1988 he lodged an application for unemployment benefit. In October 1988 he claimed both sickness and invalid pension.

Martin contended that the only work he could do was truck driving and driving machinery. He said he could no longer lift, bend, drive or do factory work because of his back. He could not read or do mathematics and was accordingly unsuited for clerical or sales work. He left school at 14 years of age and had worked sweeping and wrapping parcels and later gained a fork lift driver's licence. He also worked for 7 years driving a truck. In addition to back pain, he said he suffered headaches and was last admitted to hospital for migraine 8 or 9 months ago. He drove a modified car because of safety problems arising from his right leg disability following the work accident.

Psychological evidence to the Tribunal indicated Martin was at the lower extreme of the low average range of intellectual capacity, with poorly developed numeracy and literacy skills but had sufficient intellectual capacity to work as a labourer, storeman or security officer.

The issues

The issues were whether or not Martin suffered from physical and/or mental conditions, and, if so, to what extent was he incapacitated for work. The Tribunal found that Martin had a behavioural problem which was part of his mental disability and that he suffered from quite significant social disabilities. He was found to be 85% incapacitated for work with at least half of that incapacity arising out of physical and mental impairment.

Formal decision

The decision under review was set aside.

[B.W.]

Invalid pension: which legislation?

SECRETARY TO DSS and MIFSUD

(No. 7649)

Decided: 9 January 1991 by I.R. Thompson.

Rose Mifsud claimed invalid pension on 17 September 1990. Her claim was rejected and she appealed to the SSAT. The SSAT set aside the rejection and directed that she was eligible for pension. On 15 May 1991, the DSS appealed to the AAT.

Which legislation?

The *Social Security Act* 1947, under which Mifsud had claimed invalid pension, was replaced from 1 July 1991 by the *Social Security Act* 1991.

Schedule 1A to the 1991 Act contains provisions dealing with transitional issues. Clause 15(1) of the Schedule provides that an application (to the AAT) for review under the 1947 Act which has not been determined before 1 July 1991 has effect, from 1 July 1991, as if it were an application for review under the 1991 Act.

According to cl.15(3), where a decision of the AAT takes effect prior to 1 July 1991, the decision takes effect in that period as if it were a decision made under the 1947 Act.