Administrative Appeals Tribunal decisions

Job search allowance: employer contact certificates; whether special circumstances

CHAMPION and SECRETARY TO DSS
(No. 10597)

Decided: 13 December 1995 by M.T. Lewis.

Champion was in receipt of job search allowance (JSA) when, on 14 July 1994, she was issued with a notice requiring her to complete employer contact certificates (ECCs) to verify that she had applied for two advertised job vacancies for the period 25 August 1994 to 7 September 1994. On 7 September 1994 her JSA was cancelled because the ECCs which she had lodged, were not for advertised job vacancies. The SSAT affirmed the decision to cancel payment of JSA for two weeks and Champion lodged an appeal to the AAT.

The issue

The issue was whether Champion satisfied the activity test for the period 25 August 1994 to 7 September 1994 pursuant to s.522 of the *Social Security Act 1991* and whether she was therefore qualified for JSA under s.513 of the Act.

The facts

The AAT found that Champion had been issued with ECCs because the DSS doubted that she was employable or that she was actively looking for work. Champion was a 42 year-old woman who had been unemployed for about 10 years. She had refused to apply for disability support pension, and her claim for special benefit had been rejected. She had an unusual personality, and was living in an extremely socially marginalised way. She exhibited eccentric behaviour, refusing to use the telephone or public transport. There was no evidence that she suffered from a physical or psychiatric illness.

The AAT said that she was a significant fringe dweller of our society who did not neatly fit into any specific categories of the social security system.

The AAT noted that an activity agreement with the CES, which Champion had signed on 14 July 1994, required her to seek advertised positions. Champion's genuine belief that this was not the case, was incorrect. The AAT also noted that for the pay period immediately before the period in question, Champion had completed ECCs for non advertised positions which had been accepted by the DSS.

The law

Champion argued that special circumstances existed whereby it was not reasonable to expect her to provide ECCs in respect of advertised job vacancies. The AAT said that the DSS had correctly invoked the power of s.522(1A) to require a person to apply for a particular number of advertised job vacancies. Champion had not complied with the requirement of s.522(1C) as she had not provided a written statement confirming that she had applied for an advertised job vacancy. However, the requirement of s.522(1C) does not apply if there are 'special circumstances' as provided by s.522(1E). In considering the words 'special circumstance' the AAT relied on the decision of the High Court in *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 7 CLR 492 and said that it was not proper to consider the present situation to be one of special circumstances if, in so doing, it ran counter to the basic purpose of JSA, which is to provide income support to an unemployed person provided she is actively seeking work and willing to undertake it.

The AAT found that Champion's unpreparedness to use public transport or telephones, did not prevent her from pursuing advertised vacancies, as she could respond by letter or personally. Although sympathetic to Champion, the AAT concluded that it could not find that there were special circumstances whereby it was not reasonable to expect Champion to seek employment through advertised job vacancies. Therefore, the ameliorating provisions of s.522(1E) did not apply and the DSS had correctly applied the provisions of s.522(1A) and (1C) to the facts of the case.

Formal decision

The AAT affirmed the decision under review.

[G.H.]

Job search allowance: 'enrolled in a full-time course of education'

SECRETARY TO DSS and CHENG
(No. 11121)

Decided: 2 August 1996 by D. Chappell.

The DSS requested review of an SSAT decision which had set aside the DSS decision that Cheng was enrolled in a full-time course of education, and thus not qualified to receive job search allowance (JSA). The DSS had raised and sought recovery of an overpayment of $2565.41 paid to Cheng for the period 27 February 1995 to 7 July 1995. It had also sought recovery of an overpayment to Cheng's wife of $2442.30 for the same period.

The facts

Cheng applied for JSA on 23 August 1994 claiming his wife as a dependant. Cheng and his wife enrolled in a Master of Arts course in Chinese studies which commenced on 27 February 1995. On his fortnightly 'Application for Payment of Job Search' forms Cheng replied 'no' to the question 'Did you enrol or did you study in a full-time course between (dates)?'

Cheng explained to the AAT that he had returned from a trip overseas in August 1994. He decided to apply for a one-year Master of Arts course to improve his employment prospects. The course required him to attend 6 hours a week for face-to-face teaching, and he estimated that he would need to spend approximately 10 extra hours studying because he was a native Chinese speaker and had done considerable study in the area. The course required students from a non-Chinese background to study approximately 40 hours extra a week. Cheng was aware that the University considered the course 'full-time'. The University offered the same course on a part-time basis taking two years.

Cheng told the AAT that he had twice attended the offices of the DSS to inquire whether he was entitled to receive JSA while he was attending the Masters

course. On each occasion, he stated the officer checked the computer and told him that he was entitled to continue receiving JSA. On the second occasion he showed the officer his student card, which showed that he was a full-time student. Cheng explained to the AAT that he thought it was acceptable to say he was not a full-time student because his face-to-face contact was less than 15 hours a week. If he had been aware that his course would be classified full-time by the DSS he would have changed to the part-time course, or withdrawn from the course altogether. Since Cheng's JSA was cancelled he had commenced part-time work and his wife had commenced full-time work.

Cheng's wife gave evidence. She was also enrolled full-time in the Masters course, and had completed it at the same time as her husband, even though she had worked full-time from August onwards. Cheng's wife was able to confirm that they had attended the DSS office twice, but she was vague when recalling exact details of what they had been advised.

The issues

The AAT identified the issues in this matter as:

- whether Cheng was 'enrolled in a full-time course of education';
- whether there was a debt to the Commonwealth pursuant to s.1224 of the *Social Security Act 1991*; and
- whether any debt should be waived pursuant to s.1237 of the Act.

Enrolled in a full-time course of education

The AAT found that there could be no dispute that a Masters of Arts in Chinese Studies was a 'course of education'. The issue was whether this was full-time. The AAT had been referred to the Federal Court decision of *Harradine v Secretary to the DSS* (1989) 25 FCR 35 which had been followed by the AAT in *Secretary to the DSS and Cheary* (1993) 71 *SSR* 1019. In both cases it was noted that there was no definition of 'full-time course of education' in the Act. The AAT quoted from a recent AAT case of *Lander and Secretary to the DSS* (1996) 2(3) *SSR* 38 in which it was decided that whether a course could be categorised as a full-time course of education would depend on a number of matters, including how the university categorised the course. Other matters to take into consideration would be the hours of tuition and study, whether lectures were held during normal working hours, and the hours a particular student actually devoted to study. The AAT noted that whilst the University's categorisation of the course was important, it should not lose sight of the individual characteristics of each case.

In this matter the AAT found that the Master of Arts course was a 'full-time course of education' under the Act. It found the University's classification to be significant, because it was based on the classification under the HECS scheme. This was a consistent means of assessing all courses within the institution. Unlike in *Cheary,* the classes were held during normal working hours and relied on use of the University's facilities. The course was designed to require a number of hours of private study. Cheng had told the Tribunal that he was aware that his course was full-time according to the University, and he had paid full-time fees.

The debt

Pursuant to s.1224 of the Act, Cheng owes a debt to the Commonwealth if as a result of a false statement or false representation, JSA was paid to him during the relevant period. The AAT relied on the Federal Court decision of *McAuliffe v Secretary to the DSS* (1991) 23 ALD 284 noting that for the statement to be false it must be untrue in fact. 'Liability . . . is not dependent on proof that the statement or representation was deliberately or intentionally untrue': Reasons, para. 34. In this matter the AAT was satisfied that Cheng and his wife both knew that the course was full-time when Cheng answered 'no' to the question on the JSA form. As a result JSA was paid to Cheng when he was not qualified to receive it.

Waiver

Because Cheng's debt was outstanding at 1 January 1996, the AAT was able to apply the amended waiver provisions. It was agreed by Cheng and the DSS that write-off was not appropriate in this matter, because Cheng and his wife were both earning an income.

On behalf of Cheng it was submitted that the debt was due to administrative error, and Cheng had received the payments of JSA in good faith. The AAT accepted that Cheng and his wife had twice gone to the DSS to ask advice about their entitlement. However, the AAT could not be satisfied on the balance of probabilities that the Chengs had given the DSS officers sufficient information for those officers to give Cheng and his wife accurate information in their particular case. Therefore, the debt did not arise solely because of administrative error. Cheng continued to state on his form that he was not enrolled as a full-time student, even after he had paid fees as a full-time student.

The AAT then considered whether there were special circumstances in this case. It followed the Federal Court decision of *Beadle v Director General of the DSS* (1985) 60 ALR 225 when deciding what special circumstances should be. It was not sufficient to show financial hardship alone. It was noted that there was no question of illiteracy, isolation or illness in this case. The submission on behalf of Cheng had stated that he had suffered cultural disgrace after his JSA had been cancelled, because he had been forced to borrow money to survive. Also Cheng had acted in good faith when he had received the money. The AAT stated:

> 'While cultural disgrace should not be underestimated, there was no indication before the Tribunal that it was likely to be permanent.'

(Reasons, para. 41)

The AAT decided that there were no special circumstances in this case.

Formal decision

The AAT decided to set aside the decision of the SSAT and substitute its decision that a debt of $2565.41 was recoverable from Cheng.

[C.H.]

Case management activity agreement: failure to comply with terms

SECRETARY TO DEETYA and SMITH
(No. 11036)

Decided: 24 June 1996 by W. Eyre.

The DEETYA cancelled Smith's newstart allowance on the basis that he had failed to comply with the terms of his case management activity agreement (CMAA). The SSAT set aside the DEETYA's decision to cancel Smith's newstart allowance.

Background

On 1 May 1995 Smith signed a CMAA which contained a number of obligations including:

- reporting every 4 weeks to his case manager the list of employers he had contacted and activities undertaken;
- attending the CES 3 times each week, checking the job boards and applying