Newstart allowance: misconduct as a worker

O'KEEFFE and SECRETARY TO THE DSS (No.13099)

Decided: 13 July 1998 by J. Handley

The background

O'Keeffe's employment was terminated by his employer, the reason given being 'misconduct'. As a result, O'Keeffe was subject to an 'activity test rate reduction period' with respect to his newstart allowance after a decision by the DSS that he had become unemployed due to 'misconduct as a worker'.

The allegation was that O'Keeffe had been dismissed because he was drunk at work, had racially abused the supervisor and other employees, had assaulted the supervisor and had refused to leave the premises when asked to do so by the supervisor.

O'Keeffe stated that he had had one 7 ounce glass of beer prior to starting work on the night shift on the night in question. He stated that the night shift supervisor had set out to ensure that his employment would be terminated. He denied having been drunk, racially abusive, or assaulting the night supervisor.

The evidence of the employer, a night shift supervisor and a Police Senior Constable all agreed that O'Keeffe had been slurring his words and sounded drunk. The night shift supervisor and the employer stated that O'Keeffe had been sent home from work that night because he was a danger to himself and other workers, in the presence of large machines in the workplace.

The employer also gave evidence that all employees were required to complete a written contract, one paragraph of which stated that employees should not be in possession of, or under the influence of, intoxicating liquor or drugs.

The legislation

Section 629 of the Act states that if the person's unemployment is due to the person's misconduct as a worker, and it is the person's first or second activity test breach, then the person is subject to an 'activity test breach rate reduction period'. As the AAT points out, the word misconduct is not defined by the Act.

The meaning of 'misconduct'

The DSS relied on the definition of 'serious misconduct' as found in the *Workplace Regulations* No. 12 of 1989, which included intoxication at work or refusal to carry out an instruction by an employer.

The AAT held that that definition while useful is not necessary, as the Workplace Regulations refer to 'serious misconduct' while the Act talked about 'misconduct'.

The AAT stated that:

> 'whilst it would be a factor in considering whether misconduct had occurred to consider the given reason expressed by an employer — in the present case misconduct was recorded as the reason for termination — it must of course not alone be determinative. Whether an employee has become unemployed because of 'misconduct' is a question of fact for which a Tribunal must hear evidence and make findings. The reasons for termination as expressed by an employer must not alone permit the respondent to reduce benefits'.

(Reasons, para. 26)

The AAT also held that it was only the person's misconduct as a worker that was relevant, and behaviour outside employment is not relevant.

Any breach of written terms of conditions of employment should be considered in deciding whether misconduct had occurred. In some cases it might be relevant to consider any workplace agreement.

The AAT found that O'Keeffe was under the influence of alcohol at his workplace on the night that he was dismissed. It also found that he was abusive to other employees. The behaviour of O'Keeffe on that night amounted to misconduct.

Formal decision

The AAT affirmed the decision under review.

[A.B.]

Family allowance: arrears; residency requirements

SECRETARY TO THE DSS and MOSCA (No. 13155)

Decided: 5 August 1998 by S.M. Bullock.

Background

Mr and Mrs Mosca came to Australia from Uruguay in 1972. Their daughter, Carolina, was born in 1980 and has an intellectual disability. In 1989 the family returned to Uruguay so Mrs Mosca could care for her terminally ill sister. Mr Mosca returned to Australia in 1991 and sent money to his family in Uruguay. Mrs Mosca's sister died in May 1996, and Mrs Mosca and Carolina returned to Australia in October 1996.

Mrs Mosca was receiving family allowance for Carolina before they went to Uruguay. She told the DSS that her absence would be indefinite, but possibly for two years, and she would contact the DSS about payment on her return. Further payments were suspended, and the allowance was cancelled in June 1992. It was not clear whether a notice of the suspension was given to Mrs Mosca, but the DSS conceded that a cancellation notice was not sent.

On returning Mrs Mosca claimed arrears of family allowance from 15 June 1989 to 15 June 1992, and was refused by the DSS because she was considered not to be an Australian resident. The SSAT decided Mrs Mosca was a resident, remitting the matter back for DSS to determine the amount payable and the date of effect. The DSS appealed to the AAT.

Could arrears be paid?

It was common ground that if it was payable at all, family allowance could only be paid for the first 3 years of Mrs Mosca and her daughter's absence from Australia (see for example s.836(1), *Social Security Act 1991* (the 1991 Act)). As a preliminary issue the AAT considered whether family allowance for that period could now be paid on the assumption that Mrs Mosca had been qualified to receive the allowance.

The DSS argued that family allowance had been correctly cancelled in 1992 as Mrs Mosca and Carolina had been overseas for 3 years, and even if that decision was set aside the earlier decision