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

to suspend payments would remain. The AAT noted that in *Secretary, DSS v Sevel & O'Connell* (1992) 28 ALD 626, the Full Court of the Federal Court held that the effect of a decision to set aside a decision to suspend an allowance is to revive a person's entitlement to receive it until some other event or act terminated that entitlement. It also noted that s.1243A was inserted into the Act in 1993 in response to that decision. Section 1243A(1) provides:

'If:

(a) the Secretary makes a determination (the **'first determination'**) that:

(i) a social security payment is granted or is payable to a person; or

(ii) a social security payment is payable at a particular rate to the person; and

(b) the Secretary makes a determination (the **'second determination'**):

(i) to cancel the social security payment; or

(ii) to reduce the rate at which the social security payment is payable; and

(c) notice of the second determination is given to the person; and

(d) the person applies under section 1240 for review of the second determination; and

(e) the application is made more than 13 weeks after the notice is given; and

(f) a decision (the **'review decision'**) is made by the Secretary, the CEO, an authorised review officer, the Social Security Appeals Tribunal or the Administrative Appeals Tribunal; and

(g) the review decision, or the effect of the review decision, is:

(i) to set aside the second determination; or

(ii) to affirm a decision setting aside the second determination;

the following provisions have effect:

(h) the second determination does not become void from the time when it was made;

(i) the mere setting aside of the second determination does not of itself revive the first determination.

. . .

Note 3: This section does not apply to a determination by the Secretary to suspend a social security payment. If the Secretary's determination to suspend a social security payment is set aside on review, the recipient is placed in the position that he or she would have occupied if the determination to suspend had not been made.

Note 4: If the Secretary or an authorised review officer decides that a person's social security payment is to resume, or resume at an increased rate, section 887 restricts the date from which the new determination can take effect. Section 1255 places a similar restriction on the Social Security Appeals Tribunal and s.43 of the *Administrative Appeals Tribunal Act 1975* places a similar restriction on the Administrative Appeals Tribunal.'

The AAT concluded that as s.1243A only applies where a determination has been made to cancel or reduce the rate, where the decision was to suspend payments, as in this case, the Act does not prevent the payment of arrears.

Resident in Australia?

Following *Katsimalis & Secretary, DSS* (1994) 36 ALD 759 the AAT then looked at whether Mrs Mosca met the qualification criteria for family allowance in the *Social Security Act 1947* and the 1991 Act, as amended from time to time, during the first 3 years of her absence from Australia. In particular, it considered whether or not she was an Australian inhabitant and hence resident in Australia.

From Mrs Mosca's statement to the DSS before she left and her oral evidence, the AAT found there had been a clear purpose behaind the travel to Uruguay and that Mrs Mosca's absence from Australia continued to be of a temporary nature. The absence was longer than originally envisaged, but it was not clear how long it would take for Mrs Mosca's sister to pass away. The sale of their house and other assets in Australia before departing had been a way of achieving their purpose of caring for Mrs Mosca's sister and, while not the only way of achieving that purpose, was not an unreasonable choice. Mrs Mosca had a rational explanation for not returning to Australia immediately after her sister died, namely that Carolina needed to be taught English again.

There was evidence to suggest that Mr Mosca's return to Australia in 1991 was because the marriage had broken down due to his infidelity, but Mrs Mosca said he had asked for her forgiveness and she had given it before he returned. The AAT considered:

> 'that in 1991 . . . and beyond Mrs Mosca did have a clear conviction that her marriage was continuing and therefore in her mind had a strong family connection with Australia.'

(Reasons, para. 111)

Carolina also had ties with Australia as:

> 'her future in terms of the availability of special resources for people with her disability was more likely to be found in Australia than in Uruguay, particularly resources which could be provided to Carolina in an affordable manner.'

(Reasons, para. 112)

Formal decision

The AAT took the view that Mrs Mosca was a resident of Australia from June 1989 to June 1992, and that family allowance was payable for that period. It affirmed the SSAT's decision and remitted the matter to DSS to calculate the amount payable under the income test.

[K.deH.]

Family payment: proper notice of a previous decision

McALLAN and SECRETARY TO THE DSS (No. 12840)

Decided: 22 April 1998 by R.P. Handley.

The background

McAllan had 2 children Joshua and Sarah. Joshua turned 16 on 11 October 1995. On 18 August 1995, McAllan lodged a 'Review of Payment for Students Turning 16 years of Age' form. In answer to question 4 'Will your student be eligible to receive AUSTUDY . . . in 1995?, McAllan answered:

> 'Our taxable income will be reduced for this year as my husband was unemployed for 4 months and I am not working at present, but if AUSTUDY is calculated on 93/94 our income may have been higher, so we shall claim but if we are not able to receive payments for Joshua we shall claim Home Child Care Allowance.'

McAllan received a letter dated 25 September 1995 from the Department informing her that her family payment for Sarah and Joshua would be $45.15.

A further letter from the Department dated 6 October 1995 contained these paragraphs:

> 'I am writing to you about your Family Payment. You will be paid $21.70 every second Thursday, starting 12 October 1995. This amount is your family payment for Sarah. We cannot pay you Additional family payment any more. This is because your income is more than the amount allowed . . . You should contact us now if you expect that you and your partner's combined income for this financial year (1995/96) will be at least 25 % lower than it was in 1993/94, or below $21,700 plus $624 for each dependent child after the first.'

In December 1996, McAllan became aware that family payment was still payable for Joshua as the income threshold far exceeded the family's income. On 23 December 1996, McAllan lodged a new claim for family payment in respect of Joshua. Arrears of family payment for Joshua were not paid to McAllan on the basis that she had not sought a review of the decision to reduce the rate of family payment within 13 weeks of the decision.

The issue

Were arrears of family payment payable for the child Joshua? This depended on whether a proper notice was given to McAllan advising her of the making of a previous decision to terminate family payment for Joshua.