

# Federal Court

## Meaning of 'unemployed'

**DEVRIADIS v SECRETARY TO THE DFaCS**  
(Federal Court of Australia)

**Decided: 15 September 2000 by Mansfield J.**

Devriadis appealed against an AAT decision that he owed debts of unemployment benefits, job search and newstart allowance paid to him between 18 March 1991 and 30 April 1993.

### The facts

Devriadis and his wife were directors and shareholders of Zorba Structural Steel Co Pty Ltd (Zorba). The company conducted a structural steel fabrication business. Zorba employed Devriadis until December 1990. He applied for unemployment benefits in March 1991. While receiving unemployment benefits Devriadis continued to undertake certain activities for Zorba, which he did not tell the DSS about.

### The law

At the time when Devriadis applied for unemployment benefits the *Social Security Act 1947* applied. Section 116 provided that throughout the period a person is qualified to receive unemployment benefits if that person is unemployed and capable and willing to undertake paid work. According to s.116(4) a person could be treated as being unemployed even though the person had undertaken some paid work. The *Social Security Act 1991* came into operation of 1 July 1991. Similar provisions applied.

Section 1224(1) of the 1991 Act states that where an amount that should not have been paid has been paid to a person because of a false statement or false representation, that amount becomes a debt due to the Commonwealth. Sections 1236 and 1237 of the 1991 Act provide for write off and waiver of the debt.

### The issues

The issues the Court addressed were:

1. whether the applicant was unemployed during the period 1 March 1991 to 12 June 1993;
2. whether the AAT should have treated Devriadis as being unemployed;

3. whether Devriadis received unemployment benefits because he made a false statement or false representation;

4. if there is a debt, whether it should be written off or waived.

### The findings of the AAT

In its reasons for decision the AAT indicated that it gave little weight to Devriadis' evidence except where the evidence was corroborated. Devriadis' accountant had also given evidence. The AAT stated that it had 'some difficulty' with the accountant's evidence. The Court noted that it was unclear if the AAT placed no weight on the accountant's evidence where it was not corroborated.

The AAT relied on the documentary evidence that showed Zorba operated its bank accounts between March 1991 and June 1993 with 45 deposits totalling over a \$125,000 and more than 400 withdrawals. Zorba entered into a number of contracts to perform structural steel works worth up to \$100,000.

During the period in question Zorba had a lease on its premises, a telephone connection and advertised in the Yellow Pages. It also advertised its business in various journals. It consistently used electricity through the period. In 1993 Devriadis tried to sell Zorba's business.

The Court noted that the AAT set out Zorba's accounts but did not state that it accepted those records as correct, although this could be inferred. The AAT commented that the accounts suggested a cash or prompt payment business. The accountant had explained that certain withdrawals from the accounts were shareholder drawings. The AAT found a discrepancy in the books also suggesting cash transactions. The Court noted that for the AAT to draw this conclusion it must have accepted the accountant's evidence.

The AAT inferred from bank deposit slips that Zorba was doing some subcontract work. The Court could find no evidence from the banks slips for this inference.

The AAT found that Devriadis and his wife owned an investment property from which they received rental income. The property was mortgaged, although Devriadis did not mention the property to the DSS when he lodged his claim. Devriadis had consistently stated

'no' on the form to the question 'did you work?'

Several findings were made by the AAT in relation to Devriadis' bank accounts, which were acknowledged by the Department to be incorrect. It was argued that these findings 'unfairly coloured the Tribunal's approach'. The Court found it hard to understand what use the AAT had made of these findings, and therefore it was difficult to say that these findings had tainted the AAT's decision.

Devriadis' tax return showed income from Zorba and income from the rental property. The AAT found the tax return to be false, but made no findings about Devriadis' actual income.

The AAT concluded that because Devriadis was the controlling mind of the company and also a director, he was not unemployed. The AAT refused to exercise the discretion to treat Devriadis as being unemployed, because of the undisclosed cash trading and direct involvement in the day-to-day running of the company.

### 'Unemployed'

Mansfield J referred to *McAuliffe v Secretary to the DSS* (1991) 23 ALD 284 where the meaning of 'unemployed' was discussed. The Court concluded that the meaning of 'unemployed' was essentially a question of fact and degree. The purpose of unemployment benefits was to provide income to persons who were unable to find paid work. The meaning of 'unemployed' was not to be engaged in remunerative work. It was acknowledged that a self-employed person who works varying hours each day for little return may not be 'unemployed'. The Court found that the AAT:

Has addressed the question whether as a matter of fact and degree, the appellant was unemployed. It did so on the basis that 'unemployed' bears its colloquial meaning. Its conclusion reflects its findings that the applicant was working for the benefit of Zorba in carrying out its normal business activities on a significant scale, albeit a scale reduced from its level of activities of previous years.

(Reasons, para. 42)

### The adequacy of the findings of fact

It was argued that the AAT had failed to make findings about the activities of Zorba during the relevant period, the likelihood of undisclosed cash trading and Devriadis' involvement in the day-to-day running of Zorba. The Court

stated that it was difficult to discern the AAT's findings of fact upon which it based its conclusions. In some cases the findings were not explicitly made. The Tribunal relied upon the documentary evidence and Devriadis' own evidence to conclude that he was carrying on a business and that this led to Devriadis being not 'unemployed'.

Reading the Tribunal's decision as a whole and not over-zealously, particularly in light of the documentary evidence upon which it relied, the basis of its reasoning emerges clearly, as does the source of the material for its conclusions.

(Reasons, para. 46)

Two findings raised concerns for the Court. These were the findings concerning Devriadis' tax returns and the evidence of the accountant. It was unclear from the reasons what use the AAT had made of these findings. Mansfield J concluded that it was not necessary for the AAT to make findings on each piece of evidence or argument.

The purpose of provisions such as subs 43(2) and (2B) of the AAT Act are to ensure the public and the parties are informed of the manner in which the Tribunal's decision was arrived at. That enables it to determine whether legal error has been made in the consideration of the application, and to demonstrate generally that the Tribunal has approached its responsibility properly and fairly.

(Reasons, para. 46)

Mansfield J stated that it would have been preferable if the AAT had clearly indicated what findings it made on the accountant's evidence. The AAT should state in clear and unambiguous language whether it accepts or rejects the evidence. However, if the reasons are read as a whole the findings are discernible.

#### Discretion to treat as unemployed

It was argued by Devriadis that the AAT had failed to address the issue that his activities on behalf of Zorba were unusual and sporadic. The Court rejected

this argument and noted that the AAT had found that Devriadis' activities were of a continuous nature.

#### False statement or representation

It was argued that a DSS officer had told Devriadis that he did not have to disclose the income he received from Zorba, and therefore he had not made a false statement. The Court noted that the AAT had chosen to place no weight on Devriadis' evidence except where it was corroborated. This was not an error of law. Devriadis conceded that his non-disclosure of rental income would have led to an overpayment.

#### Waiver and write off

It was argued by Devriadis that waiver and write off had not been considered by the AAT. The Court found that the AAT had had regard to the fact that Devriadis had made 'dishonest claims for benefits', and that it found no special circumstances existed and gave reasons.

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