Section 116(6A) not applicable to Clemson

Neaves J said that s.116(6A) could only operate to prevent qualification for unemployment benefit on the actual day when the person moved her or his residence; and was irrelevant to the qualification of a person who moved outside the period in respect of which the person was seeking to qualify.

Section 126(1)(aa) not applicable to Clemson

Neaves J said that each of the paragraphs of s.126(1) (addressing such matters as voluntary unemployment, misconduct as a worker and failure to accept a job offer) —

> 'was intended to have an operation only where, by virtue of the operation of the other provisions of the statute, including ss.116 and 125, an unemployment benefit was payable to a person in respect of an identifiable period . . . [Section] 126(1) was to be read as requiring that the circumstances referred to in each of the lettered paragraphs have a close relationship to the period in respect of which the unemployment benefit would have been payable by virtue of the provisions of the statute other than s.126'.

(Reasons for Judgment, p. 22)

In particular, s.126(1)(aa) required, before it would be applicable, that the change in a claimant's residence during the period for which unemployment benefit would otherwise have been payable occurred:

> 'Thus the paragraph would operate in a case where a person already in receipt of an unemployment benefit moved to a new place of residence with the consequent lessening of his or her employment prospects. The paragraph would also operate in the case of an initial application for unemployment benefit provided the change in residence occurs during the period in respect of which benefit would, apart from the provisions contained in s.126, have been payable.'

(Reasons for Judgment, pp. 24-5)

Neaves J said that he had 'taken a somewhat different view of the relevant statutory provisions from that taken by the Tribunal': Reasons for Judgment, p. 25. However, the AAT had been correct in concluding that ss.116(6A), 126(1)(aa) and 126(4) did not apply so as to prevent payment of unemployment benefit to Clemson.

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

Background

DISABILITY AND SICKNESS LEGISLATION

Policy objectives of the legislation

A year after the commencement of the *Social Security (Disability and Sickness Support) Amendment Act* 1991, Anne Anderton, Senior Member of the Social Security Appeals Tribunal in Perth, identifies issues of interpretation of the Act which have yet to be considered by the AAT.

Just over a year ago, on 12 November 1991, the *Social Security (Disability and Sickness Support) Amendment Act* 1991 came into operation replacing invalid pension and sickness benefit with the new payment types of disability support pension and sickness allowance.

The shifting emphasis of the legislation is well expressed in the Department's own motto for the new legislation: 'Disability Reform Package — Focus on Ability'.

Peter Staples, in moving that the Bill be read a second time in Parliament referred to it as 'the introduction of an entirely new strategy which will help us deal far more effectively with the needs of people who have disabilities in the 1990s'.

Over the past 20 years there has been a significant increase in the number of people in receipt of disability income payments. Over the past ten years the number of people in receipt of invalid pension increased by 66%, far in excess of the population growth.

The increase has been attributed to a number of factors:

- The structural changes in employment and the ageing of the population with a consequential increase in the chance of being injured at work.
- The loosening of the eligibility criteria, referred to by the Government as follows:

  'The AAT went a considerable way in taking account of socio-economic factors and the labour market in assessing a person's incapacity for work.'

  The Government suggested that in the case of long-term recipients of invalid pension 'The concept of permanent incapacity for work became self-fulfilling' as a result of which only 2% of invalid pension recipients returned to work.'
- In referring to sickness benefit the government suggested that a number of problems existed in the old legislation, the main one being that the level of incapacity was not specified. This led to differences of opinion as to whether total or merely partial incapacity for work was required.

These problems resulted in many applicants, who had medical problems too insignificant to enable them to receive invalid pension, receiving sickness benefit for many years.

The overhaul of the disability legislation started in the late 1980s. The initial review recommended changes to income support payments and suggested a far greater level of assistance for retraining and rehabilitation to positively assist people with disabilities to return to work.

The review recommended that eligibility for a new payment, to be called disability support pension (DSP) be clarified and that it should rely on the interaction of three major factors:

- the level of medical impairment and its functional effects;
- relevant socio-economic factors affecting the individual's employment chances such as qualifications, education and English language skills;
- the labour market opportunities which are available to the person.

In the event, the legislation disregarded all but the first of these factors.

The Disability Reform Package was announced in the 1990/91 Federal Budget and was finally implemented in November 1991.

The main aims of the legislation are as follows:

- to help people with disabilities obtain employment and become independent while at the same time ensuring that they receive income support as long as required;
- to target DSP to people with significant medical disabilities; and

- to ensure that sickness allowance (SA) retains its temporary nature.

Sickness allowance

The medical eligibility criteria for SA are contained in s.666(1) of the *Social Security Act* 1991 which states that a person is qualified for SA in respect of a period if:

- the person is incapacitated for work throughout the period because of sickness or an accident; and
- the incapacity is caused wholly or virtually wholly by a medical condition arising from the sickness or accident; and
- the incapacity is, or is likely to be of a temporary nature.

It is important to note that the legislation refers to the *incapacity for work* being temporary, not the *medical condition.* Therefore, a person who has a permanent medical condition can be eligible for SA if the condition temporarily incapacitates the person for work.

'Work' for SA purposes is now defined in the legislation and there are two distinct categories.

The first is where the person already holds a job and there 'work' is defined as 'the work that the person has contracted to perform under the contract of employment'.

If the person does not have a job then 'work' is widely defined to be:

> Work of a kind that the person could, in the Secretary's opinion, be reasonably expected to do, and which is for at least eight hours a week (s.666(2)).

This definition would suggest that in deciding what work a person could reasonably be expected to do it is acceptable to consider socio-economic as well as medical factors. The considerations identified in *Re Panke* (1981) 2 *SSR* 9 for assessing a person's incapacity for work are relevant here.

Disability Support Pension

The qualification criteria for DSP are set out in s.94 of the *Social Security Act* 1991 which states that a person qualifies for DSP if the person

- has a physical, intellectual or psychiatric impairment of 20% or more under the impairment tables; and
- has a continuing inability to work.

The impairment tables are contained in Schedule 1B of the Act. The introduction to Schedule 1B states that for an impairment rating to be assigned the condition must be a 'fully documented, diagnosed condition which has been investigated, treated and stabilised'.

The s.94 criteria raise several problems of legislative interpretation, which SSATs have had to grapple with in the absence of guidance from the AAT or the Federal Court. The issues are:

(a) how to determine the types of work for which a claimant is 'currently skilled';
(b) in determining whether a medical condition prevents the person from working for at least two years, from what date is that period to be reckoned?
(c) in determining whether a person is capable of undergoing educational or vocational training, is there a minimum number of hours per week?

Each of these issues is now discussed in greater detail.

Work for which the person is currently skilled

To satisfy the test of 'continuing inability to work' the impairment firstly must be 'of itself sufficient' to prevent the person from doing:

- the person's usual work, and
- work for which the person is currently skilled.

The inclusion of the words 'of itself sufficient' would appear to suggest that only the impairment can be taken into account — no other socio-economic factors are relevant.

Most of the DSP cases of which I have personal experience involve decisions by the DSS rejecting the DSP claims pursuant to a finding that although the claimant cannot do his or her usual work the claimant is capable of alternative work.

The Department appears to be defining 'work for which the person is currently skilled' as including unskilled work and including work of which the claimant may have had no previous experience.

I accept that if you have before you a bricklayer who has also had past experience as a sewing machine mechanic it is relevant to consider his skills in that other area and whether his medical condition would preclude him from exercising those skills.

However, is it within the spirit and meaning of the legislation to assume that everyone has the skills to do work such as theatre attendant, shop assistant, security officer and caretaker even if they have never done that type of work?

I would submit that the legislation requires some evidence of actual skill in a particular type of work before a person can be said to be 'currently skilled' for that work.

If no previous experience in such work is required why is the word 'skilled' used in the legislation? Why not simply use the SA test of 'work which the person could reasonably be expected to do'? Also, why does the legislation assume that some people will need to attend an educational or vocational training program to learn such skills?

Reckoning the two-year period

Section 94(2) states that to qualify for DSP the medical condition must prevent the person from working for at least two years.

When does this two year period start? From the date of onset of the medical condition, from the date of claim for DSP or from the date of the appeal to the SSAT or the AAT?

The two year period is also relevant in considering the tests of educational and vocational training for DSP.

To pass the 'inability to work' test a person's medical condition has to prevent him or her from undergoing educational or vocational training within the next two years or it has to be shown that such training would not equip the person within the next two years to do work for which the person is currently unskilled.

The legislation here refers to the *next* two years and so we can assume that we are looking at two years from the date of the decision, whenever that is made.

Ability to undertake training

'Work' for DSP purposes is defined in s.94(5) as being for at least 30 hours per week. Unfortunately there is no equivalent definition of 'training'.

Are we to consider a person's ability to do a training course which lasts eight hours a day or one hour a week? The legislation contains no guidance as to the minimum weekly hours that a person is capable of spending in training.

Except for applicants who are aged 55 or more, the availability of work in the person's locality is irrelevant as long as such work exists in Australia. The local availability of educational and vocational training is irrelevant irrespective of age. It would arguably be unreasonable to send someone away from home to train if they are over 55 and the work for which they could be trained is not available in their local area.

The only times when the Act permits the consideration of non-medical factors in DSP cases is when the applicant is aged 55 or more, or when considering whether training is likely to equip a person with work skills in a two year period. Here one should consider English language ability, level of intelligence and other factors identified in *Re Panke* in deciding whether within the two year period the person is likely to acquire skills to do work for which the person is currently unskilled.

At the time of writing, there were no relevant AAT decisions considering any of these issues. It is hoped that a body of relevant decisions will soon be developed to guide DSS decision-makers and SSATs in the interpretation of the legislation.

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