Administrative Appeals Tribunal Decisions

Unemployment benefit: 'work test'

WALLER and SECRETARY TO DSS (No. N83/371)

Decided: 10 July 1985 by J. R. Dwyer.

Charles Waller had been granted unemployment benefit in October 1981. In July 1982, the DSS learned that Waller had commenced working around 27 May 1982. Accordingly, the DSS cancelled Waller's benefit from 13 July 1982, and decided that all the unemployment benefit paid to Waller between 27 May and 13 July 1982 was an overpayment which could be recovered from Waller.

Waller asked the AAT to review that decision.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person meets age and residence requirements and if the person passes the 'work test', set out in paragraph (c) of that sub-section. That is, the person must be unemployed, capable of undertaking and willing to undertake paid work and have taken reasonable steps to find such work.

Section 107(3) gives the Secretary a discretion to treat a person as unemployed, notwithstanding that the person undertook paid work. This discretion is to be exercised by taking into account the nature and duration of the work and any other matters considered relevant.

Section 140(1) provides that any amount paid by way of benefit is recoverable from the person to whom the amount was paid if that amount was paid in consequence of a false statement or representation or in consequence of failure to comply with the *Social Security Act*.

The issues

The DSS claimed that the unemployment benefit paid to Waller was recoverable because he had not been qualified to receive it (as he had been employed during the relevant period) and because he had failed to disclose that employment to the DSS. Indeed, Waller had told the DSS (on his applications for continuation of unemployment benefit) that he was not working or receiving any income.

On the other hand, Waller claimed that the work which he had undertaken was selling on commision, from which he had cleared very little money and his employment had been on a trial basis. Accordingly, Waller argued, he should be treated as 'unemployed' during that period. Alternatively, he argued that the Secretary's discretion under s.107(3) should be exercised so as to treat him as 'unemployed'.

Not 'unemployed'

The AAT referred to the Federal Court decision in *Thomson* (1981) 38 ALR 624 and the statement that, 'at its broadest the description "unemployed" encompasses those who are without paid work'. The AAT said that, as Waller had worked 4½ days a week during the relevant period and had received commission payments throughout that period, he had not been 'unemployed'.

The discretion

The AAT said that the most common cases for exercising the s.107(3) discretion would probably be where a person earned a small amount by casual part-time work while looking for full-time work. In *Hine* (1981) 4 *SSR* 38 the AAT had refused to exercise the s.107(3) discretion where a person had worked long hours for inadequate reward. There were other cases where people engaged in their own businesses and unable to earn an adequate income had failed to obtain unemployment benefits: *Brabenec* (1981) 2 *SSR* 14; *Te Velde* (1981) 3 *SSR* 23; *Weekes* (1981) 4 *SSR* 37; and *Maiorano* (1984) 19 *SSR* 197.

In the present case, Waller had been engaged to work for an indefinite period; so that there was nothing in the duration of the work which would support an exercise of the s.107(3) discretion. Although Waller claimed that he had earned very little during the period of this employment, the evidence showed that he had received substantial payments of commission (apart from the first 2 weeks of his employment). The AAT decided that, in view of his low earnings in those first 2 weeks, the discretion in s.107(3) should be exercised to treat him as 'unemployed' during those 2 weeks only.

Recovery of overpayment

It followed, the AAT said, that Waller had been overpaid unemployment benefit during the period from 12 June 1982 to 13 July 1982 and that the full amount of unemployment benefit paid to him in that period was recoverable under s.140(1).

Given that Waller had received public moneys to which he had not been entitled because of his failure to disclose his employment to the DSS, and given that there was no evidence of hardship, the AAT said that the full amount of the overpayment should be recovered from Waller.

Net or gross income?

The AAT said that it was not necessary to decide the exact amount of the income received by Waller from his employment on commission. In particular the AAT did not have to decide which of the expenses claimed by Waller should be set off against his commission earnings in calculating his income during that period.

The Tribunal noted that this question had caused some conflict of opinion in earlier decisions, such as *Shaefer* (1983) 16 *SSR* 159; *Szuts* (1983) 13 *SSR* 128; *Paula* (1985) 24 *SSR* 288; and *Sheppard* (1983) 13 *SSR* 127. Recently, the Federal Court had said that, 'having regard to the purpose of reducing the pension by reference to income earned, we are of the view that, at least in general, net income is meant': *Haldane-Stevenson* (1985) 26 *SSR* 323.

In all the cases, the AAT noted, a sharp distinction had been drawn between income under the *Social Security Act* and income under the *Income Tax Assessment Act* 1936. Some further clarification of this issue by Parliament, the AAT suggested, would remove the current uncertainty: Reasons, para. 45.

Formal decision

The AAT affirmed the decision to raise an overpayment but varied the amount of overpayment so as to cover all but the first 2 weeks of Waller's employment; and the AAT remitted the matter to the Secretary.

LOCHNER and SECRETARY TO DSS (No. N84/322)

Decided: 15 July 1985 by J. R. Dwyer.

Clive Lochner had been granted unemployment benefit in November 1977. This benefit was paid to Lochner at the married rate because he was living in a *de facto* relationship with a woman, F.

On 23 January 1979, the DSS cancelled Lochner's unemployment benefit on the ground that he was no longer 'unemployed'. The DSS then decided that Lochner had been employed since 25 September 1978 and it decided to recover from him the total amount of unemployment benefit paid to him since then, namely, $1373, by deducting $5 a week from his current unemployment benefit. According to the DSS, Lochner's employment consisted of working in a health food shop owned and operated by his *de facto* wife.

Lochner asked the AAT to review the DSS recovery decision.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person meets age and residence requirements and if the person passes the 'work test'; that is, the person must be 'unemployed', capable of undertaking and willing to undertake paid work and have taken reasonable steps to obtain such work.

Section 112(2) provides than an increased rate of unemployment benefit (the married rate) is to be paid to 'a married person who . . . has a spouse . . . dependent (whether substantially or less than substantially) on the married person . . .'

Section 140(1) provides that, where an amount of unemployment has been paid as a consequence of a false statement or a failure to comply with the Act, that amount is recoverable from the person to whom it was paid.

Section 140(2) gives the Secretary a discretion to deduct from any current benefit an amount paid by way of unemployment benefit which should not have been paid.

The evidence
The only evidence as to Lochner's involvement in his wife's business was given by Lochner. He said that his wife had opened the shop on 25 September 1978 and that he had provided her with some help (about 1/2 hour each day) until Christmas 1978 but had not been paid for this help. He said that from 25 December 1978, he had been heavily involved in the operation of the shop and that this had continued at least until the cancellation of his unemployment benefit. Lochner told the AAT that he had not been prepared to work in his wife's shop (although there had been employment available there) before Christmas 1978 because he did not like selling and because he feared that it would strain his relationship with his wife.

Lochner also claimed that his wife's shop had never made a profit but it appeared that, early in 1979, the shop had been sold for more than $8000.

Lochner told the Tribunal (and the DSS did not dispute this) that he had been advised by a DSS officer that he was not obliged to refer to his wife's business on his regular applications for continuation of unemployment benefit, unless that business produced a profit.

Finally, Lochner argued that any recovery of the overpayment would cause him financial hardship because his present weekly income (from unemployment benefit) was $101 and this was fully committed to meeting his living expenses and a hire purchase repayment of $50 a week.

'Unemployed'?
On the basis of Lochner's evidence, the AAT decided that the level of his involvement in his wife's business before 25 December 1978 was not so high as to prevent him from being 'unemployed' during the period between 25 September and 25 December 1978. But his increased level of involvement in the business after Christmas 1978 established that he was not 'unemployed' from that date on.

'Willing to undertake paid work'?
However, the AAT said that Lochner's evidence that he had been unwilling to work in his wife's business before December 1978 (when this work had been available from 29 November to 25 December 1978) demonstrated that, during that period, Lochner had been unwilling to take suitable employment.

Overpayment
It followed from these 2 findings that Lochner had not been qualified to receive unemployment benefit for the period from 29 November 1978 to the date of the cancellation of his benefit on 10 January 1979 and that the whole of the benefit paid to him in that period was recoverable from him.

Benefit at the married rate?
The AAT then considered the question whether Lochner should have been paid unemployment benefit at the married rate during the period from the opening of his wife's business on 25 September 1978 to 29 November 1979. The answer to this question depended upon whether his wife could be described as 'dependent' on Lochner. Referring to earlier AAT decisions in *Brabenec* (1981) 2 *SSR* 14, *McKenna* (1981) 2 *SSR* 13 and *Weekes* (1981) 4 *SSR* 37, the Tribunal said:

> 24. It would be a strange result to hold that a spouse running a non-profitable business is a 'dependant' for the purposes of the Act when many cases have held that proprietors of small businesses are not entitled to unemployment benefit in their own right even if the business makes no profit . . .
> 26. To hold that Ms Fisher is a 'dependant' for the purposes of the Act would mean that single people engaged in non-profitable businesses would not be entitled to receive any assistance by way of social security but people running such a business and married to a pensioner or a beneficiary would be entitled to receive indirect support in the way of additional pension or benefit paid to their spouse.

The AAT said that this inconsistency in approach appeared to be inherent in the different wording of s.107(1)(c) (the work test) and s.112(2). Without expressing any concluded views on this issue, the Tribunal attempted to establish whether Lochner's spouse had been dependent on him in this period. It described the evidence about the profitability of the business as 'thoroughly unsatisfactory'. Given the difficulty of establishing whether the business was making a profit in 1978, and the fact that it was dealing with welfare legislation, the AAT decided that it was—

> appropriate not to regard the amount represented by the difference between the single and the married rates of unemployment benefit paid to Mr Lochner between 25 September 1978 and 29 November 1978 as an overpayment.

(Reasons, para. 32)

Recovery of overpayment
Because the overpayments made to Lochner between 29 November 1978 and 10 January 1979 were made in consequence of Lochner's failure to advise the DSS of the extent of his involvement in his wife's business, they were recoverable from Lochner under s.140(1) as well as under s.140(2). There were no grounds in the present case, the AAT said, for exercising any discretion to waive recovery of the overpayment.

Recovery might be postponed for a limited period if Lochner could establish that his present financial situation prevented him from immediately repaying the overpayment. In particular, if the hire purchase agreement (under which Lochner was making repayments of $50 a week) could be shown to have pre-dated the hearing of this review, it would be appropriate to postpone recovery until that agreement expired. Otherwise, it would be appropriate immediately to resume recovery by deduction at the rate of $5 a week from Lochner's unemployment benefit.

Formal decision
The AAT affirmed the decision to raise an overpayment but reduced the amount of that overpayment to $532 and remitted the matter to the Secretary.

HOWIE and SECRETARY TO DSS (No. Q84/139)

Decided: 12 August 1985 by J. A. Kiosoglous, D. J. Howell and H. M. Pavlin.

Ian Howie was a qualified carpenter who had last worked in his trade in October 1980. The DSS granted him unemployment benefit in October 1980, which continued until August 1983, when it was cancelled at Howie's request because he was harvesting strawberries on his own land. Howie was again granted unemployment benefit in October 1983 and this continued until the DSS cancelled his benefit from 26 March 1984 on the basis that he was no longer 'unemployed'. Howie asked the AAT to review that decision.

The legislation
Section 107(1) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person meets age and residence requirements and if the person passes the 'work test': that is, the person must be 'unemployed', be willing to work and capable of working and must have taken reasonable steps to obtain work.

The evidence
Howie had planted 3000–4000 strawberry plants on one hectare of land in 1983. The maintenance of the plants (watering, fertilizing and weeding) occupied no more than 2 hours a week. It was only during the picking season (about 8 weeks over summer) that the plants required full-time attention.

In the 1983–84 tax year, Howie had made a loss of $905 on the plants; and in the following year he had made a profit of $1661. However, all of the profit would have been spent on replanting the strawberries (which needed to be totally replaced every two years). After the 1984 picking season, Howie had decided not to replant but to abandon the venture. It appeared that, if he were to undertake the venture seriously, he would need at least 6000 plants.

Not a serious business undertaking
The AAT referred to a number of earlier decisions, such as *Te Velde* (1981) 3 *SSR* 23, *Brabenec* (1981) 2 *SSR* 14, *Ozdil* (see this issue of the *Reporter*) *Vavaris* (1982) 11 *SSR* 110 and *Guse* (1982) 6 *SSR* 62. Those decisions had established that the question whether a person was 'unemployed' within s.107(1) depended on whether the person was 'engaged in a serious business undertaking or a viable economic enterprise'. Those decisions had established that a number of factors should be taken into account when deciding whether a person was engaged in a serious business undertaking. The factors included—

- the person's intention;
- the size of the venture;
- the amount of time required to operate the venture;
- the economic viability of the venture;
- whether the undertaking was experimental or long term; and
- the person's level of commitment to the venture.

In the present case, the AAT said, it had originally been Howie's intention that the strawberry venture might provide him with an adequate income. However, there had never been any realistic prospect of such a small strawberry farm achieving that result. In the AAT's view, 'such an enterprise was never capable of being described as a serious business undertaking'.

In any event, the AAT said, by the second year of the venture, Howie's intentions had changed—he had decided to harvest the second (1984) crop and then to plough in the strawberry crop. Finally, the amount of time which he was devoting to the venture in March 1984 was minimal. Taking all those factors into account, the AAT concluded that from 26 March 1984 until 30 June 1984 (when Howie began to harvest the 1984 crop), Howie had been qualified for unemployment benefit.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Howie was 'unemployed' with s.107(1) between 26 March 1984 and 30 June 1984.

OZDIL and SECRETARY TO DSS (No. V84/227)

Decided: 7 June 1985 by I. R. Thompson.

The AAT *affirmed* a DSS decision to reject an application for unemployment benefit by a 37-year-old grape grower.

Ozdil and his wife owned a 20-acre vineyard which had proven inadequate to support their family. Although they had placed the vineyard in the hands of estate agents for sale, they had been unable to sell it because no one was willing to pay the price which they asked. In the meantime, Ozdil had continued to attend to pruning, weeding, spraying, irrigation and harvesting and drying of the grapes.

Ozdil said that, although he had done the bulk of the work, he had attempted to find other employment and had been prepared at any time to leave the running of the vineyard to his wife. Evidence given by an agricultural specialist confirmed that Ozdil's wife could have operated the block by herself. According to Ozdil's accounts, the vineyard had produced a gross income of $24 000 in 1983, $30 000 in 1984 and was expected to produce gross income in excess of $30 000 in 1985.

The AAT referred to several earlier decisions—*Vavaris* (1982) 11 *SSR* 110; *Guse* (1981) 6 *SSR* 62; *Yilmaz* (1984) 17 *SSR* 174 and *Anderson* (1984) 19 *SSR* 198, where the eligibility of marginal primary producers for unemployment benefit had been considered. Those cases had established, the AAT said,

> that the question whether the applicant is not unemployed for the purposes of s.107(1) of the Act is to be decided by ascertaining the extent to which he has been engaged in an economic enterprise.

(Reasons, para. 16)

The AAT said that the degree of Ozdil's involvement in the vineyard and the size of the income produced by the vineyard showed that he had been engaged in an economic enterprise of substantial scale, and had been committed to working full-time on the vineyard. Accordingly, he could not be regarded as 'unemployed'; and he had not qualified to receive unemployment benefit.

VIJH and SECRETARY TO DSS ((No. N85/20)

Decided: 26 July 1985 by R. A. Hayes, H. D. Browne and J. R. Taylor.

Anand Vijh had been injured in 1981 while working for the NSW State Rail Authority (SRA). Although he then began a workers' compensation claim against the SRA, his employment contract with the SRA was not terminated. Over the 4 years since 1981, Vijh had remained available for light duties work and the SRA had made that work available to him intermittently.

Although the conditions of Vijh's employment with the SRA prohibited him from undertaking other employment, he had regularly attempted to find other work during this period. Following a short period of light duties work with the SRA in June 1984, Vijh applied to the DSS for unemployment benefit. The DSS rejected that application on the ground that Vijh was not 'unemployed'.

After another period of light duties work with the SRA, which ended in October 1984, Vijh made his second application for unemployment benefit. The DSS also rejected this application on the ground that he was not 'unemployed'. (Vijh had been offered no further period of light duties work with the SRA between October 1984 and the hearing of this matter.)

Vijh asked the AAT to review the 2 DSS decisions.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person meets age and residence requirements and if the person passes the 'work test'—that is, the person must be unemployed, capable of undertaking and willing to undertake paid work, and have taken 'reasonable steps' to obtain such work.

Section 107(7) defines 'unemployed' as including unemployment due to industrial action, unemployment due to termination of employment and a person having been stood down or suspended from employment.

Not 'unemployed'

The AAT examined the relationship between Vijh and the SRA; and concluded that, during the relevant periods, there had been an employer/employee relationship, even though the SRA only paid Vijh for those scattered periods when he did light duties work. Accordingly, although Vijh was able to establish that he was capable of undertaking, and was willing to undertake, paid work and that he had taken reasonable steps to find such work, he could not be said to have been 'unemployed'. Until such time as Vijh's employment with the SRA was formally terminated, he remained an employee of the SRA and could not be treated as 'unemployed', despite the failure of the SRA to offer him paid work:

> [I]t may be that a special benefit might be payable, at the discretion of the Secretary, and depending upon the circumstances, under Division 6 of the Act. But it would not seem that unemployment benefit can be used to relieve an employee who is being exploited by his or her employer, or who is otherwise disadvantaged in employment.
>
> The Tribunal views the difficulties of the applicant in this review as being beyond resolution through the granting of unemployment benefit. The applicant claims that he is discriminated against, and that he is the victim of unfair bureaucratic practices, particularly on the part of the SRA. Fortunately there are many avenues which he might use to have his complaints explored, in particular, the NSW Ombudsman, the NSW Anti-Discrimination Board, his local member of State Parliament, and his trade union representative. Whether he is being treated unfairly by SRA is beyond the jurisdiction and capacity of this Tribunal to judge. However he remains an employee of SRA and, as such, is ineligible for unemployment benefit until such time as his employment is formally terminated. This does not, of course, reflect upon his eligibility for other benefits, in particular, sickness benefit, or special benefits.

(Reasons, pp.14–15)

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: student

COLLINS and SECRETARY TO DSS (No. S84/130)

Decided: 13 June 1985 by R. A. Layton.

James Collins completed his secondary schooling in November 1983. He then applied for admission to a number of tertiary institutions, his first preference being a university course. He also applied for unemployment benefits which were paid to him after the expiry of 6 weeks (in accordance with s.120A of the *Social Security Act*).

In January 1984, Collins was offered a place in a tertiary college which he accepted in February. He advised the DSS that he was about to commence a tertiary course and wished to cancel his unemployment benefit. But on the following day he contacted the DSS and said that, because his first preference was to obtain employment, his wished to continue on unemployment benefits; and that he would continue with his college course until he found a job.

However, the DSS cancelled Collins' unemployment benefit as from the date when he began his college course, on 27 February 1984. Collins continued with that course until November 1984 when, having failed most of the subjects, he withdrew from the course and was re-granted unemployment benefit as from 26 November 1984.