WILLIAMSON and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W83/55)

Decided: 21 May 1984 by G.D. Clarkson, J.G. Billings and I.A. Wilkins.

Williamson's child David was born in June 1977. When the child was about two years old, he was found to be suffering from a speech defect for which he needed regular therapy. In November 1982, Williamson applied for a handicapped child's allowance for David and the DSS granted the allowance on the basis that the child was handicapped, rather than severely handicapped.

Williamson asked that payment of the allowance be back-dated to December 1979, when David began speech therapy. She explained that, although she knew of the existence of the handicapped allowance scheme, she thought that she would not be eligible, a belief which had been reinforced by advice given by nurses at a children's hospital and by a DSS officer.

When the DSS refused to back-date payment of the allowance, Williamson asked the AAT to review that decision.

The legislation

Sections 102(1) and 105R permit payment of a handicapped child's allowance to be back-dated (to the date of eligibility) if the claim is lodged within six months of that date or 'in special circumstances'.

Misleading advice by hospital staff

Williamson said that the two nurses at the children's hospital had told her that her child would not qualify for the allowance because he was older than one year, was not an Aboriginal and was attending speech therapy. A senior social worker at the hospital told the AAT (which was sceptical that any nurse would have given such misleading advice) that it was common for mothers of handicapped children to be given inaccurate advice, whether by nursing staff, other parents or the DSS.

However, the AAT said, too much emphasis should not be placed on this:

> [W]hatever the nurses were understood to say their advice does not constitute special circumstances within the section. The respondent cannot in any way be responsible for what was said . . .

(Reasons, p. 9).

Misleading advice by DSS staff

However, any misleading advice given by the DSS would, the Tribunal said, be a different matter: in deciding whether there were special circumstances, the Tribunal would

> take into account wrong advice given by departmental officers which delayed the making of an application, or any undue delay on the part of the department which had the same effect.

(Reasons, p. 9).

The Tribunal concluded that the advice given to Williamson by a DSS officer had not been misleading: it had been accurate but Williamson had misunderstood it. It followed that this advice was not the cause of her delay in claiming handicapped child's allowance.

According to the AAT, most cases of delay in claiming handicapped child's allowance were caused by ignorance, either of the existence of the scheme or of a child's eligibility. That ignorance could not, therefore, be regarded as a 'special circumstance'.

Formal decision

The Tribunal affirmed the decison under review.

Unemployment benefit: work test

MAIORANO and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/337)

Decided: 2 April 1984 by J.O. Ballard, R.G. Downes and L.J. Cohn.

Vincenzo Maiorano applied for unemployment benefit on 21 March 1983. This claim was rejected by the DSS on the basis that the applicant was not 'unemployed' within the meaning of s.107(1)(c)(i) of the Act and had not taken reasonable steps to obtain employment within the meaning of s.107(1)(c)(ii). He applied to the AAT for review of that decision.

The legislation

Section 107(1) of the *Social Security Act* provides that a person will qualify for unemployment benefit if the person passes age and residence tests and –

> (c) the person satisfies the Director-General that –
>
> (i) throughout the relevant period he was unemployed and was capable of undertaking, and was willing to undertake, paid work that, in the opinion of the Director-General, was suitable to be undertaken by the person; and
>
> (ii) he had taken, during the relevant period, reasonable steps to obtain such work.

The facts

The applicant owned a furniture making business. This business had suffered as a result of the economic downturn and the applicant was heavily in debt. This had led him to approach the CES in March 1983 looking for a job. He had tried to sell the business, but had continued to give quotes for work in order to earn living expenses.

While making himself available for work at the CES he also attended his workshop on two to three days per week for three to four hours each day. In the period March to December 1983, he had some work in his business, earning $4000 to $5000.

In January 1984, the applicant obtained medical certificates saying that he suffered from an obstructive airways disease which would be aggravated by wood shavings and dust, and that he suffered from sciatica and tenosynovitis which would make it difficult for him to do his work as a cabinet maker/carpenter. In January or February 1984, he decided to dispose of the freehold and the machinery, rather than persisting with his attempts to sell the business.

Was the applicant unemployed?

The Tribunal could find no evidence to support a conclusion that Maiorano had not taken reasonable steps to obtain employment; and it accepted Maiorano's evidence as to the steps he had taken to find work. Thus s.107(1)(c)(ii) was satisfied.

It then fell to be determined whether he was unemployed for the purposes of s.107(1)(c)(i).

Due to the medical evidence dating from January 1984 the AAT was able to conclude that, from that date on, the applicant, although prevented by his condition from working in his business, was capable of undertaking and willing to undertake paid work that did not affect his obstructive airways disease or involve heavy physical work. From that time he was entitled to unemployment benefit.

As for the period from March 1983 (when he first applied for unemployment benefit) to January 1984 the Tribunal turned to the Federal Court decision in *Thomson* 38 ALR 624, where it was said that to find that the pursuit of one activity demonstrated a preference over paid employment necessitated considering the applicant's intention at the relevant time.

The AAT commented:

> In reaching a conclusion as to the applicant's intention, it was clear that the business was not a viable economic project. He was not fully occupied in it and although he attended at the premises he did not do so with commitments which would have prevented him from accepting employment if such had been made available as a result of his registration with the Commonwealth Employment Service . . . The fact that the applicant was seeking to sell his assets first as a going concern and then as separate pieces of property does, however, indicate a change in his intention. While the applicant was prepared only to sell the business as a going concern we think he must be regarded as not being unemployed. Once he offered for sale the property and the equipment separately we think he had acquired an intention to do other work and should be regarded as unemployed.

(Reasons, para. 11.)

The Tribunal did not know when that change of intention took place; but it assumed that it took place in January 1984.

Formal decision

The Tribunal set aside the decision under review and substituted a decision that the applicant was entitled to unemployment benefit from 24 January 1984.

BLACKMORE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/79)

Decided: 2 April 1983 by E. Smith, F.A. Pascoe and J.T. Linn.

This was, initially, an appeal against a decision to recover $269 allegedly overpaid to Peter Blackmore in the form of unemployment benefit. Blackmore argued he was entitled to unemployment benefit for six weeks from 25 December 1981 to February 1982 while he was interstate and this should be offset against the overpayment. The 'appeal' against the overpayment was settled. The question for the Tribunal was Blackmore's entitlement to unemployment benefit for the relevant period.

Blackmore apparently went on a trip from Adelaide to Sydney just before Christmas Day 1981. The DSS presumably cancelled his pension on the ground that he did not satisfy the work test in s.107(1) of the *Social Security Act*.

[The DSS placed some relevance on the fact that during his trip to Sydney he did some rabbit hunting and seems to have suggested that the purpose of the trip was a hunting trip, rather than to look for work.]

The Tribunal accepted Blackmore's evidence that his trip to Sydney was to find work. It noted that the applicant had been unemployed for some two to three years, that he spent some time in the Forbes area where he looked for work and registered with the CES. In Sydney he spent considerable time looking for work and detailed those efforts to the Tribunal.

The AAT stated 'we are satisfied that the applicant was unemployed during the relevant period, did make reasonable efforts to obtain employment while he was interstate and had not engaged merely in a hunting exercise'.

Formal decision

The Tribunal decided that Blackmore was entitled to unemployment benefit for the relevant period.

HOOPER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/327)

Decided: 3 May 1984 by R. Balmford, H.E. Hallowes and R.A. Sinclair.

The applicant was in recept of unemployment benefit from April 1980 to August 1983, when the DSS decided to cancel the benefit on the basis that he was not unemployed, not willing to undertake paid work and had not taken reasonable steps to obtain work as required by s.107(1)(c) of the *Social Security Act*.

An SSAT dismissed the applicant's appeal and then application was made to the AAT.

The legislation

Section 107(1) provides that a person is qualified to receive an unemployment benefit if

> (c) the person satisfies the Director-General that –
>
> (i) throughout the relevant period he was unemployed and was capable of undertaking, and was willing to undertake, paid work that, in the opinion of the Director-General, was suitable to be undertaken by the person; and
>
> (ii) he had taken, during the relevant period, reasonable steps to obtain such work.

The facts

Hooper lived in rural Victoria. He worked on a voluntary basis (40 hours per week) for those in need in his neighbourhood and refused wages when offered. This had commenced when he worked for his landlord in exchange for free rent. He felt he was contributing to society by working in this way.

Was the applicant 'unemployed'?

The AAT referred to the Federal Court decision in *Thomson* (1981) 38 ALR 624 and to its own decision in *McKenna* (1981) 2 *SSR* 13. Those cases generally state that 'unemployed' means not to be engaged in remunerative work. On that basis the applicant was 'unemployed'.

However, s.107(1)(c) also requires that the applicant be capable and willing to undertake paid work and have taken reasonable steps to obtain such work.

Hooper had a commitment to his voluntary work which he chose ahead of paid employment. This prevented him from demonstrating a willingness to obtain paid work or the taking of reasonable steps to do so (see *Thomson*). Thus he could not meet the requirements of s.107(1)(c).

Was there an entitlement to special benefit?

The Tribunal considered the applicant's eligibility for special benefit. Dealing with the exercise of the discretion to grant special benefit under s.124 (assuming that the applicant would meet the criteria specified in that section), the AAT referred to *Law* (1982) 5 *SSR* 52, where it was said:

> We do not think it would be a proper exercise of the discretion to grant a special benefit to a person whose need for it derives directly from his own action leading to the termination of an unemployment benefit which would otherwise be payable to him.

This applied to Hooper. By not seeking paid work he caused his unemployment benefit to be cancelled. Therefore it would not be appropriate to exercise the discretion to grant special benefit to him.

Formal decision

The Tribunal affirmed the decision under review.

ANDERSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/108)

Decided: 13 April 1984 by R.C. Jennings, E. Smith and B.C. Lock.

This was an application for review of the DSS refusal to grant unemployment benefit to Brenton Anderson from 2 December 1982 on the ground that he was not 'unemployed' within s.107(1)(c) of the *Social Security Act*.

Anderson and his wife bought a citrus fruit block in November 1980. They carried out a number of improvements and expected a good crop prior to June 1982. In June and September 1982 there were severe frosts which led to virtual loss of the crop and severe damage to the trees.

Anderson applied for and was granted unemployment benefit from 24 September 1982. In November 1982 he was granted a loan under the *Primary Producers Emergency Act* 1967 (SA). His unemployment benefit was cancelled in early December on the ground that he was 'in receipt of carry-on assistance'.

(The Tribunal pointed out that the DSS had made two incorrect assumptions. One, that grant of 'carry-on assistance' meant that Anderson was in immediate receipt of that money and, more importantly, that the applicant lost his entitlement to unemployment benefit because of the grant of 'carry-on assistance'. The DSS did not pursue this argument before the AAT.)

Was the applicant 'unemployed'?

Before the Tribunal, the DSS relied on the argument that the applicant 'was so seriously engaged in an economic enterprise as to lead to the conclusion that he is not unemployed'. This phrase had been used in *Vavaris* (1982) 11 *SSR* 110 upon which the DSS relied.

Anderson stated and the DSS conceded that the work required to be done on the farm was minimal and could be done outside normal working hours.

The Tribunal found that the farm was not viable, i.e. did not produce sufficient income to meet all its expenses from September 1982. It concluded

> if ownership can only be retained at a substantial loss, it can hardly be said that a man who is not physically engaged, except to a very minor degree, in endeavouring to bring it into production can be seriously engaged in an economic enterprise.

(Reasons, para. 26.)

The DSS' concession that the farm could be managed so as to leave the applicant free for full-time work elsewhere precluded them from arguing that Anderson was seriously engaged in an economic enterprise. Anderson was therefore 'unemployed' for the purposes of s.107 of the *Social Security Act*.

Formal decision

The Tribunal set aside the decision under review and remitted the matter to the Director-General with a direction that Anderson was qualified for unemployment benefit for the relevant period.