SOCIAL SECURITY

# Policy *v* statute

**MIKE DE ROHAN AND GRAEME HEMSLEY have a disturbing sense of deja vu about this case in which income support was sought from the Department of Social Security.**

On 25 November 1976, Karen Green registered for employment at a branch of the Commonwealth Employment Service, the day before she completed her final school year. She returned on 20 December 1976 and completed a claim for unemployment benefit although she was told at that time that as a school leaver she could not receive the benefit until 22 February 1977. Over the school holidays, she was unsuccessful with her attempts to find work, as was the CES and eventually she was paid unemployment benefit from 22 February 1977.

In an action for declaration of entitlement to unemployment benefit from 27 November 1976 to 22 February 1977, and for payment of arrears, the High Court in granting the declaration said that the policy of the Department of Social Security (DSS) not to pay unemployment benefit during the Christmas holidays was unlawful. Further, it said the departmental policy was: 'an attempted substitution of inconsistent departmental criteria for those which the Parliament has enacted as appropriate to qualify an applicant for unemployment benefit' (*Green v Daniels & Others* (1977) 13 ALR 1, at 8).

Under the new forms of unemployment benefit, Jobsearch and Newstart, CES has now assumed administrative and determinative powers previously left with the DSS. But policy — this time that of CES — is once again competing with the statutes.

On Tuesday, 31 March 1992, the President of the Administrative Appeals Tribunal handed down her decision in the case of *Department of Social Security and Diepenbroek*. The case represented a relatively simple set of facts but its full effect has yet to be felt by many of the unemployed in Australia.

David Diepenbroek claimed unemployment benefit on 13 August 1990. On 1 July 1991, he began receiving Jobsearch Allowance and transferred to Newstart Allowance. At that stage he was 19 years of age.

On 26 August 1991, he commenced a CES-approved course. On the first day, application forms were handed out to all participants for claims for the Formal Training Assistance (FTA). However, unlike the others, David Diepenbroek was told that there was no point in him applying because he was under 21 years of age and was therefore not eligible.

During the day, David pondered the injustice of the situation. He was no different from any of the other participants except that they were over 21 and he was under 21. Later that day he lodged his claim form saying that he believed he should have a similar entitlement.

Two days later, a determining officer approved the payment of $30 per week but the order for payment was rejected automatically by the computer because he was under 21 years of age. The decision was reviewed and the rejection maintained although this was based on the wrong section in the *Social Security Act*.

Undeterred, and spurred on only by a sense of injustice, David appealed. He was supported by the Welfare Rights Centre (Adelaide) and his case was upheld by the Social Security Appeals Tribunal (SSAT). The Department appealed further and its application was rejected by the Administrative Appeals Tribunal.

The relevant section of the *Social Security Act* 1991 is s.644 which says:

> (1) Where a person who is receiving a Newstart Allowance is undertaking a course of vocational training approved by the Employment Secretary for the purposes of this section, the rate of the person's Newstart Allowance is to be increased by an amount, to be known as a Newstart Training Supplement, that the Employment Secretary *considers appropriate.*
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> (2) In calculating the amount of the increase, the Employment Secretary is to have regard to:
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> (a) the expenses of the person *undertaking* the training; and
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> (b) any expenses of the person in *living away* from the person's usual residence in order to undertake the training; and
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> (c) any expenses of the person in maintaining the person's usual residence while living away from that residence in order to undertake the training.
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> (3) The maximum amount of the increase for a person is not to exceed $87.90.

There are three significant aspects to this legislation. First, the payment is discretionary. Second, there are three criteria for setting the rate contained in sub-section (2) and these appear to be complete in their own right. Third, there is a specific maximum amount.

A perusal of the relevant departmental manual paints an entirely different picture. In essence, the manual provides that all people over 21 who do a course are to receive $30 a week regardless of expenses and those under 21 are to receive nothing. This was the experience of participants in David's course where no attempt was made to assess their expenses and all those over 21 received $30 a week.

The DSS attempted to argue that the criteria in sub-section (2) were not exhaustive and that other factors should be taken into account, i.e. the departmental policy.

The President rejected this approach. She found that: '. . . s.644 is not ambiguous nor obscure nor does the ordinary meaning of the section lead to a result which is manifestly absurd or unreasonable' (para. 17). The Act is meant to be 'plain English' legislation which is clear to the lay-person (para. 18).

This position was stressed by the applicant's counsel and it was submitted that the effect of the proposed policy was to completely rewrite the section in a manner inconsistent with the actual section.

The President acknowledged the role of policy in considering the exercise of discretionary powers but held that the 'policy must be consistent with the statute' (para. 19 — see also *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 at 641).

There are a number of interesting issues that flow from this result. The first and by no means the least of these was the confused approach of the Department of Employment Education and Training. Evidence was given that originally, none of these training allowances was paid pursuant to any form of legislative framework. In 1985, the Government took a political decision to restrict payment to $30 a week to over 21-year-olds. This decision was conveyed in a Minute of 7 December 1987. Four years later (July 1991) a new *Social Security Act* came into effect which did not reflect that policy (in fact quite the reverse) despite wide consultation and the 'plain English' nature of the legislation.

This situation was not helped by the extensive material to which the Tribunal was referred. The Explanatory Memorandum referred to age in a non-specific manner while the Second Reading Speech conflicted with this (paras 17 and 18 of decision).

Rule making by informal means — by policy alone — and the attempt to justify this rule making when called to account in this case are two aspects of this matter which deserve the highest reprobation.

The second interesting aspect of this decision has been the response of the DSS and the relevant Minister.

Amending legislation has now passed through the Parliament rendering the policy lawful, although there seems to be no logic behind the policy.

For all those cases already decided, Senator Cook, on 2 June, in answer to a question from Senator Lees said:

> On receipt of legal guidance identifying those clients who are entitled to supplementary FTA payments as a result of the AAT decision, the Department will back pay those clients appropriately. However, payments will not be made on a blanket basis. Each client will have to apply and have his or her individual circumstances assessed.

This answer is curious. It would be comparatively easy for those who attended courses and did not claim FTA to be identified from the course register and directly paid.

It would also be administratively more cost efficient to pay a blanket $30. It does not appear that over 21-year-olds are being invited to have their expenses tested which seems inconsistent with the text of Senator Cook's statement. Indeed, the cynical onlooker would be tempted to suggest that the government has taken this course of action in the hope that the number of applicants will be comparatively few.

In opposing the Government's amendment, the New South Wales Welfare Rights Centre (WRC) argued that removal of the training supplement was unjustifiable for a number of reasons, including:

1. That the supplement is only paid where CES *requires* a person to undertake a training course and is paid to meet the *additional costs* incurred in undertaking the course. It is compensation, not a pay rise.
2. Removing the training supplement in fact introduces the very disincentive to undertake training (the only option open to those affected) that the policy is designed to remove. People on Jobsearch Allowance will not, unless compelled, undertake a training course if it will cost them money (fares, materials) which, if not compensated, will make them worse off.

The WRC argued that the Government's assumption that Jobsearch Allowance and Austudy have been equated in every respect is incorrect and in fact to a large extent, a red herring. It detracts from the real issue which is that an arbitrary and unjustifiable age discrimination will be made between those under and over 21. Not only will those over 21 continue to receive a higher rate of JSA but also they will be paid the training supplement to attend a vocational training course when in both cases, their attendance is a CES requirement. What logic justifies payment of a training supplement to those more able to afford the cost of training while denying it to those who are least able to pay?

Finally, the Government's timing is appalling with the substantial shortfall in the number of places available to meet the demand for further and higher education dictating that any determination to remove the training supplement should be postponed until at least the choice of full-time education, which underpins the policy, has been restored.

None of these arguments, of fairness, equity and commonsense, has been appreciated by the Government and once again, as with the Karen Green generation and the generations of school leavers after her, the Government has imposed discriminatory legislation on those least able to afford it — the young.

## Postscript

Delays in payment by DEET officers in State offices, despite Senator Cook's assurances on 2 June, led to many aplications being refused, necessitating appeals to the SSAT. Payments were not uniformly commenced across the States and in South Australia in excess of 250 appeals accumulated at the SSAT before a central office direction to commence payment was sent to South Australia on 22 July.

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