

In the matter of  
the Unemployed  
Workers' Union,  
Centrelink, and  
the Department  
of

## MEMORANDUM

1. I am instructed by the Unemployed Workers' Union (the **Union**) to advise on issues arising out of the "Work for the Dole" scheme currently administered by Centrelink.
2. The issues relate to decisions being made, purportedly by a delegate of the Secretary of the Department of Human Services (**Secretary**), in reliance on assertions made by employees of private companies as to the conduct of participants in a "work for the dole" scheme.
3. Through this scheme participants obtain income from the government for participation in a program called an "employment pathway plan" (a **participation payment**). If they do not fully participate, the Secretary may effectively "dock" their pay, but only through application of a particular statutory process.

### **Legislation: Social Security Administration Act 1991**

4. Section 42C is the key provision in this case.
5. Section 42C provides:
  - (1) The Secretary may determine that a person commits a **no show no pay failure** on a day if...
    - (a) (i) the person fails to participate, on the day, in an activity that the person is required to undertake by an employment pathway plan...

- (iii) the person commits misconduct... while participating in an activity... (see (i)) or while purporting to comply with a serious failure requirement imposed on the person.
  - (iv) the person intentionally acts in a manner on the day (including by failing to attend a job interview), and it is reasonably foreseeable that acting in that manner could result in an offer of employment not being made to the person; and
- (b) the person receives an instalment of a participation payment for the instalment period in which the day occurs.
- (4) Despite subsection (1), the Secretary must not determine that a person commits a no show no pay failure on a day if:
  - (a) both of the following apply:
    - (i) subparagraph (1)(a)(i), (ii) or (iv) applies; and
    - (ii) the person satisfies the Secretary that the person has a reasonable excuse for the failure; or...

6. Section 42D provides:

If the Secretary determines that a person commits a no show no pay failure, the person's penalty amount (see section 42T) for the no show no pay failure is to be deducted from the person's instalment of a participation payment for the instalment period determined under subsection 42C(5).

7. In determining whether there is a reasonable excuse, the Secretary must take into account matters set out in a legislative instrument under s 42U. Section 42U(2) provides:

To avoid doubt, a determination under subsection (1) does not limit the matters that the Secretary may take into account in deciding whether the person has a reasonable excuse.

8. I have reviewed the legislative instrument made under s 42U(1) entitled the "Social Security (Reasonable Excuse - Participation Payment

Obligations) DEEWR) Determination 2009 (No 1)", made August 2014. For present purposes it is not relevant, because s 42U(2) makes it clear that the Secretary is not limited to the Determination in deciding whether a person has a reasonable excuse.

9. Section 42C is the key provision, because it empowers the Secretary to make a determination. Section 42D follows automatically (by operation of law) from a determination made under section 42C.

### **Factual scenarios**

10. My instructors are concerned about persons who are in receipt of participation payments and who have those payments reduced or deducted unfairly. In particular, the company who manages the employment pathway plan may make an incorrect finding or unsubstantiated assumption.
11. Examples were provided to me. In one example, a person was reported to Centrelink to have "been repeatedly told to stop listening to music" during a work for the dole activity, when this was not the case. The person was not asked for his version of events, and when he challenged the finding of fact his representations were ignored.
12. There is another complaint as to the kind of activity which may be reported. In one example the person in receipt of benefits was wishing to apply for work during his work for the dole activity. (It is possible that this activity is in breach of the employment pathway plan, even though this result might seem illogical to some people.) His desire to do this was seen as being in breach of his employment payment plan.
13. That example may be more about the content of the employment payment plan than whether the activity should have been treated as a non-breach.
14. What apparently occurs, is that
  - (a) the private company forms a view about a person's participation, sometimes based on incorrect or unsubstantiated facts,

- (b) the company then relays that view to the Secretary (indirectly, through the Secretary's delegate), and
  - (c) the Secretary adopts that view without question or analysis.
15. While the Secretary is legally required to make the statutory decision or decisions, in practical terms the decision is arguably being made by a private company.

### **Potential unlawfulness**

16. My instructors are interested in pursuing these matters or a suitable matter as a case study. It is considered that the Secretary tends to unfairly, and perhaps unlawfully, rely upon the assertions of private companies in the making of determinations under s 42C.
17. In terms of potential unlawfulness, the types of problems may be described as follows:
- 17.1. The Secretary fetters their discretion by adopting, without independent consideration, the recommendations and conclusions of another person;
  - 17.2. The decision is effectively made by a person other than the Secretary - that person not having a proper delegation to make such a decision;
  - 17.3. There is no evidence for the decision (if it is factually incorrect or based on unsubstantiated assumptions); or
  - 17.4. A breach of natural justice has occurred in that the person affected is not given an opportunity to present their side of the story or case before factual findings are made.
18. The facts of each case, however, are crucial in terms of advising what particular unlawfulness issue may have arisen.

### **Recommendations**

19. In accordance with my oral recommendations in conference, I recommend that the Union consider collecting information and documents regarding a sample of cases. For example, five past cases,

and five current cases. Cases which seem particularly unfair or incorrect may be a good starting point. For each of these cases, the Union could, with the affected person's permission:

19.1. If in receipt of a determination under s 42C, ask for the record of the decision, the reasons for the decision, the documents relied upon in the decision, the name of the decision maker, and a copy of the authority of the person who made the decision; and

19.2. Ask for all relevant documents under the *Freedom of Information Act* 1973 including emails, file notes, communications from the company managing the employment pathway plan or any other matter as part of the statutory scheme.

20. Upon receipt of this information, the two most compelling cases (or more) could be presented to counsel for advice on potential legal action. The legality of any decision will always depend upon the details of that decision.

21. It is important to note that any judicial review challenge should be made in a timely manner. There are time limits, which can be extended, but it is worthwhile to act promptly once a decision is made under s 42C.

22. Please contact me if further clarification is required.

Fiona McKenzie

9 April 2016

