1979 and May 1980, when the benefit was terminated because of his failure to attend a job interview arranged by the CES. He applied to the AAT for review of this decision.

Whyte had worked (up to June 1979) as a radio announcer. The AAT found that, at the time when his unemployment benefit was terminated, he was well qualified for other employment (as a clerk or a salesman) but had taken no independent steps to obtain employment. According to the AAT, s.107(1)(c) (set out in *Weekes*, in this *Reporter)* 'required the applicant to pursue his own avenues to obtain suitable employment', not merely to rely on the CES. And the AAT was not satisfied that Whyte had taken 'reasonable steps to obtain employment outside his field of radio broadcasting [although] he was qualified for employment on other fields': Reasons for Decision, paras. 16, 18.

The AAT affirmed the decision under review.

ANDERSON and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. Q81/2)
Decided: 17 August 1981 by J.B.K. Williams.

Anderson (a 25-year-old-woman) was paid unemployment benefit between December 1977 and October 1980, when the benefit was terminated by the DSS because she was unwilling to accept a job referral. She applied to the AAT for review of that decision.

The AAT found that Anderson had worked in a food processing business (which her mother was developing) for about ten years; and that, while she received only a small income from this work, she was committed to helping her mother develop the business to the point where it would be profitable.

The AAT decided (after referring to *McKenna*: 2 *SSR* 13) that her connection with this business was more than a casual one and showed 'a preference for that activity rather than an engagement in outside employment'. Accordingly, there was real doubt that the applicant was 'unemployed' or that she 'was genuinely willing to undertake work outside her mother's organisations': Reasons for Decision, para. 17.

The AAT affirmed the decision under review.

Unemployment benefit: discretion to ignore earnings

HINE and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. T81/10)
Decided: 16 October 1981 by R.K.Todd.

Nicholas Hine was granted unemployment benefit by the DSS in August 1980. While on benefit, he worked on a casual basis as a taxi driver and he regularly informed the DSS of his income from this source.

On 10 October 1980, the DSS terminated his benefit because his income from taxi driving had, for four consecutive weeks, exceeded the permissible income level – that is, the application of the income test in s.114 eliminated all the unemployment benefit payable to Hine.

Hine applied to the AAT for review of this decision. He maintained that the Director-General should exercise, in Hine's favour, the discretion in s.107(3). Under this provision,

> the Director-General may, in his discretion, treat a person as having been unemployed throughout a particular period [for the purpose of qualifying for unemployment benefit] notwithstanding that the person undertook paid work during the whole or a part of that period if the Director-General is of the opinion that, taking into account the nature and duration of the work and any other matters relating to the work that he considers relevant, the work should be disregarded.

[**Note:** Even if this discretion had been exercised in Hine's favour, the termination of his benefit would still stand: s.107(3) allows the Director-General to disregard 'the work' but not the income from that work; and it was Hine's income, rather than the work which produced it, which caused the DSS to terminate his unemployment benefit. However, the AAT did not refer to this difficulty.]

Hine argued that this was a proper case for the exercise of the discretion because of the long hours (55 hours a week) he was working, his relatively poor remuneration (unspecified), the lack of permanency and the fact that he was paid on a commission basis. The DSS argued that these factors were irrelevant to the s.107(3) discretion.

The AAT agreed that the discretion in s.107(3) could not be exercised here: 'it strains the concept of "unemployment" to an unacceptable level', the AAT said, 'to find that a person in casual work involving 55 hours work per week is unemployed'.

The AAT referred to, and adopted what was said in, *McKenna* (2 *SSR* 13), *Te Velde* (3 *SSR* 23), and *Weekes* (this issue of the *Reporter*) on 'unemployment' and people working, more or less full-time, for little reward.

The AAT affirmed the decision under review.

Unemployment benefit: 'regular' maintenance of children

MATONS and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. N81/24)
Decided: 21 August 1981 by R.K. Todd, I. Prowse, M.S. McLelland.

Cipriano Matons was granted unemployment benefit in January 1975. It appears that he was still being paid unemployment benefit in 1981.

At the time of the initial grant of unemployment benefit, Matons was separated from his wife, who had custody of their three children. He was paying maintenance of $8 a week for each child, under a children's court order of July 1972. These payments continued until 24 April 1976 (although not always in weekly instalments) when the court order was varied to nil 'until such time as the husband obtains employment'.

In February 1975, Matons applied to the DSS for an increase in his rate of unemployment benefit because of his contribution to the maintenance of his children. Section 112(5) of the *Social Services Act* provided that an unemployment beneficiary who 'is making regular contributions towards the maintenance of a child or children' is to be paid an extra $5.50 a week for each child.

Section 112(6)(b)(iii) provided that this extra payment may not be made if any child 'has been taken into account in fixing the rate of a widow's pension'. (In 1980, s.112(6)(b)(iii) was amended by adding 'or of a supporting parent's benefit' after the words 'a widow's pension'; but, at the relevant time, the provision made no mention of supporting parent's benefit.)

Matons was paid a total of $789 to cover entitlement for the three children between January and November 1975; but no extra payment was made after November 1975.

In May 1976, the DSS noted that Maton's wife 'has been in receipt of a widow's pension' and calculated an overpayment to Matons (because of s.112(6)(b)(iii) of $789. But the DSS decided not to recover this money as the overpayment was due to an office error.

In October 1980, Matons appealed to an SSAT 'against the Department's decision not to pay me extra benefit for my children from 1975 onwards'. That appeal failed and he applied to the AAT for review of the decision. The DSS told the AAT that Matons' wife had never received a widow's pension: she had been paid a supporting parent's benefit between April 1975 and October 1978. Therefore, there was no bar to Matons being paid additional benefit, provided that he was 'making regular contributions towards the maintenance of a child or children'.

Court records showed that, between November 1975 and April 1976, Matons' had paid maintenance every four weeks. The maintenance order was for weekly payments but, said the AAT, s.112(5) did not require

> the strictest adherence to the requirements of the Court order . . . [T]he contributions, having been made substantially at regular intervals, in regular amounts, and on a periodic basis, satisfied the requirements of s.112(5)(b) of the Act.

(Reasons for Decision, para. 18).

The Tribunal pointed out that the alleged overpayment of $789 (for the period January to November 1975) was not an overpayment: the only 'office error' was in thinking that Matons' wife was receiving an widow's pension.

So far as the period after April 1976, Matons was not entitled to extra benefit because he was paying no maintenance to his children. This non-payment of maintenance was largely, if not entirely, due to the fact that he was being paid no extra benefit and this exposed a weakness in s.112:

> [R]eceipt of additional benefit is dependent upon payments of maintenance in circumstances in which it is unlikely that such payment can be made in the absence of receipt of the benefit.

(Reasons for Decision, para. 120)

This weakness, the AAT said, called for consideration.

The AAT set aside the decision not to pay the extra benefit between November 1975 and April 1976 and remitted the matter for reconsideration by the DSS on the basis that Matons was entitled to that extra benefit.

Invalid pension: husband's income not disregarded

WILLIAMS and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. N81/32)

Decided: 4 November 1981 by A.N.Hall.

In September 1980, Thelma Williams was accepted by the DSS as qualified for an invalid pension. However, because half of her husband's income was treated as her income (under s.29(2) of the *Social Services Act*), the DSS decided that the income test in s.28(2) meant that no pension was payable to her. In November 1980, an increase in the level of pensions and allowances for dependant children led to a reassessment by the DSS which decided that Mrs Williams should be paid an invalid pension at the rate of $5.70 a week.

Mrs Williams applied to the AAT for review of this decision and argued that the discretion in s.29(2)(b) should be exercised in her favour (so as to disregard her husband's income) because of the financial hardship which she faced. The relevant provision reads as follows:

> 29....
> (2) For the purposes of this Part, unless the contrary intention appears, the income of a husband or wife shall –
> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court;
> or
> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines,
> be deemed to be half the total income of both.

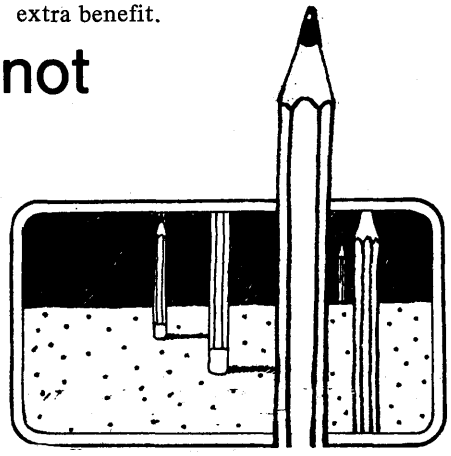
The nature of the discretion

The DSS had a long-standing policy to deal with married couples who suffered 'financial hardship because of expenses resulting from severe medical condition of one party'. This policy was set out in the DSS *Pensions Manual*, para. 8.021. The policy was that the discretion in s.29(2)(b) would be used to disregard part of a spouse's income if the expenditure of the couple on medical and similar expenses reduced their net disposable income, from all sources, to a level below the maximum rate of pension which would normally be paid to a married pensioner couple. The DSS would 'disregard' so much of the spouse's income as was necessary to bring the couple's income up to the equivalent of that 'married couple pension'. Applying this test, the DSS had found that Mr Williams' income (after medical expenses for his wife) was slightly above the relevant maximum rate of pension and so the s.29(2)(b) discretion was not exercised.

However, the DSS argued, and the AAT decided, that this policy was inconsistent with s.29(2)(b) of the Act – that the sub-section did not allow any apportioning of income to suit the needs of individual cases, that it was an 'all or nothing provision'. That is, the Director-General could decide, if there was 'any special reason', to ignore half of the pensioner's spouse's income; but the Director-General could not, no matter what the 'special reason' might be, vary 'the proportion of income attributable to a husband or wife to a proportion greater or less than half': Reasons for Decision, para 23. This was so, even though 'the discretion which the Director-General has taken upon himself to exercise appears to have been humane and sensible': Reasons for Decision, para. 20.

'Special reason'

The AAT then considered whether there was a special reason for disregarding Mr Williams' income (or the half of that income which would normally be atttributable to Mrs Williams). The evidence in this case showed that Mr Williams had a gross income of $601.50 a fortnight. Tax and superannuation payments reduced this to $431.70 a fortnight. Medical expenses further reduced the income to $368.20 a fortnight and it had been necessary to spend $1248 on changes to their house because of Mrs Williams' incapacity. However, Mr and Mrs Williams owned the house and there were no mortgage payments.



The Tribunal said that a spouse's income might be so committed to payment of the pensioner's medical expenses that there would be virtually no disposable income left. The AAT did not rule out the possibility that the discretion in s.29(2)(b) might be properly exercised in such a case. (The Tribunal clearly tended to the view that this discretion was limited to cases where, for some reason, the spouse's income was not available to the pensioner: see *Reid*, 3 *SSR* 31.) But in the present case, the Tribunal was not satisfied that there was 'hardship sufficient to justify taking it outside the operation of the rule with respect to income normally applicable to a husband and wife': Reasons for Decision, para. 27.

The AAT affirmed the decision under review and recommended that the Director-General seek an amendment of the Act so that he could continue legally to exercise the flexible discretion 'which it has long been his practice to exercise': Reasons for Decision, para. 28.