ed benefit under s.107(1)(c) the AAT referred to *Thomson* (1981) 38 ALR 624. The Federal Court in that case—

> . . . recognized the possibility that the activities being pursued by a person without work may be so fundamentally incompatible with the person's being regarded as unemployed that no further enquiry is necessary, but is the usual case (of which it thought Miss Thomson's case was an example), the solution will be arrived at 'by reference to all the circumstances, of which the activities being pursued for the time being by the applicant for benefit will be one'.

(Reasons for Decision, para. 24)

The Tribunal also cited the passage from *Thomson* which states that the various requirements of s.107(1)(c) are not divorced from each other. The Court there said—

> Thus, evidence that a person without paid work is seeking work may be relevant, not only to the question whether that person has taken reasonable steps to obtain work [s.107(1)(c)(ii)], but also to the question whether that person is willing to undertake paid work, and again to the question whether the person is, in the relevant sense, unemployed. Conversely, the fact that a person is a full-time student may often evidence not only that the person is not willing to undertake paid work but also that, in a relevant sense, the person is not unemployed. [(1981) 38 ALR at p.629.]

The AAT also mentioned that *Thomson's* case stressed the need to consider the applicant's intention at the relevant time.

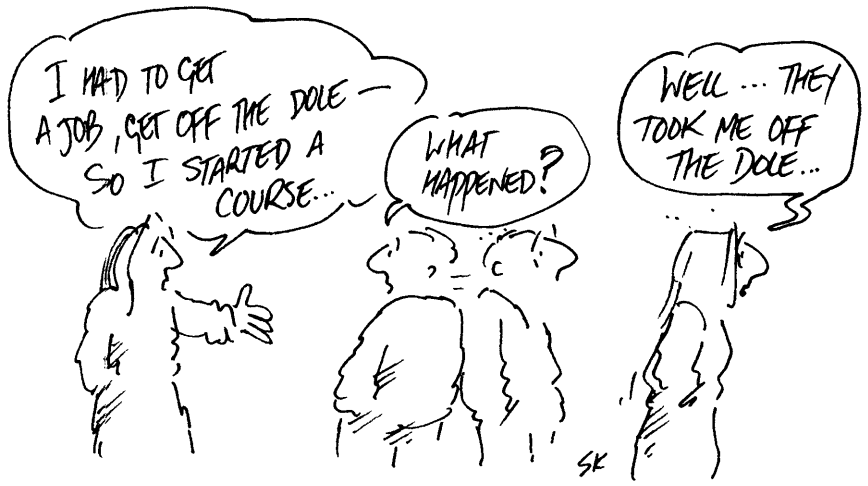
The AAT's assessment

In looking at Darby, the AAT could not accept that he would have interrupted his course to attend interviews for employment or otherwise seek employment. His intention appeared to be that he undertook the course to advance his prospects of finding employment at its completion and not as something to fill in while he looked for employment, unlike *Thomson's* case. It was clear to the Tribunal that—

> the course, and its completion, was the overriding consideration in the applicant's mind over the period 21 January–15 February 1981 and that he had a strong commitment to its completion.

(Reasons for Decision, para. 27)

The AAT concluded that, having regard



to the short duration of the course, the semi-isolation involved, Darby's commencement of a full-time course shortly after, and his propensity for outdoors training work, Darby did not satisfy any of the requirements of s.107(1)(c).

While the AAT said that 'what he did was directed to his ultimate benefit' and 'reflected considerable credit on him', it could not decide the case on the worth of his activities.

Formal decision

The Tribunal affirmed the decision under review.

MARTIN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. T81/23)

Decided: 26 January 1983 by R. K. Todd.

Rodney Martin applied for unemployment benefit in March 1981. He had completed year 10 at the end of 1980 and unsuccessfully applied for an apprenticeship with various employers. From 28 April to 11 May 1981 Martin attended a 'block release' course in carpentry at the Hobart Technical College. The DSS decided that during that period he was not eligible to receive unemployment benefit.

Section 107(1) of the Act qualifies a person to receive unemployment benefit where

> (c) the person satisfies the Director-General that—
>
> (i) throughout the relevant period he was unemployed and was capable of undertaking, and 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.

'Unemployed'

The AAT thought that *Thomson* (1981) 2 *SSR* 12 had clear application to the present case. There was no commitment to study as distinct from employment (evidence was given by the applicant that he would have dropped the course if offered a job) and Martin continued to seek employment. The fact that the course occupied his full-time attention for a fortnight did not affect the Tribunal's conclusion that he was 'unemployed' during that period.

Social utility

The AAT concluded by commenting on the manner in which its view of the Act accorded with the 'social utility' of the situation.

> It would be a distressing construction of the legislation if it were to be found that a young man of the simple candour and good intentions that were displayed by the present applicant were to be unable to receive unemployment benefit because he tried to better himself while continuing to try to obtain work, while someone otherwise in the same position but who remained indolent should receive such benefit.

(Reasons, para. 16)

Formal decision

The Tribunal set aside the decision under review.

Unemployment benefit: industrial action

GADD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. T82/53)

Decided: 13 May 1983 by E. Smith.

Kelvin Gadd was a fork-lift driver employed by the Electrolytic Zinc Company (EZ) and a member of the FEDFA union. On 21 September 1982, members of another union, the AWU, went on strike and, on 22 September, EZ stood down workers who were members of the FEDFA.

On 23 September, the FEDFA members decided to go on strike in support of the AWU and revoked this decision on 20 September. On 4 October, EZ purported to stand down, again, the FEDFA members because of the continuing industrial action by the AWU.

Gadd, and the other FEDFA members, remained stood down until 14 October, when the AWU ended its strike.

Meanwhile, Gadd had applied for unemployment benefit on 30 September 1982. The DSS rejected the application because, it said, his unemployment was due to industrial action by his union, the FEDFA. Gadd applied to the AAT for review of this decision.

The legislation

Section 107(4) of the *Social Security Act* provides that a person is not qualified to receive unemployment benefit unless

> (a) the person satisfies the Director-General that the person's unemployment during that period was not due to the person being, or having been, engaged in industrial action . . .

(Paragraph (b) deals with unemployment caused by the industrial action of *other* members of the person's trade union.)

'Industrial action' is defined in s.107(7) so as to include a strike.

The cause of the unemployment

The critical question before the AAT was whether Gadd was disqualified by s.107(4)(a) during the period 23–30 September—the period when his union had declared itself to be on strike. The AAT said

10. While a question of this kind is not to be resolved simply by looking at which action (i.e. the stand down by the Company or the strike by the FEDFA) occurred first, it is in my view relevant that it was the Company's action in standing down the members of the FEDFA, and not action on that Union's part, that caused Mr Gadd to become unemployed. The absence of written stand down notices leaves some degree of uncertainty as to the intended duration of the stand down, but Mr Gadd's evidence—and he impressed me as a man of integrity—leaves me in little doubt that the stand down was intended by the Company to be for the duration of the AWU strike. The 'renewal' of that stand down on 4 October—a matter not communicated to Mr Gadd at the time (see paragraph 6 above)—was probably prompted by the ending by the FEDFA on 30 September (the last working day before 4 October) of their decision to strike made on 23 September. Whatever the Company's motives, or their interpretation of the situation as at 4 October, what has to be decided is whether Mr Gadd's unemployment between 22 September and 30 September was 'due' to his being, or having been, engaged in industrial action (i.e. the strike decided on by the FEDFA) or his being stood down by the Company.

What s.107(4) had in mind, the AAT said, 'is unemployment that is caused by, or is the result of, the person being, or having been, engaged in industrial action': Reasons, para. 11. The AAT concluded:

13. Looking at the events that unfolded between 21 September and 15 October 1982, and accepting as I do . . . that the stand down of the applicant by the Company on 22 September was intended to operate as a stand down while the AWU strike continued, I am satisfied that the applicant's unemployment between 22 September and 30 September was due to his being stood down and not to his engaging in industrial action. Whether or not the FEDFA had, after the original stand down, made a decision to strike, the applicant would have been unemployed, as the stand down would have prevented him from working. As I have already observed . . . the fact that the Company saw fit to renew its stand down in some form (not in any event communicated to the applicant) does not in my view affect the position.

Back-payment?

The Tribunal then turned to s.119(1)(a) which makes unemployment benefit payable seven days after the unemployment commences or after benefit was claimed, 'whichever was the later'. [The effect of this would be to date payment of Gadd's benefit from 7 October 1982.] Section 119(1A) obliged the Director-General to back-date payment, up to seven days, if the Director-General was satisfied that a person had been unemployed before making a claim and

- had been capable of undertaking and willing to undertake suitable work; and
- had taken reasonable steps to obtain such work.

There was no evidence of Gadd making any attempt to find new work. The Tribunal observed:

It may seem strange that a person stood down and consequently 'unemployed' for what is expected to be only a comparatively short period should be required to establish that he was in fact looking for other work over that time, as s.119(1A) requires if advantage is to be taken of the exclusion from the waiting period. But that is what the sub-section clearly requires and the respondent's representative confirmed that that was in accordance with the then Government's policy when the sub-section was enacted.

(Reasons, para. 14)

Therefore, s.119(1A) would not apply and the seven day waiting period imposed by s.119(1)(a) was applicable.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Gadd be paid unemployment benefit in accordance with the AAT's findings.

WHITTENBURY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S82/32)

Decided: 16 May 1983 by I.R. Thompson.

Rhonda Whittenbury's husband was on strike from 11 July 1980 to 1 September 1980. On 22 July 1980 she applied to the DSS for unemployment benefit which was granted on 31 July. During the period of the strike Mr Whittenbury received various amounts from his union as dispute benefit; however, these amounts were not disclosed by Rhonda Whittenbury in her income statement when applying for continuation of unemployment benefit on 11 August and 25 August.

Upon receiving details of the dispute benefit from the union, the DSS decided that, having regard to the income of her spouse, Mrs Whittenbury should have received a reduced rate of benefit and requested a refund of $86.

'Income'

The AAT was asked to decide whether the dispute benefits were income as defined in section 106(1) of the Act. Section 106(1) says:

'income' in relation to a person, means any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever, within or outside Australia, and includes any periodical payment or benefit by way of gift or allowance, . . .'

Whether the dispute benefit was income within this meaning depended upon the nature of Mr Whittenbury's beneficial interest in the moneys comprising the union's funds and to be paid out in accordance with its constitution.

It was argued for the applicant that when her husband received the dispute benefit he was receiving his own money, the money being held in trust for him by the union until paid to him as dispute benefit. (The analogy was made with a person's withdrawal of money from his own bank account.)

The AAT held that the dispute benefit was to be regarded as income. The benefit was received by Mr Whittenbury for his own use or benefit from a source, the union's funds. Even if he could be said to have been the beneficial owner of the money prior to receiving it in cash, then he "received" the money at the (earlier) time when he became entitled to it.

Income required to be taken into account

The AAT was also asked to decide whether the operation of s.112(6A) means that that income be not taken into account. The effect of s.112(6A) is to pay, to a married person, the single rate of unemployment benefit where the spouse of that person is unemployed due to an industrial dispute of the type referred to in s.107(4).

As s.107(4) operated to exclude Mr Whittenbury from receiving unemployment benefit, Mrs Whittenbury was deemed to be a single person as s.112(6A) applied. It was argued on her behalf that, as she was deemed to be unmarried, she should also be treated as a single person. (Section 114(3) states that for the purposes of calculating the rate of benefit for a married person the income of the spouse is to be included in that persons's income.) This was submitted on the basis that to hold otherwise

would be "to expose the applicant to double jeopardy", that is to say, she would get only the lower rate of unemployment benefit appropriate to an unmarried person and then have that lower rate reduced still further because of her husband's income.

(Reasons, para. 5).

The AAT did not accept that view. The deeming provisions of s.112(6A) only apply for s.112. The objects of s.107(4) and s.112(6A) were clear.

Where a person has withdrawn his labour because of an industrial dispute his spouse is not to be able to obtain the unemployment benefit of a married person which he himself would normally be able to obtain as a result of being unemployed.

(Reasons, para. 6).

However, that was no reason for not reducing her benefit where her spouse was in receipt of income. An advantage could not be given over the case where the spouse of a person was simply unemployed and to whom s.114(3) would clearly apply. Thus the deeming provisions of s.112(6A) do not extend to s.114.

Formal decision

The decision under review was affirmed.

Overpayment: discretion not to recover

EMERY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/132)

Decided: 12 April 1983 by R.A. Balmford.

Because of an oversight by the DSS, Jean Emery was overpaid $1117 by way of family allowance (then called 'child endowment' in the *Social Security Act*) between 1977 and 1980. The overpay-