(Reasons, pp. 11-12)

The AAT was satisfied that the DSS had formed the opinion 'that part of the general damanges could reasonably be regarded as a payment to the applicant as compensation meeting the requirements of s.115(a)' and that it was a reasonable conclusion that at the time of settlement of the court action the sum paid to the DSS was reasonably attributable to the applicant's economic loss at that time.

**Formal decision**

The AAT affirmed the decision under review.

# Invalid pension: residence

**WILSON and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. V81/465)**

**Decided:** 5 May 1983 by J.O. Ballard.

Wilson applied to the AAT for the stay of a decision by the DSS to cancel his invalid pension.

Wilson left Australia for New Zealand on 1 August 1980. He had been in receipt of invalid pension since his arrival from New Zealand in 1971. He intended to return to Australia and claimed to have been informed by the DSS that he could take his pension overseas for up to 12 months. However, the DSS cancelled his invalid pension on the ground that being permanently incapacitated for work on arrival in Australia and not having completed 10 years residence in Australia, he was receiving his pension by virtue of the reciprocal agreement between Australia and New Zealand (and not under s.25(2)) and under that agreement was eligible for the Australian pension only for a period of up to six months following his departure.

**Residence: opinion to be formed**

The applicant was in receipt of invalid pension while in Australia pursuant to regulation 6 of the *Social Security (Reciprocity with New Zealand) Regulations*. (These regulations give effect to the reciprocity agreement beween Australia and New Zealand).

That regulation reads:

(1) This Part shall apply to any person who, having at any time resided in New Zealand, is permanently resident in Australia.

(2) For the purposes of this Part, a person shall be deemed to be permanently resident in Australia –
(a) if he is resident in Australia and satisfies the Director-General that he is residing permanently in Australia; or
(b) if he is resident in Australia and his residence has been continuous for not less than six months, unless the appropriate authorities of Australia and New Zealand agree to the contrary.

Regulation 11 was also applicable in relation to Wilson's absence from Australia. That regulation provides:

(1) This Part shall apply to any person ordinarily resident in Australia who is temporarily resident in New Zealand.

(2) Subject to the next succeeding subregulation, a person who, in the opinion of the Social Security Commission, is not residing permanently in New Zealand shall not, by reason only of his temporary absence from Australia, be disqualified from claiming or receiving any pension, allowance, endowment or benefit under the Act to which he would have been entitled if he had remained in Australia.

(3) The Director-General may, in his discretion, withhold payment of the whole or such part of the pension, allowance, endowment or benefit as he thinks fit until the return of that person to Australia.

This regulation entitled the applicant to apply to the New Zealand Social Security Commission for a determination that being a person ordinarily resident in Australia, he was not residing permanently in New Zealand. If that opinion was formed by the Commission then he remained entitled to his Australian pension.

However, as no opinion had been formed one way or the other there was no *prima facie* case for restoration of the benefit on the facts. There existed only an assertion of facts by the applicant which if true would entitle him to the pension. On that basis, the AAT could not grant the stay order.

**Formal decision**

The Tribunal decided not to grant a stay order pursuant to s.41(2) of the *Administrative Appeals Tribunal Act*.

# Invalid pension: 'permanent incapacity'

**SYNTAGEROS and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. Q82/67)**

**Decided:** 12 July 1983 by J.B.K. Williams.

The Tribunal *set aside* a DSS refusal to grant invalid pension to a 54-year-old former labourer who suffered an injury to his right hand at work.

**PYE and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. N82/176)**

**Decided:** 20 July 1983 by E. Smith.

The AAT *set aside* A DSS decision to cancel an invalid pension held by a 40-year-old former labourer who suffered from spinal problems, headaches and partial deafness.

**DABBAGH and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. N82/63)**

**Decided:** 20 July 1983 by E. Smith.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 42-year-old former factory worker who had injured his back at work.

**BEGOVIC and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. S82/97)**

**Decided:** 21 June 1983 by R.A. Balmford.

The AAT *affirmed* a DSS refusal to grant an invalid pension to a 45-year-old glazier whose wrist was severely lacerated in an industrial accident and who had not worked since.

The Tribunal could not accept that he was 85% permanently incapacitated for work and considered that with rehabilitation and retraining he could expect to be attractive to an employer in any capacity which did not require the full use of both hands.

**ALVARO and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. W82/59)**

**Decided:** 30 May 1983 by G. D. Clarkson.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 30-year-old woman who had lost all power of movement in her ankles and toes. While she was unable to do the work which she had performed before her injury, she was capable of doing a wide range of work.

**HARDACRE and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. N82/107)**

**Decided:** 13 July 1983 by E. Smith.

The AAT *set aside* a DSS refusal to grant invalid pension to a 49-year-old former forklift driver who suffered from unstable angina and high blood pressure.

**AZIZI and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. N82/93)**

**Decided:** 6 June 1983 by E. Smith.

The AAT *set aside* a DSS decision to reject a claim for invalid pension lodged by a 47-year-old former factory labourer, with very limited English, who had not worked since injuring his back in 1973.

Taking into account Azizi's history (which included injury, workers' compensation award, sickness benefit, an earlier grant of invalid pension and acceptance by several doctors of his inability to work), the AAT said 'it would be flying in the face of reality to take the view that the applicant has any meaningful residual capacity for work or to attract an employer': Reasons, para. 34.

**VERVERELLIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/72)**

**Decided:** 30 May 1983 by E. Smith.

The Tribunal *set aside* a DSS refusal to grant invalid pension to a 51-year-old man who injured his back while working.

The Tribunal concluded that Ververellis was presently unemployable due to his injury. His refusal to undergo a serious and potentially risky operation—risky in the sense that it might worsen his condition—did not prevent his incapacity being regarded as 'permanent'.

**ZEMETNER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/232)**

Decided: 13 July 1983 by R. Balmford.

The Tribunal *affirmed* a DSS cancellation of invalid pension held by a 52-year-old man who suffered from the after-effects of polio in one leg, osteoarthritis and pancreatitis.

**'K' and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. A82/34)**

Decided: 22 June 1983 by E. Smith.

The AAT *affirmed* a DSS refusal to grant an invalid pension to a 48-year-old kitchen maid suffering from degenerative arthritis affecting her back and legs.

On the medical evidence the Tribunal had little difficulty finding that she was permanently incapacitated for work. However the applicant was in full-time employment and although suffering pain she was performing her work to her employer's satisfaction.

**CHEE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/161)**

**Decided:** 21 June 1983 by J.B.K. Williams.

The AAT *affirmed* a DSS refusal to grant invalid pension to a 48-year-old woman who had lost her right knee cap in a car accident and who also suffered from decreased vision in one eye.

Chee had not engaged in work since 1973, her accident occurred in 1980. There was no evidence that the applicant whilst looking for work had been unable to find any by reason of her disabling condition.

**O'RAFFERTY AND DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q 81/162)**

**Decided:** 7 June 1982 by A.N. Hall.

The AAT *set aside* a DSS decision to cancel the invalid pension of a 44-year-old former fitter and welder and sheet-metal worker who had suffered a back injury at work.

The Tribunal concluded that the medical evidence upon which the DSS based the cancellation was not conclusive as to his capacity to work, for there was reason to believe that he had 'some psychological overlay upon his underlying organic symptoms'.

## Federal Court Decision

# Unemployment benefit: 'industrial action'

**SAVAGE v DIRECTOR-GENERAL OF SOCIAL SECURITY**

**Federal Court of Australia**

**Decided:** 4 August 1983 by Bowen CJ, Lockhart and Neaves JJ

This was an appeal from the decision of the AAT in *Savage* (1983) 11 *SSR* 111 where the Tribunal had decided that the applicant was not qualified to receive unemployment benefit because his unemployment was due to industrial action.

Section 197(4) and (5) of the *Social Security Act* reads:

> (4) A person is not qualified to receive an unemployment benefit in respect of a period 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;
>
> ...
>
> (5) Sub-section (4) does not disqualify a person from receiving unemployment benefit in respect of a period occurring after the cessation of the relevant industrial action.

**The facts**

Savage was a member of the Amalgamated Metal Workers and Shipwrights Union, employed as a fitter by Toohey's Limited. In September 1980 the AMWSU and a number of other unions commenced industrial action in support of, in particular, a 35 hour week. The campaign, in which Savage participated, included stoppages, bans and restrictions on performance of work. On 11 November 1980 the appellant was asked to sign a letter saying that he was prepared to work in terms of the award without further disruption of normal production. The appellant, along with some 420 others refused to sign and was summarily dismissed. None of the employees was paid until all were reinstated on 19 December 1980.

**Industrial action: contract of employment**

The appellant submitted that his dismissal prevented him from engaging in industrial action after 11 November. Thus he was qualified to receive unemployment benefit for the period 11 November to 19 December 1980.

The Federal Court rejected this submission. 'Industrial action' in s.107 did not require that a contract of employment be in existence.

> In one sense it is true to say that the appellant's unemployment during the relevant period was due to his having been dismissed from his employment. But he was dismissed because he refused, as evidenced by his unwillingness to sign the letter presented to him for signature on 11 November . . . The words 'due to' suggest some element of caustion. But unemployment may be due to industrial action notwithstanding that the relationship of employer and employee is technically terminated . . .
>
> It is a question of fact depending on the particular circumstances of each case whether unemployment of the claimant for unemployment benefit is due to his or another member of the same trade union being, or having been, engaged in industrial action. The question is answered by broader considerations than the contractual relationship between employer and employee. The industrial context in which that relationship was shaped and severed is also relevant. Section 107 is not to be read in isolation from, but rather against, the background of the industrial scene.

(Reasons for Judgment, pp. 10-12)

In this case the Court formed the view that the appellant was clearly dismissed because he was engaged in the industrial action and that this dismissal was part of the 'battle of tactics' between the employer and the union.

This also appears to address the second submission by the appellant that no industrial action occurred between 11 November and 19 December 1980. It was not established, said the Court, that there was no evidence to support the AAT's finding that other members of the AMWSU were engaged in relevant industrial action during that period. Industrial action extended over the whole period.

**Formal decision**

The Federal Court dismissed the applicant's appeal, with costs.

## Statistics

This table of applications lodged with and decided by the AAT, is compiled from information provided by the Department of Social Security.

| | Jan. 83 | Feb. 83 | Mar. 83 | April 83 |
|---|---|---|---|---|
| Applications lodged* | 90 | 123 | 103 | 112 |
| Decided by AAT | 19 | 23 | 27 | 36 |
| Withdrawn | 14 | 20 | 10 | 25 |
| Conceded | 8 | 30 | 40 | 37 |
| No jurisdiction | 2 | 4 | 5 | 7 |
| Awaiting decision at end of month | 1134 | 1180 | 1201 | 1208 |
| *** Applications lodged: type of appeal** | | | | |
| Medical appeal | 81 | 86 | 70 | 85 |
| Other appeals | 9 | 36 | 31 | 37 |
| FOI | 4 | 1 | 2 | 0 |
| **State where application lodged** | | | | |
| ACT | 0 | 2 | 0 | 1 |
| NSW | 60 | 80 | 58 | 50 |
| NT | 0 | 1 | 1 | 0 |
| Qld. | 8 | 6 | 5 | 6 |
| SA | 3 | 13 | 4 | 11 |
| Tas. | 1 | 2 | 6 | 0 |
| Vic. | 13 | 13 | 26 | 42 |
| WA | | 6 | 3 | 2 |