years, nor had she resided in and been physically present in Australia since the date when she reached 60 years of age.

There was no discretion in the Director-General to waive the residential requirements of the Act on humanitarian or hardship grounds:

> 12. Thus, it seems to me that the applicant, having resided in Australia for only 5½ years, having returned to reside in Italy with her husband in November 1973 and her husband having since died, has no continuing entitlement to look to the Australian Government for social welfare support in accordance with the provisions of the *Social Services Act* 1947.

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: farmer

VAVARIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/514)

Decided: 13 December 1982 by R. K. Todd.

Vavaris and his wife had, since 1973, owned a 34 acre property in Robinvale on which he grew grapes. Vavaris applied for unemployment benefits on 16 June 1981, stating that he had last worked on 15 April 1981. His claim was rejected on 1 July 1981 on the ground that he was employed as a primary producer. He appealed to the AAT, which also considered his eligibility for special benefit.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person passes the age and residence tests and if—

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

Section 124(1) of the Act provides that the Director-General may, in his discretion, grant a special benefit to a person not receiving a pension under the Act and not qualified for unemployment or sickness benefit,—

> (c) with respect to whom the Director-General is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).

The evidence

The Reasons for Decision contain a detailed discussion of the annual demands of viticulture. The applicant claimed that he did not need to work his block except at weekends. He said that since he had moved to the property he had done various jobs off his property—electrical work and casual picking; he had worked in a wrecking yard in Wollongong for seven months in 1977, and had registered with the CES in November 1976. The CES stated he had been placed in seasonal employment on four occasions, the last being in March 1981. The applicant stated that he and his wife had also obtained some picking work in 1982, not through the CES. Vavaris stated in the last two years he had seen some 14 people in order to obtain work. He stated that it was widely known in the Robinvale area that he was looking for permanent work.

The applicant had received unemployment benefit for a total of approximately two years since 1973. In February 1981 he had his unemployment benefits stopped because he had obtained work as a picker. He said that since June 1981 he had borrowed $3800 from his sons-in-law and now owed $8400 to friends and $6000 to a bank.

The applicant stated that he still owned a house in Wollongong, which was unencumbered. He maintained it could not be rented as it had to remain available for use by his daughters, and it would not be sold, as it was to be a dowry for his children.

Evidence was given by a viticultural extension officer from the Department of Agriculture. He stated that the applicant could have produced his 1981–82 crop with only two days work a week, excluding the picking season. To pick the 16 tonnes of wet sultanas and 22 tonnes of wine grapes would have taken the applicant and his wife alone a week, without any of the operations associated with picking. However, a person's rate of picking was extremely variable depending on motivation, denseness of vines, etc.

'Unemployed' or 'underemployed'

The Tribunal assumed, without deciding the issues, that the applicant was at the relevant times capable of undertaking and willing to undertake paid work within the meaning of s.107(1)(c)(i) of the Act, and had in all the circumstances taken reasonable steps to obtain such work (s.107(1)(c)(i)). The difficult question was whether he was 'unemployed' within s.107(1)(c)(i).

The Tribunal found that the applicant intended that his operations on the property should be operated as a business with a view to making a profit to give himself and his family a livelihood. The Tribunal reached this view from the fact that the operation could be characterised as a business venture, given the long term nature of agricultural undertakings; that the applicant had already undertaken a deal of work on the property; that real production had increased in size over the years; and that there was a likelihood, if not next season, then the one after, that the applicant would make a profit.

The Tribunal stated that the applicant had been 'employed' 'in any ordinary sense of the word'—in building up his block to the point where it provided him and his family with a livelihood. He may have been 'underemployed' in the sense that he chose to limit the amount of time he spent in building up the block so that he had around 40 hours a week available for other activities, but this did not make him 'unemployed' within the meaning of the Act. the Tribunal explained its view:

> 31. A wide variety of business activities may involve, in their initial stages, the devotion of less effective time to dealing with customers than the operator of the business would have wished. The briefless barrister may wait anxiously in his chambers for the call from a solicitor, or may even occasionally pass hopefully through the office of his Clerk for fear that he may have been forgotten. But this barrister, like the person who opens a small shop and waits for customers, is occupied, and is underemployed, not unemployed, when simply remaining available at his post so that he is on hand when the call to action comes.
>
> 32. The primary producer on the other hand does not when physically unoccupied wait for customers. He may wait for livestock to grow, in which case he is likely to have his time occupied, to a greater or less degree, in attending to that stock. Where he waits for crops to grow or for vines to come into leaf, to form buds and then to fruit, it is tempting to think that his employment is suspended and that he is in fact unemployed. I do not consider that this is so . . .

This view, the Tribunal said, was supported by the earlier decision in *Te Velde* (1981) 3 *SSR* 23.

Special benefits

This did not mean that a primary producer

in a desperate condition (as 'many undoubtedly now are') was denied social security assistance. Section 124 of the Act was 'apt to deal with a situation in which a primary producer is "unable to earn a sufficient livelihood for himself and his family" [the basic qualification set out in that section for a special benefit]'.

But, in this case, the Tribunal felt it could not exercise the discretion to grant special benefit to Vavaris because he owned a house in Wollongong which he had 'declined to sell or let because of family considerations derived from his ethnic and cultural background':

> [I]t does not seem to me that s.124, which I repeat involves an exercise of discretion, can be invoked so as to assist from the public purse someone who will not for family reasons make the full use of his assets to ensure his continuing sustenance. If the family will not let him sell or let the Wollongong house, the family will no doubt have to continue to support him. Of course, even since the hearing it is notorious that there has been a serious downturn in the employment situation in Wollongong and it may be that the property market has been affected. If so, a decision by the applicant to sell or let might not now even be realistic. Beyond saying that it is obviously open to the applicant or his advisers to make representations to the respondent about the matter accordingly, I say no more about it.

(Reasons for Decision, para. 35)

Formal decision

The Tribunal affirmed the decision under review.

Unemployment benefit: industrial action

SAVAGE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/165)

Decided: 15 December 1982 by McGregor J.

Savage appealed to the AAT against a refusal by the DSS to grant him unemployment benefits from 11 November 1980 to 19 December 1980. The DSS refused on the grounds that he was engaged in injustrial action during that period.

Facts

Savage was a member of the Amalgamated Metal Workers and Shipwrights Union, employed as a fitter by Toohey's Limited at Auburn. In September 1980 the AMWSU and a number of other unions commenced industrial action in support of demands for improved wages and working conditions in the brewing industry, in particular for a 35 hour week. The campaign, in which Savage participated, included stoppages, bans and restrictions on performance of work. On 11 November 1980 the applicant 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 applicant, 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.

Legislation

S.107(4) and (5) of the *Social Security Act* state:

> (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.

Was there industrial action?

Savage argued that he was not engaged in any industrial action on the morning of his dismissal and that the reason for the dismissal was his refusal to sign the letter, which did not constitute industrial action. His dismissal, he argued, ended the relationship of employer and employee and thus ended any industrial action. He was thus entitled to unemployment benefits coming within the terms of s.107(5), which overrode s.107(4).

The Tribunal rejected these arguments and concluded that there had been industrial action, from some time before 11 November 1980 and continuing up to 19 December 1980. They cited in support the following 'evidence':

- that there had been industrial action up to 11 November 1980 at the Auburn brewery by AMWSU members, including the applicant;
- that, after 11 November 1980, the applicant (by refusing to sign the letter) was refusing to indicate willingness to work in terms of his award;
- that, on 11 November 1980, there had been a mass meeting at Auburn brewery where employees refused to sign the letter and were dismissed; a letter from Toohey's Limited to the DSS in May 1981, which gave as a reason for dismissal of the employees, including Savage, their refusal to perform work in accordance with the terms of the Award, and referred to an existing campaign for improved pay and conditions;
- statements by counsel for Toohey's in proceedings before the NSW Industrial Commission on 12 and 13 November 1980 to pickets at the Auburn brewery;
- a statement by the President of the NSW Industrial Commission on 20 November 1980 concerning a union campaign in the brewing industry; and
- a calendar of events supplied by Toohey's Ltd.

It followed that the AAT was 'satisfied that the applicant is not qualified to receive any employment [sic] benefit for the period 11 November 1980 – 19 December 1980.'

Formal decision

The AAT affirmed the decision under review.

Procedure: application for 'stay' of cancellation

ROUMELIOTIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/392)

Decided: 17 December 1982 by W. Prentice.

Constantino Roumeliotis had been granted an invalid pension in 1980. The DSS cancelled this pension in September 1982. He then applied to the AAT for review of this decision.

At about the same time, he asked the AAT to use its power under s.41 of the *Administrative Appeals Tribunal Act* to 'stay' the operation of the cancellation. (that is, to order that the pension continue to be paid) pending the hearing of the application for review.

The Tribunal noted that Roumeliotis was living in Athens with his wife and young daughter; that his elder daughter was sending about $50 a week to him from Australia; that he was allegedly suffering from 'manifold disabilities'; and that his wife was 'ill and suicidal'.

However, the Tribunal said, it was 'by no means apparent that the applicant is experiencing any particular financial difficulties, maintaining himself in his own home with the monies being sent him': Reasons for Decision, para.6. The AAT continued:

> 8. On such an application, one must bear in mind not only that should the application to review prove successful back payments of the pension would normally be ordered, but also that in the event of failure, payments during a stay of cancellation might well be irrecoverable.
> 9. The pattern of facts revealed in the affidavit and submissions put to me, indicate to my mind that should a stay be granted, far from the effectiveness of the hearing being secured and the application determined thereby, its result could well be the contrary, namely an extended delay in the final determination of the issue: Though I feel considerable sympathy for