

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 'declin-

ed 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 industrial 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