answering newspaper advertisements and through the computer school) in the computer industry; and that he would have converted to a part-time course if he had found employment during that period.

The AAT's assessment

The Tribunal said that, in deciding whether Martens was 'unemployed', his intention was the important consideration. This was established by the High Court decision in *Green* v *Daniels* (1977) 13 ALR 1, and the Federal Court decision in *Thomson* (1981) 38 ALR 624. In the present case, the evidence had established that Martens had intended

> at all relevant times . . . to join the permanent workforce in the chosen area of his endeavours. This must define his status as an unsuccessful aspirant for employment – an unemployed person.

(Reasons, p. 11).

The AAT then rejected the DSS argument that, by seeking employment only in the computer industry, Martens had not shown a willingness to undertake work and had failed to take reasonable steps to find work. This argument was based on the decision in *Whyte* (1981) 4 *SSR* 37, where the Tribunal had decided that a person who had looked for a job only as a radio announcer had not taken reasonable steps to obtain suitable employment.

However, the AAT said, there was a difference between the labour market for radio announcers and the labour market in the computer industry. After noting that the applicant in *Thomson* (above) had been looking for a design job, the Tribunal said:

> Having regard to the size and rate of growth of the computer segment of our economy, the number of jobs available in it, the mobility of employees and the consequent rate of availability of employment, we consider that genuine and assiduous enquiries in that field amounted to reasonable steps to obtain suitable employment.

(Reasons, p. 14).

Accordingly, the AAT said, Martens had qualified, during the relevant period, for unemployment benefit.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that unemployment benefit be paid to Martens during the relevant period.

KONTOGEORGOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V84/23)

Decided: 5 October 1984 by R. Balmford.

John Kontogeorgos left school in November 1979 and was granted unemployment benefit in January 1980. In Feburary 1980, he decided to obtain a qualification while waiting for employment. An officer of the DSS advised him that he could continue to receive unemployment benefit while attending a commercial hairdressing school. Between March 1980 and January 1981, Kontogeorgos attended this school for about 8 hours a day although he frequently absented himself in order to look for work.

In January 1981, when Kontogeorgos sought reassurance from the DSS as to his continuing eligibility for unemployment benefit, the DSS decided to cancel the benefit and to recover from him money paid between March 1980 and January 1981, namely $2391.

The legislation

Section 140(1) of the *Social Security Act* provides for the recovery of an overpayment which would not have been paid but for a false statement or a failure or omission to comply with the Act.

Section 140(2) gives the Director-General a discretion to recover, by deducting from any current pension, allowance or benefit, an overpayment made for any reason.

According to s.107(1) a person is qualified to receive unemployment benefit if the person satisfies age and residence requirements and –

> (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.

Full-time student can qualify for unemployment benefit

The AAT decided that there was no ground for recovery of any overpayment from Kontogeorgos under s.140(1). At no time had Kontogeorgos made a false statement to the DSS nor had he failed to comply with any provision of the Act.

Moreover, there was no basis for recovery under s.140(2) because Kontogeorgos had continued to qualify for unemployment benefit during the whole period of his enrolment at the hairdressing school. Applying the Federal Court decision in *Thomson* (1981) 38 ALR 624, the AAT said that his attendance at the school did not prevent him from qualifying for unemployment benefit. The Tribunal noted that the DSS had acted on the assumption that attendance at an 'educational institution' would prevent a person from qualifying for unemployment benefit. After noting that this term ('educational institution') was relevant for the purposes of the *Student Assistance Act* 1973, the AAT continued:

> The question of whether a particular institution is an educational institution for those specific purposes is not relevant to the question of whether a particular person complies with the requirements of sub-paragraph 107(1)(c)(i). The Department knew what he was doing: he was attending an institution which would train him for a trade; he had told them so. What they really needed to find out was whether he was 'willing to undertake paid work' and 'had taken . . . reasonable steps to obtain such work'. Once the decision of the Federal Court in *Thomson's* case had been handed down, it should have been clear to the Department that attendance at an educational institution is not, of itself conclusive of these matters. It is simply one of the relevant factors.

(Reasons, para 18).

Unemployment benefit: work test

CHI MINH CHAU and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/688)

Decided: 24 July 1984 by C. E. Backhouse.

The AAT *set aside* a DSS decsion to reject Chi Minh Chau's claim for unemployment benefit, a decision made on the basis that he was not 'unemployed'.

Chau and his wife and children arrived in Australia as refugees in February 1980. In November 1982 Mrs Chau leased a vegetable garden. Mr Chau did some work in the garden—ploughing, sometimes selling vegetables and giving advice to his wife. Mr Chau was registered with the CES and had applied for various jobs.

The Tribunal was satisfied that, although Mr Chau helped with the heavy work in the garden, the business was Mrs Chau's: the lease was in her name and income tax returns were filed in her name. Further, Mr Chau had complied with the requirements in s.107(1)(c) and intended during the period in question to join the workforce. 'I further find that he was unemployed although he pursued the activities in his wife's market garden in the time available to him through lack of paid work': Reasons, para. 20.

TATE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/560)

Decided: 6 August 1984 by W. A. G. Enright.

The Tribunal *affirmed* a DSS decision to cancel David Tate's unemployment benefit on the ground that he was heavily involved in farming and therefore not unemployed. The Tribunal stated:

> The whole thrust of the applicant's evidence was that he intended to develop an income producing farm for his support . . . He was self-employed and was seriously and heavily committed to a commercial undertaking . . . It is true that the applicant had no farm income adequate for his support but this was due to the fact that his farm had not reached a stage of development at which it would produce income.

OHL and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q83/174)

Decided: 3 October 1984 by J.B.K. Williams.

The AAT *affirmed* a DSS decision to cancel an unemployment benefit held by Alexander Ohl.

Ohl was employed by a meat processing company, which had closed its plant and dismissed all its workers in March 1983. Ohl was then granted unemployment benefit. On 20 April 1983, the company announced that it had agreed with Ohl's union (the AMIEU) to re-open the meatworks on 26 April and to re-employ all except 17 of its former workers.

However, work did not resume on 26 April and the meatworks did not re-open until 26 May 1983. In the intervening period, the union insisted that all former workers be re-employed; and the company eventually agreed to this demand. Ohl unsuccessfully sought other employment in this intervening period; but the DSS cancelled his benefit on 4 May on the basis that his present unemployment was due to his being engaged in industrial action, and so disqualified by s.107(4) of the *Social Security Act*.

Ohl claimed that the disqualification in s.107(4) should not be applied to him because he had tried to leave the meat industry to find other employment during the relevant period. But the AAT concluded that, while he 'had unsuccessfully applied for other jobs, he would nevertheless [have] been in employment during the relevant period with the company, had it not been for the dispute between the AMIEU and its members and the company': Reasons, p. 6. He was accordingly disqualified by s.107(4).

Unemployment benefit: postponement

PEARSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/55 and V83/161)

Decided: 7 September 1984 by R. Balmford.

Colin Pearson was appealing against two decisions of the DSS to postpone payment of unemployment benefit. The first matter concerned postponement in April 1982 after Pearson left GMH on the ground that Pearsons' unemployment was due to his misconduct as a worker (s.120(1)(b)); the second postponement occurred after Pearson left Silverwood and Beck in June 1982 on the ground that his unemployment was due to his voluntary act which was without good and sufficient reason (s.120(1)(a)).

The legislation

Section 120(1) of the *Social Security Act* provides:

> The Director-General may postpone . . . the date from which an unemployment benefit shall be payable to a person . . .
> (a) if that person's unemployment is due, either directly or indirectly, to his voluntary act which in the opinion of the Director-General, was without good and sufficient reason;
> (b) if that person's unemployment is due to his misconduct as a worker . . .

GMH matter

The senior personnel officer from GMH gave evidence. He described the disciplinary system, agreed to by the unions, involving several stages of verbal warning, counselling and then dismissal. Pearson commenced work in the foundry at GMH in March 1982. In his third week of employment he had a second stage disciplinary counselling after being told not to leave his place of work without contacting his supervisor. During the counselling he apparently agreed that he had left his place of work to go over to the engine plant where he used to work, in order to find employment in that area. Pearson complained about the dirt and dust in the foundry. But the area was said to comply with safety requirements, safety equipment was available and Pearson's medical examination showed that he was able to work in that area. Attempts were made to find a job in the engine plant for him, but these were unsuccessful. A few days later Pearson again left his place of work and a third stage counselling was set up where he said he could not work in the foundry area. His job was then terminated.

The Tribunal concluded that Pearson's unemployment in April 1982 was due to his misconduct as a worker.

Silverwood and Beck matter

Pearson gave 4 reasons for leaving his employment with Silverwood and Beck: travelling was difficult, working conditions were bad, he was not receiving the award wage and he could only do a sit down job because he had arthritis in his hip.

The AAT agreed with the SSAT that the travelling involved in getting to and from the job was not unreasonable. Pearson's foreperson at Silverwood and Beck gave evidence about working conditions, which were described as not noisy or dirty; and a variety of safety equipment was available.

The AAT noted that Pearson gave no evidence that he was underpaid at Silverwood and Beck and pointed out that, if this was so, there were ways to remedy this. Medical reports indicated that he was fit for the sort of work he had undertaken. Finally, the Tribunal referred to Pearson's work history and suggested that this showed a certain consistency on Pearson's part.

The Tribunal concluded that Mr Pearson's voluntary act of leaving Silverwood and Beck in June 1982 was 'without good and sufficient reason'.

Formal decision

The decisions under review were affirmed.

Unemployment benefit: claim for backpayment

GRAY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/902)

Decided: 26 October 1984 by R.K. Todd.

Norman Gray had worked as a self-employed motorcycle stunt man at country shows for some weeks prior to November 1982, registering a business name in October. In mid-November he enquired at a DSS office about his eligibility for unemployment benefits. He claimed that he was told that he would not be eligible because he had a registered business. Over the next 2 months he unsuccessfully applied for a number of jobs, borrowed $1000 from a finance company and was supported by his parents.

In Feburary 1983, Gray claimed and was granted unemployment benefit, which was backdated to 7 days before his claim, in accordance with s.119(1A) of the *Social Security Act*. When the DSS refused to backdate payment of this benefit to November 1982, Gray sought review by the AAT.

The legislation

Section 119(1) of the Act provides that unemployment benefit is payable 7 days after making a claim, or after becoming unemployed, 'whichever was the later'. Section 119(1A) is an exception to this, as is s.119(1)(b), which dispenses with the 7-day waiting period when a person has served a waiting period within the past 12 weeks. But there are no other exceptions; and s.116 provides that a claim for unemployment benefit shall be in writing, in a form approved by the Director-General and lodged with a Registrar.

No basis for retrospective claim

In the present case, the AAT said, Gray had not completed a form and attempted to hand it in: if he had, there would 'have been grounds for saying that he had made a claim, and made it in writing.' And if he had clearly said that he was making an oral claim, which the DSS had not accepted, there would have been a basis for considering an *ex gratia* payment, as in *O'Rourke* (1981) 3 *SSR* 31. But neither a written nor an oral claim had been attempted in November 1982; and