ed employment for short periods between their dismissal and the resumption of work.

When the applicants claimed unemployment benefits for the duration of their unemployment, the DSS rejected their claims.

The legislation

Section 107(4) of the *Social Security Act* disqualifies a person from unemployment benefit where the person's unemployment is due to the person's industrial action or due to the industrial action of another member of that person's trade union.

Section 107(5) declared that a person was not disqualified from receiving unemployment benefit once the relevant industrial action had ceased.

Section 107(7) defined 'industrial action, as meaning 'a ban, limitation or restriction on the performance of work'.

Formal procedures

In its Reasons, the AAT responded to what it saw as criticism of its 'too formal' procedures. It was clear, the AAT said, that the *AAT Act* 1975 required that there should be a hearing; and the International Covenant on Civil and Political Rights (to which Australia was a signatory) demanded a 'fair and public hearing by competent, independent and impartial tribunal established by law'.

While the AAT had some flexibility in dealing with proceedings and while there was no single level of formality or informality appropriate for all cases, –

> considerable experience has demonstrated that a degree of so-called formality in fact serves to confer, and not to detract from, that equality of treatment to which applicants, particularly unrepresented applicants, are entitled.

(Reasons, para. 5)

Industrial action

Proceeding on the assumption that the applicants had not participated in the industrial action and that they had not actually refused to work for their employers, the AAT nevertheless decided that

they had been dismissed for reasons directly related to industrial action. It did not matter, the AAT said, whether the applicants had participated in that industrial action: the evidence showed that there had been industrial in the form of bans on performance of work and that these bans had been imposed after meetings of members of the BLF and the BWIU, to which the applicants belonged. Because those bans amounted to 'industrial action' and because they had been imposed by other members of the applicants' trade unions, s.107(4) operated to disqualify them from receiving unemployment benefit.

Unemployment 'due to' industrial action?

The AAT then looked at the situation of the two applicants who had found work for short periods between their dismissal and resumption of work on the site. The question was whether their unemployment after those short periods of employment could be described as still 'due to' the original industrial action at the Parliament House site.

The Tribunal admitted that there would be circumstances where the connection between the industrial action and unemployment could be broken. But the Federal Court decision in *Savage* v *Director-General of Social Security* (1983) 15 *SSR* 156 made it clear that the applicants' unemployment should be regarded as 'due to' the original industrial action, even though they had obtained work for shorter periods.

That result was produced for two reasons. First, it was clear from *Savage* that it was 'enough that the industrial action be a cause of the unemployment. It need not be the sole or dominant cause': Reasons, para 33. The reasoning in *Savage* indicated that s.107(5) should be read as requiring that a person remain disqualified from unemployment benefit until the relevant industrial action on the part of other members of the person's union ceased. Second, the intervening employment should be regarded as 'an interruption of a state of unemployment': it did not provide the basis for new unemployment for those applicants who had obtained short term work 'remained "due to" other members being or having been, engaged in industrial action. A "sufficient nexus" remained':
Reasons, para. 35

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: work test

PORTER and SECRETARY TO DSS (No. Q84/130)

Decided: 14 February 1985 by J.R. Dwyer, H. Pavlin and W. De Maria.

John Porter had worked as a carpenter for some 20 years. From 1977 he was employed by his family company (a contract builder) on building sites on the Gold Coast, Queensland. Following a fall-off in the building industry, the family company stopped employing Porter from 20 January 1984.

On 25 January 1984, Porter applied to the DSS for unemployment benefit. In that application, and in subsequent applications for continuation of the benefit, Porter said that he was looking for paid work as a carpenter and also tendering for building jobs on his own account. On 23 March 1984, the DSS rejected Porter's claim for benefit on the ground that he was not 'unemployed' This was because, the DSS said, he was still tendering and quoting for jobs, which showed a 'continued committment to working in and maintaining (his) business'.

Porter asked the AAT to review that decision.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified for unemployment benefit if –

> (c) the person satisfies the Secretary 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 Secretary, 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 noted that in several earlier decisions, such as *Vavaris* (1982) 11 *SSR* 110, the Tribunal had decided that a self-employed person who was trying to attract work was 'underemployed, not unemployed' In *Vavaris*, the Tribunal had described the example of 'the briefless barrister [waiting] anxiously in his chambers for the call from a solicitor'. But, the AAT said, the case of a skilled tradesman like Porter could be distinguished from that of a briefless barrister. Porter had not attended his business office because he had no office other than his home and, he had not confined his efforts to looking for work as a carpenter on his own account

but had applied for employment. The AAT continued

> 14. The distinction is a narrow one but it seems to us that where a person's only work skills are in a certain trade area, it should not be seen as disqualifying from unemployment benefit if he does what he can to look for work using those skills while he is unemployed so long as he is looking for other employment as well and is at all times prepared to cease to look for work on his own account if he is successful in obtaining paid employment . . . we are satisfied if Mr Porter had been offered a full time position at any stage after he lodged his claim for unemployment benefit, he would have taken that position. Thus we do not find that he had any commitment at all to his own business as a carpenter . . .

'Reasonable steps to obtain work'?

Porter told the AAT that, during the period between January and March 1983, he had not registered with the CES. However, he had asked the manager of the local CES office to inform him of any vacancies and had applied for several jobs.

The AAT said that, in view of Porter's local reputation as a carpenter and builder and the relative brevity of the period in question and the other efforts made by him to obtain work, he should be regarded as having taken reasonable steps to obtain work.

'Willing to undertake work'?

Porter also told the AAT that, during the relevant period, he had restricted his efforts to find work to the carpentry and building trades. The Tribunal said that this was a reasonable course, given his qualifications and the fact that he was recognised locally as a good tradesman. Accordingly, the AAT found that throughout the relevant period, Porter had been willing to undertake suitable work.

Formal decision

The AAT set aside the decision under review and remitted the matter to the respondent with the direction that Porter was qualified to receive unemployment benefit from 25 January 1984 to 23 March 1984.

High Court decision

HARRIS v DIRECTOR-GENERAL OF SOCIAL SECURITY

High Court of Australia

Decided: 5 February 1985 by Gibbs C J, Wilson, Brennan, Deane and Dawson JJ.

This was an appeal to the High Court against the Federal Court's decision in *Director-General of Social Security* v *Harris* (1982) 11 *SSR* 115.

Harris had been granted an age pension in April 1976. From September 1977 to September 1979 she received varying amounts of wages for casual work. However, she did not advise the DSS (as required by s.45(1) of the *Social Security Act*) of her income from this work. When the DSS discovered the extent of Harris' earnings it decided she had been overpaid and that this overpayment should be recovered by deducting $10 a fortnight from her pension.

The AAT set aside this decision, on the basis that the DSS had incorrectly calculated the amount of the overpayment. On appeal, the Federal Court decided that both the DSS and the AAT had adopted the wrong approach to calculating the overpayment.

The central issue before the AAT, the Federal Court and the High Court was the meaning of the term 'annual rate of income' in s.28(2) of the *Social Security Act*, which provides that

> The annual rate at which an age . . . pension is determined shall . . . be reduced by one-half of the amount if any per annum by which the annual rate of the income of the claimant or pensioner exceeds –
>
> (a) In the case of an unmarried person – $1,560 per annum . . .

The difficulty of applying this provision to Harris' situation (and to the situations of many other pensions) was caused by the fact that her income had fluctuated. Were those fluctuations to be averaged; and, if so, over what periods? Or were the fluctuations to be left in 'peaks' and 'troughs', so as to produce a fluctuating rate of age pension?

The majority of the High Court (**Gibbs CJ, Brennan, Deane and Dawson JJ**) decided that both the AAT and the Federal Court had adopted the wrong approach to the calculation of the overpayment. They allowed the appeal and remitted the matter to the AAT.

In their joint judgment, the majority said that the Director-General had a duty under s.28(2) to adjust a pensioner's pension in the light of the pensioner's income. To discharge that duty, the Director-General had to ascertain the pensioner's annual rate of income from time to time in the light of information supplied to or obtained by the DSS.

It was critical, the majority said, to an understanding of s.28(2) to distinguish between an annual amount of income and an annual rate of income:

> If an annual amount of income were a component in the s.28(2) calculation, it would be necessary to identify a commencing date of the income year in order to ascertain what receipts fell into one year and what into the next. But a rate of income, like a rate of interest, may vary within any annual period though it is expressed as an annual rate. It is a current rate of income, expressed as so much per annum. An annual rate of income may not subsist for a year: an annual rate of income that obtains in one week may change in the week following. Annual income is the sum of the products of each annual rate of income that is obtained during any part of one year multiplied by the fraction of the year during which it obtained.

(Judgment, p.6)

The majority said that, in the case of a pensioner who was employed intermittently, it might be appropriate to average that person's earnings over a period or it might be appropriate to treat each period of employment as a separate source of income yielding its particular amount of earnings. The former approach would establish a relatively constant annual rate of income; but the latter approach would produce several, varying annual rates of income. 'The circumstances of the particular case,' the majority said, 'would show which method is more appropriate': Judgment, p.7.

In the case of a pensioner who earned different amounts each week from casual employment (as Harris had) it might be appropriate to strike an average of her earnings so as to determine the annual rate of income. 'But,' the majority said, 'the circumstances of the case must determine what is a fair method of ascertaining the current rate of income at a particular time': Judgment, pp.7-8. The majority continued:

> An annual rate of income, at whatever time it is ascertained for the purposes of s.28(2), is the aggregate of those income payments which would be received by the pensioner during the ensuing year on the assumption that he retains all his current sources of income for the year and that they continue to yield income at the current level. The annual rate thus ascertained enures until something occurs which falsifies the assumption on which the particular annual rate was ascertained – that is, until a source of income is gained or lost, or the level of income yielded by a source of income changes. Then a new annual rate of income must be ascertained on a new set of assumptions that accord with the then current sources of income and the then current levels of income yielded by those sources.

(Judgment, p.8)

The majority expressly rejected the argument that a pensioner's annual rate of income should be calculated over 'rolling periods of 8 weeks' as the majority of the Federal Court had held; or that it should be calculated over the 'pension year' as the majority of the AAT had decided. However, the majority said, where the annual rate of income was being calculated after the event (as in the present matter), it was not necessary to reconstruct intermittent reviews and adjustments of the pensioner's annual rate of income: that annual rate of income, and the appropriate rate of the pensioner's pension, could be calculated by aggregating the pensioner's earnings – in the present case the earnings of Mrs Harris could be aggregated into two periods, the first year of her employment and the following 49 weeks until she ceased employment.

The majority then ordered that the matter should be remitted to the AAT to allow it to calculate the appropriate level of Harris' age pension and the consequential overpayment 'in accordance with the principles expressed by the judgment of this Court.'