requirement that, in order to qualify for an invalid pension, at least 50% of the permanent incapacity for work be directly caused by a permanent physical or mental impairment.

The AAT said that 'it is well established that the law which is to be applied in reviewing the delegate's decision is that which was in force at the time when the claim was lodged (see *Reilly* (1987) 39 *SSR* 494)': Reasons, para. 3. It therefore proceeded to apply the legislation as it was prior to the commencement of the 50% medical-cause rule, which simply required not less than 85% permanent incapacity for work.

Incapacity for work

The AAT then referred to the decisions in *Panke* (1981) 2 *SSR* 9, *Annas* (1985) 29 *SSR* 366) and *Sheely* (1982) 9 *SSR* 86. In the last of these cases it was held that a person's medical disability had to be of such significance that the incapacity could be said to result from it.

The factors found by the AAT to contribute to the applicant's inability to obtain employment included 'his imperfect command of the English language, his lack of qualifications and skills, and the general reluctance of employers to employ for the first time men aged 57 years who have not been in employment for a number of years': Reasons, para. 15.

The applicant was found to suffer some pain as the result of minor osteoarthritis affecting his cervical, dorsal and lumbar spine and minor fibritis syndrome affecting the shoulder girdles. Even though a doctor (to whom the applicant had been sent by the SSAT) quantified his physical impairment at only 10-20%, the AAT found that it was a significant factor in the applicant's incapacity for work, because it effectively prevented him from obtaining the only types of work which he might otherwise be able to obtain, unskilled factory production line work. His physical impairment made him suitable only for light work of a type not readily available.

Formal decision

The AAT set aside the decision of the Department and directed that the applicant be granted an invalid pension.

[D.M.]

Jurisdiction: finance direction

ROBERGE and SECRETARY TO DSS

(No. N88/546)

Decided: 30 September 1988 by B.J. McMahon.

Bradley Roberge finished his secondary education in November 1987. Shortly afterwards, he and his parents enquired at the local DSS office about unemployment benefits. They maintained that they were told that, if Roberge waited 13 weeks before lodging a claim, he would then be eligible for unemployment benefit.

In fact, Roberge only waited until 8 February 1988 before lodging his claim for unemployment benefit. He was then told that the *Social Security Act* imposed a 13-week waiting period following the lodgment of any claim by a school leaver and that, accordingly, he could not receive unemployment benefits for a further 13 weeks. Roberge asked the AAT to review that decision.

Mandatory waiting period

Section 127(1)(a) of the *Social Security Act* provides that an unmarried person under the age of 21 years who has ceased to be a full-time student cannot receive an unemployment benefit for 13 weeks after lodging a claim for that benefit.

The AAT pointed out that there was no discretion to exempt anyone from this waiting period.

Payment under Finance Direction 21/3

In the present case, the SSAT had agreed that unemployment benefit could not be paid to Roberge during the 13 week period. However, the SSAT had recommended that the Secretary approve a payment to Roberge under Finance Direction 21/3, because Roberge had a claim against the Department of Social Security for the misleading advice which had caused him to delay lodging his claim for unemployment benefit.

Finance Direction 21/3 sets out procedures to be followed by the permanent head of a department when dealing with claims against the Commonwealth. In particular, it authorised the Secretary to the DSS to meet claims against the Commonwealth arising out of actions of the Department, where the amount of those claims was below a specified amount and where it appeared to the Secretary that the Commonwealth was legally liable.

The AAT pointed out that its review jurisdiction was limited by the former ss.16 and 17(1) of the *Social Security Act* to reviewing decisions of the Secretary to the DSS made under the *Social Security Act*, following review by the SSAT. Although the Secretary's decision not to approve payment under Finance Direction 21/3 had followed a review by the SSAT, any decision made in relation to that Finance Direction was not a decision made under the *Social Security Act*. Accordingly, it did not fall within the review jurisdiction of the AAT.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Cohabitation

RAYNER and SECRETARY TO DSS

(No. N87/429)

Decided: 20 October 1988 by J.R. Gibson.

The AAT set aside a DSS decision to recover the sum of $20 221 from Michelle Rayner, which the DSS claimed had been overpaid to her as a supporting parent's benefit between May 1977 and March 1982.

The DSS argued that, throughout that period, Rayner had been living with a man, D, as his wife on a *bona fide* domestic basis, so that she was not a 'supporting parent' within the former s.83AAA of the *Social Security Act*.

Rayner had lived with D for about a year in 1974-75. She gave birth to their child in November 1976, the child having been conceived after they ceased living together. In May 1979, Rayner gave birth to a second child, also fathered by D.

Between 1976 and 1983, Rayner lived at various times with a woman friend, her parents, her brother and by herself. For about 8 months in 1977-78 and for 3 years between 1980 and 1983, Rayner lived in two flats leased in D's name. For about half of the second period, two of D's children from a former marriage lived with Rayner. However, D did not live with Rayner during these periods but visited her from time to time. They had an