Section 122(8) provides that, where a person is entitled to receive income by way of periodical payments made at intervals longer than one fortnight, the person shall be deemed to receive in each fortnight an amount proportionate to the number of fortnights in each period in respect of which the person is entitled to receive payment.

Section 12L provides that, where a person is entitled to receive income of a capital nature, the person shall be taken to receive 1/52nd of that amount as income during each week of the year after becoming entitled to receive that amount.

The basis of the calculation

The distribution of profits, the AAT said, was not income of a capital nature but income according to ordinary concepts. It followed that s.12L was irrelevant and that it could not support the approach taken by the DSS.

The AAT said it was 'bemused' by the reference to 'Government policy', on which no evidence had been placed before the Tribunal. In any event, the AAT said, the Tribunal was 'required to apply the provisions of the Act giving full effect to the objects and purpose of the legislation': Reasons, p.3.

It followed that Ferguson's income from the quarterly distributions of profits had to be determined as provided in s.122(8) and should be based, not on the distributions in the previous 4 quarters, but on the distribution in the immediately preceding quarter.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Ferguson be assessed for benefits on the basis that his most recent payment from AFT was the relevant periodical payment for the purpose of s.122(8) to be apportioned on a fortnightly basis over the 3 months following Ferguson's entitlement to receive that payment.

[P.H.]

Unemployment benefit: receipt of Austudy

SECRETARY TO DSS and BRYCE (No. 6259)

Decided: 11 October 1990 by K.L. Beddoe.

The DSS applied to the AAT to review a decision of the SSAT to grant Susan Bryce unemployment benefit from 25 July 1988. Bryce had been a full-time student until that date, when she changed her status to part-time student. She had been in receipt of Austudy benefits since the commencement of 1988. When she went to the CES in July 1988 to register for full-time employment, she did not apply for unemployment benefit because she thought that she was still entitled to Austudy benefits. This apparently arose from incorrect advice given to her by a CES officer.

Bryce continued to receive Austudy benefits until 1 December 1988. She applied for unemployment benefit on 3 November 1988 and began to receive that payment on 7 November 1988. A review of her Austudy entitlement at about the same time determined that she had received $1302 to which she was not entitled as she had ceased to be a full-time student on 25 July 1988. Bryce refused to repay this amount to the Department of Education, Employment and Training until she was paid unemployment benefit from 25 July 1988.

The effect of the Austudy payment

The AAT referred to s.127 of the *Social Security Act* which postponed unemployment benefit for 13 weeks where the applicant had ceased a full-time course of education. The Tribunal noted that, even if it was assumed that Bryce was deemed to have applied for unemployment benefit on 25 July 1988, s.127 would have postponed her entitlement until 23 October 1988. This was 2 weeks prior to the date on which unemployment benefit was in fact paid.

However, it was the operation of s.136 that decided the case against Bryce. Section 136(1)(a) provides that, where a person is in receipt of a payment under a prescribed educational scheme, the person is not entitled to unemployment benefit. Section 136(4) provides that Austudy is a 'prescribed educational scheme'.

According to the AAT, there had clearly been an Austudy payment made in this case. It was argued by Bryce that an Austudy payment had not been made because it was now claimed that this was an overpayment. To this the Tribunal responded:

> 'I do not think that can be the correct interpretation of the provision because it of necessity requires that the meaning of "payment" must be qualified to mean "payment to which the person is entitled under the *Student Assistance Act*". In my view "payment" when used in the context of subsection 136(1) is not so qualified and means amount paid or disbursement. It does not reflect a qualification as to entitlement to the amount paid; merely the fact of an amount paid.'

Although the AAT expressed its sympathy with Bryce – she had always acted *bona fide* and without intent to defraud – it could not find her eligible for unemployment benefit on any basis before 23 October 1988. But her continued receipt of Austudy benefits until 1 December precluded her from unemployment benefit until that date.

This was also not a proper case for the exercise of the discretion in s.125(2)(b) to treat the application for unemployment benefit as being made within a reasonable time of the application for employment. The erroneous advice from the CES would seem to suggest its consideration, but to so exercise it would be to circumvent the sections of the Act mentioned.

Formal decision

The AAT set aside the decision of the SSAT.

[B.S.]

Unemployment benefit: part-time school teacher

SECRETARY TO DSS and KEARNS (No. 6535)

Decided: 20 December 1990 by W.J.F. Purcell, H.D. Browne and D.B. Williams.

The DSS appealed against an SSAT decision that Wayne Kearns was qualified to receive unemployment benefit for the period 1-16 July 1989.

Kearns worked as a temporary part-time school assistant with the South Australian Education Department and had done so since March 1988. According to the relevant award, a part-time employee was required to be on