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

duty only during term-time and worked a minimum of 30 hours a week. During vacations they were allowed to undertake other paid employment. Kearns received various salary loadings (16%) in lieu of recreation leave. In May 1989 he became a permanent employee, which had no effect on his leave conditions but gave him security of employment.

On the last Friday of each school term between May 1988 and May 1989, Kearns had visited the CES in order to find work during the school vacations. He had found work once, and had received unemployment benefits on four other occasions. (He had subsequently found permanent work in a school holiday programme.)

When he was unable to find work on 1 July 1989, he had applied for unemployment benefit. This claim was rejected on the ground that he was not 'unemployed' as he had a contract for the next school year.

The legislation

Section 116(1)(c) of the *Social Security Act* provides that, in order to be eligible for unemployment benefit, an applicant must be unemployed, capable of undertaking and willing to undertake suitable paid work, and have taken reasonable steps to obtain such work.

Unemployed?

The DSS argued that Kearns had in prior vacations satisfied the requirements of s.116 because he was a temporary employee. Once he became a permanent employee on 2 May 1989, he could no longer be regarded as 'unemployed' during the school vacations: his permanent status provided him with 'secure, regular, predictable and continuous employment': Reasons, para. 9. It conceded Kearns might be 'underemployed' in his vacations, but the appropriate benefit was then Family Allowance Supplement.

Kearns, in turn, argued that the only difference in his situation after he had been made permanent was in his attitude: he was less inclined to pursue alternative full-time employment. He argued he was in the same position as a seasonal worker and unemployed during his vacation periods.

The AAT noted that when the decision was reviewed by the SSAT, Kearns (and the SSAT) had understood that he received no salary loading to make up for his lack of holiday pay. It was clear from the material before the AAT that he did receive such a loading.

The AAT agreed with the DSS that the appropriate benefit was FAS, which the Kearns' were in fact receiving. It concluded that the terms of his employment financially disadvantaged him, but agreed with the AAT in *Vijh* (1985) 27 *SSR* 328, that unemployment benefit should not be used to relieve employees being exploited or otherwise disadvantaged by their employment. It concluded:

> 'We are satisfied on the whole of the evidence that the respondent's contract of employment is not severed by periods of unpaid recreation leave. In our view he is not "unemployed" for the purposes of s.116(1)(c)(i) of the Act.'

(Reasons, para.17)

The AAT also went on to consider whether Kearns fulfilled the requirements of the remainder of s.116(1)(c), in case they had 'fallen into error' on their earlier finding. The DSS argued that Kearns' behaviour outside the relevant period had to be considered, not just his work seeking activities during the contested two weeks. The AAT suggested that this was an unnecessarily restrictive interpretation of the work test, which would exclude seasonal workers from unemployment benefit. It accepted that in July 1989 Kearns would have accepted more lucrative employment if it were offered. It found that he applied for a series of jobs during the relevant period and fulfilled the remainder of the requirements of s.116(1)(c), apart from the requirement that he be 'unemployed'.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that Kearns was not qualified for unemployment benefit in respect of the period 1 July 1989 to 16 July 1989.

[J.M.]

Unemployment benefit: reducing employment prospects

SECRETARY TO DSS and PRINCE
(No.Q90/252)
Decided: 24 December 1990 by D.P. Breen

Linda Prince applied for unemployment benefit on 29 November 1989, after moving from Sydney to Byron Bay on 16 November. Her claim was rejected by the DSS and a 12-week waiting period was imposed on her.

She appealed to the SSAT who decided that unemployment benefit should be paid to her from 7 days after her claim, subject to all other requirements of the legislation being met. The DSS applied to the AAT for review of this decision.

The legislation

The relevant legislation was inserted in the *Social Security Act* by sections 36 and 39 of the *Social Security and Veterans' Affairs Legislation Amendment Act (No.3)* 1989. Sub-section (6A) was inserted into section 116 of the *Social Security Act*:

> '(6A) A person is not qualified to receive an unemployment benefit on a day on which the person reduces his or her employment prospects by moving to a new place of residence without sufficient reason for the move.'

A new s.116(6B) narrowly defined 'sufficient reason' for moving to a new place of residence. This provision was not relevant to the present matter.

Section 126(1) was also amended by the addition of paragraph (aa), deferring payment of unemployment benefit where –

> '(aa) a person has reduced his or her employment prospects by moving to a new place of residence without sufficient reason for the move'

A new s.126(4) fixed the deferral period where s.126(1)(aa) applied at 12 weeks. A new s.126(5) defined 'sufficient reason' for moving to a new place of residence by reference to s.116(6B).

The argument

The DSS argued that the SSAT's decision was wrong as it was decided on the basis that the relevant legislation should not be given a retrospective effect in Prince's case; further, once the legislation was applied to Prince, she should be subject to a 12-week postponement period, as the female unemployment rate in Byron Bay was twice that for the whole of NSW.

Retrospectivity

The AAT accepted that the amending legislation applied to Prince. Although the amending Act did not receive royal assent until 19 December 1989, the sections containing the relevant amendments were specifically stated to commence on 1 November 1989. In such a circumstance, Parliament had clearly indicated its intention to legislate retrospectively, which it had the power to do (*R v Kidman* (1915) 20 CLR 425).

'Reducing employment prospects'

Prince had a number of job-related skills. She was a qualified herbalist, had completed courses in commerce and visual arts, philosophy and psychology.