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.

She had worked as a co-ordinator of a women's group, a teacher, a journalist and a photographer in Germany. In Australia, she had undertaken clerical work, managerial work and as a welfare worker.

Prince had become unemployed and had spent some 4 months looking for work in Sydney. She had moved to Byron Bay on the advice of friends after becoming somewhat despondent in Sydney.

Detailed evidence was given by an officer from the local DEET office. He testified that the greatest area of employment in the Byron Bay area was in the sales and tourist areas. His evidence was summarised by the AAT:

> 'Mr Mulholland advised that he thought all the statistical information indicated that Mrs Prince had diminished her employment prospects by moving to the Byron Bay area. However, he conceded that statistics suffer from the defect that they tend to place prospective workers into broad categories. Mrs Prince's qualification and skills have a wide-ranging quality and the witness conceded that the respondent's skills would surpass the majority of job seekers in the Byron Bay area and under normal circumstances he would expect her to obtain employment reasonably quickly.'

(Reasons, para. 33)

The AAT concluded that Prince had not reduced her employment prospects by moving to Byron Bay.

Formal decision

The Tribunal affirmed the decision of the SSAT.

[J.M.]

Special benefit: commitment to voluntary work

SECRETARY TO DSS and CONDON
(No. W90/68)

Decided: 2 November 1990 by B.H. Burns

On 19 December a DSS delegate rejected Helen Condon's claim for special benefit on the ground that she was voluntarily committed to unpaid employment.

The SSAT set aside that decision, finding that Condon was unemployable and therefore ineligible for unemployment benefit; that, given her preoccupation with spiritual matters, she was unable to earn a sufficient livelihood; and that it was appropriate to exercise the discretion to pay special benefit.

The DSS applied to the AAT for review of this decision.

The legislation

Section 129 of the *Social Security Act* provides that a special benefit may be granted to a person if s/he is not a person to whom unemployment or sickness benefit is payable and s/he is, because of age, physical or mental disability or domestic circumstances, or for any other reason, unable to earn a sufficient livelihood.

The basic requirements for unemployment benefit are described in *Kearns*, noted in this issue of the *Reporter*.

Were unemployment benefits payable?

Condon had been in continuous receipt of unemployment benefit since January 1980 to the date of the hearing. Given that special benefit could not be paid to a person to whom unemployment benefit was payable, the AAT had to determine whether Condon did or did not fulfil the requirements of the work test in s.116(1)(c) of the *Social Security Act*.

Condon had made a number of unsuccessful applications for special benefit prior to the one in dispute and on two occasions a DSS social worker had recommended that special benefit was the more appropriate benefit.

Condon in an earlier application (in April 1989) had stated that because of her age (then 41), her lack of qualifications and the length of time she had been unemployed, she would be unable to find full-time work. She also stated that she worked on a voluntary basis for the Universal Brotherhood and the Hare Krishna movement.

In relation to her application in September 1989, the SSAT had decided that Condon's

> '"overriding preoccupation with spiritual matters" was not a rational decision to live an alternative life-style, but rather an integral part of her personality and identity, and that even if she were to secure paid employment, her spiritual pre-occupation would result in any position being terminated.'

Condon relied on the SSAT's reasons for decision and the recommendations of the DSS social worker in making her arguments before the AAT. She explained to the AAT that she had made 3 commitments: one to the Universal Brotherhood, one to the Hare Krishnas and one to the farmers from whom she rented her home, 'where she tried to develop a "temple" atmosphere of peace and spirituality'.

Condon's last paid full-time work was as a comptometrist at Coles in 1969. She had held various part-time positions until 1986 and since then had not applied for paid full-time or part-time work.

The DSS described the voluntary work done for the Universal Brotherhood and the Hare Krishnas as domestic and cleaning work which Condon explained 'helps to make a pleasant atmosphere, conducive to spiritual development in those who share it'. She spent four to five 8-hour days every 2 to 3 months at each of these organisations. She also maintained the house and garden at the farming property where she lived, in an attempt to give something back to the farmers 'who contribute so much to society'.

Condon agreed that there was no paid work in the general community that she wanted to do. She said that even if she got work, she would leave it as she would not identify with it and 'it would be a strain to work while trying to keep up the temple atmosphere and her spiritual work'.

Condon agreed 'that there were choices available to her and she did not feel compelled or driven by some irresistible force to live as she does'.

In relation to eligibility for unemployment benefit the AAT concluded:

> 'The Tribunal finds the respondent to be genuinely committed to a belief that society can be improved by a heightening of spiritual values, and that in her own small way she is contributing to such an improvement. However, it is not the Tribunal's view that such a commitment makes her unemployable and by her demeanour at the hearing she impressed the Tribunal as being quite capable of looking after herself. She agreed readily that she could find work, but that it would be her choice to leave it and that it was by her choice that she lives as she does. She is not lacking in employable skills and she is able to work 8 hours a day when she wants to. The amount of time she spends in voluntary work . . . is not so large as to prevent her from working in at least part-time paid employment. The Tribunal is not satisfied that the respondent has, in recent times, genuinely sought paid work or been willing to undertake paid work, and finds that she is not eligible to be paid unemployment benefit.'

(Reasons, para.12)

The AAT went on to consider the discretionary payment of special benefit. It concluded, following *Te Velde* (1981) 3 *SSR* 23, that the degree of control a person exercises over their circumstances was a relevant consideration in eligibility for special benefit and concluded that Condon was not '"unable to earn a sufficient livelihood" but rather, she chooses not to': Reasons, para.13. It concluded:

> 'The purpose of s.129 of the Act is to provide support from the public purse to people who are unable to support themselves and who are not eligible for any other Social Security