The evidence in relation to the legal advice received by Mr Kulakov was equivocal. He gave evidence that his lawyer said he would have no problem getting the pension while his sister-in-law gave evidence that the solicitor had said he could see no reason why Mr Kulakov would not get a pension. The AAT regarded this difference as significant.

Mr Kulakov's complaint in relation to the DSS was that there had been ample opportunity from as early as 16 August 1990 for the Department to inform him of the preclusion period. Mr Kulakov first heard of the application of a preclusion period on 28 September 1990 when he received a letter from DSS rejecting his claim for invalid pension on that ground.

Circumstances not special

The AAT followed its previous decisions in *Krzywak* (1988) 45 *SSR* 580, *Bolton* (1989) 50 *SSR* 650 and *Di Pietro* (1988) 43 *SSR* 544, in relation to the factors to be taken into account in deciding whether 'special circumstances' existed.

The AAT was unable to make a finding that Mr Kulakov had received misleading advice from his solicitor and added:

> 'Even if the solicitor had given misleading advice and was negligent, he had no authority to make such assertions and should such be the case, the remedy would be for the applicant to seek redress against the solicitor.'

(Reasons, para. 23)

The allegation regarding DSS responsibility was not accepted because the AAT found that Mr Kulakov 'had already disposed of the bulk of the lump sum compensation settlement sum prior to making a claim for pension': Reasons, para. 25.

In relation to Mr Kulakov's financial situation, the AAT found that the family was able to make ends meet and that Helen and David (who had an unencumbered property and $51 000 combined income) clearly had a responsibility to assist Mr and Mrs Kulakov until the end of the preclusion period. The AAT decided that Mr Kulakov's financial position might be described as 'straitened' but not 'exceptional'. Accordingly 'financial hardship would not appear to be a factor so significant as to be crucial': Reasons, para. 29.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Social security and compensation payments

SECRETARY TO DSS and SMALLACOMBE

Decided: 28 June 1991 by P.W. Johnston.

In February 1988, Kym Smallacombe's husband suffered an industrial injury and was paid periodic workers' compensation for several months. During this period, Mrs Smallacombe received family allowance supplement and rent assistance.

Following cancellation of the periodic workers' compensation, Mr Smallacombe was granted unemployment and sickness benefits and Mrs Smallacombe's family allowance supplement and rent assistance then ceased, in accordance with s.73 of the *Social Security Act* 1947.

Some 2 years' later, Mr Smallacombe was awarded a lump sum payment of compensation of $7184, covering part of the period during which he had received social security payments. A delegate of the Secretary decided to recover $6111 from the compensation payment, representing the unemployment and sickness benefits paid to Mr Smallacombe.

On review, the SSAT found 'special circumstances' within s.156 of the *Social Security Act* 1947 in the cancellation of the periodic compensation payments made to Mr Smallacombe—but for that cancellation and his consequential receipt of social security payments, Mrs Smallacombe would have continued to receive family allowance supplement and rent assistance. The SSAT exercised the s.156 discretion so as to reduce the amount recovered by the Secretary from the compensation award by an amount equivalent to the family allowance supplement and rent assistance foregone by Mrs Smallacombe.

The DSS asked the AAT to review that decision.

Relieving the harsh operation of the Act

The AAT observed, without concluding the issue, that s.156 was 'not a proper way to redress what some might see as an anomalous operation of the Act in respect of beneficiaries of FAS who lose access to that allowance through no fault of their own': Reasons, para. 10.

The preferable approach to relieving any harsh operation of the Act would be to consider waiver of recovery of the debt arising under the Act, by virtue of the discretion conferred by s.251 of the 1947 Act, which allowed the write-off or waiver of debts 'arising under or as a result of this Act'.

The ambit of the decision under review

However, the AAT said, there was no need to consider the availability of the s.251 discretion because the ambit of the decision under review was not confined to the specific issue raised by the parties—whether a discretion should be exercised in favour of the respondent.

The elements of the decision under review, according to the AAT, included the determination of the amount which was recoverable by the Secretary out of the award of compensation made in favour of Mr Smallacombe.

Periodic payments or lump sum?

The Secretary had treated that award of compensation as providing for periodical payments of compensation, because the award had been expressed as compensation for wages lost in a specific past period. The effect of treating the award as periodical payments of compensation was to allow the Secretary to recover the social security benefits paid during the period specified in the award.

The AAT decided that the award was for a lump sum payment by way of compensation, rather than periodical payments of compensation, with the result that the Secretary could only recover the social security benefits paid during the substantially shorter period calculated by dividing half of the lump sum award (as required by s.152(2)(c)(i) of the 1947 Act) by average male weekly earnings (pursuant to s.152(2)(e) of the Act).

The AAT said that it did not accept the analysis of the compensation award put forward by the Secretary— that the amount of the award really represented a consolidated or aggregated series of periodical payments in arrears. The AAT said:

> 'Whilst it is true that regularity need not be an attendant feature of what would form a series of periodic payments, it rather stretches the meaning of that concept to say that a single and definitive payment in settlement of a claim could be regarded as constituting, exclusively of any other payment, part of a series of periodical payments.'

(Reasons, para. 16)

This approach, the tribunal said, was supported by the Federal Court decisions in *Secretary, Department of Social Security v Banks* (1990) 56 *SSR* 762; and *Secretary, Department of Social Security v a'Beckett* (1990) 57 *SSR* 779. The practical result was to reduce the period, in which social security benefits paid to the Mr Smallacombe were recoverable, from some 20 weeks to some 6-7 weeks.

The AAT observed, in conclusion, that the outcome for Mrs Smallacombe was

> 'much more favourable than would have been the case had some concession been recognised in terms of producing a substituted payment of FAS as sought by [Mrs Smallacombe]. This perhaps provides an answer, as a matter of legislative policy, to the objection that the system of recovery pursuant to Part XVII of the Act is apt to produce an anomalous result by reason of a failure to take into account a notional entitlement to FAS in situations like those faced by the Smallacombes. Though somewhat mechanistic, and described by some as "arbitrary", the way in which the provisions of Part XVII operate in this specific instance tend to more than compensate for the amount of FAS apparently foregone by a person in the situation of the respondent. This provides an answer to the suggestion that s.156 should be resorted to [in order to] correct what some would perceive is an unjust working of the legislation.'

(Reasons, para. 25)

Formal decision

The AAT set aside the decision under review and substituted a decision that the amount of $7184 paid to Mr Smallacombe was a lump sum payment'; the 'compensation part' of the payment was 50%; and the 'lump sum payment period' commenced on 18 July 1989. The AAT remitted the matter to the Secretary to re-calculate the amount recoverable from Mr Smallacombe under ss.152 and 153 of the *Social Security Act* 1947.

[P.H.]

Unemployment benefit: 'unemployed'

BRIESE and SECRETARY TO DSS (No. 7076)

Decided: 25 June 1991 by B.M. Forrest.

The applicant asked the AAT to review a decision to refuse his application for unemployment benefit. The basis of the decision was that the applicant was not 'unemployed' within the meaning of s.116(1)(c)(i) of the *Social Security Act* 1947.

The legislation

Section 116(1)(c)(i) provided that a person must, as one of the requirements to qualify for unemployment benefit, satisfy the Secretary that:

> '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; . . . '

The facts

The applicant was 53 years old. For 20 years he had been a book exchange dealer in various cities. The most recent location was in Albury, where he had been conducting this business since 1985. He held a lease of the premises from which the business was conducted and paid rent as well as rates, taxes and insurance premiums. The business had advertised trading hours of 10 a.m. to 5 p.m. Monday to Friday, although these hours were usually shortened to 5 hours per day with the addition of Saturday morning trading. He averaged 4 customers a day. He had 8000 books in stock, and the average sale was $2 per book. He told the DSS that he received about $40 per week net from the business and that in the previous financial year he earned about $5619 from it.

Was the applicant 'unemployed'?

The Tribunal referred to the decision in *McKenna* 3 ALD 319 where the Federal Court had held that the meaning of 'unemployed' in the context of the Act was its 'popular meaning of not being engaged in work of a remunerative nature'. But this meaning had to be qualified by the fact that the legislation allowed for the earning of some income without the person losing their eligibility for the payment. It was further qualified by the recognition that a person may be so committed to some non-remunerative activity, such as study or domestic duties, that they could not be regarded as 'unemployed'.

Reference was also made to the Tribunal's decision in *Weekes* (1981) 4 *SSR* 37 where it was decided that 'employment' included self-employment which was non-profitable. The Tribunal concluded with reference to a number of previous decisions:

> 'The test is not whether the activity in which the applicant is engaged is remunerative. A self-employed person may be engaged in activities designed to earn a living but fail to do so . . .
>
> The proper question to ask is whether the person in question is so seriously engaged in the conduct of a business as to lead to the conclusion that he is not unemployed . . . '

(Reasons, p.3)

The applicant gave evidence that he was looking for other work and that the book exchange was a hobby to fill in time. But the Tribunal was not impressed with this statement. The length of time the applicant spent in the book exchange, its location in a commercial centre, the fact that it was leased in that location, the keeping of records and the advertising of the business suggested that it was a business activity.

The Tribunal commented:

> 'I do not think that the conduct of the book exchange may be described as simply the pursuit of a hobby rather than a business. A hobby is associated with pleasure or recreation, secondary to one's main occupation. The fact that trade in the book exchange is meagre was not suggested as being attributable to any lack of perseverance or regular attendance on the part of the applicant. I think it is fair to say the applicant having regard to all the circumstances including the time he devotes to the book exchange is attempting to run it as a viable business.'

(Reasons, p.6)

The Tribunal concluded that the applicant was not 'unemployed' within the meaning of s.116. In doing so it commented that this was in spite of the Act recognising that a person may receive a small income while still being qualified for unemployment benefit. There was no provision for assistance for unprofitable business ventures in the Act, which the Tribunal described as an 'unfortunate position' for the applicant.

Formal decision

The Tribunal affirmed the decision under review.

[B.S.]