Coober Pedy to show that he was not willing to obtain employment.

Kernyi said he had not left Coober Pedy because he had no money. He had accumulated debts since his benefit was cancelled and the mining was a way to survive and was something to do. He said he looked for work in preference to mining but had only found casual work of limited duration.

The Tribunal distinguished this case from those of *Brabenec* (1981) 2 *SSR* 14 and *Anderson* (1981) 4 *SSR* 38. In *Brabenec* the claimant was mining for 40 to 50 hours a week, and in *Anderson* the claimant was engaged in full-time farming. The applicants in those cases were not deriving income but were unwilling to abandon their activities. They could not then be said to be 'unemployed' for the purposes of the Act. Kernyi, on the other hand, was mining for only 10 hours a week and had been available for whatever casual work he could pick up. The Tribunal found that Kernyi was at 26 July 1990 unemployed, and capable and willing to undertake full-time paid work when and if it arose.

However, the AAT found that Kernyi had not taken reasonable steps to obtain full-time employment. The Tribunal said that he had transport at the time and could have looked beyond Coober Pedy for work. The extent of his search for work was to ask around Coober Pedy, to look at local newspapers and to telephone friends in Sydney.

Formal decision

The decision under review was affirmed.

[B.W.]

Unemployment benefit: failure to attend CES

MIFSUD and SECRETARY TO DSS
(No. 7546)

Decided: 4 December 1991 by R.A. Balmford, W.G. McLean and L.S. Rodopoulos.

Mr Mifsud's unemployment benefit was cancelled on 31 January 1991 because he failed to comply with requests to attend at the CES. This decision was affirmed by the SSAT and Mr Mifsud then applied for review by the AAT.

The legislation

Under s.170(3) of the *Social Security Act* 1947 the Secretary was empowered to request 'a person who is in receipt of an unemployment benefit' to attend at a CES office. If s/he failed to attend and did not have a 'reasonable excuse', unemployment benefit ceased to be payable. Section 168(1) permitted cancellation.

Section 178 of the 1947 Act stated that the SSAT could not review decisions made under a list of specified sections. Section 178 was not included in that list. However, while s.182(4) of the 1947 Act enabled an SSAT to exercise 'all the powers and discretions that are conferred by this Act on the Secretary', s.182(5) specifically excluded the powers and discretions under, amongst other sections, s.170.

The facts

Mr Mifsud received unemployment benefit for some years and was last paid on 28 December 1990. On 11 and 29 January 1991, when lodging further applications for payment of unemployment benefit, he was requested, pursuant to s.170(3), to attend at the CES. On both occasions he declined to do so. Mr Mifsud told the AAT that this was because he regarded the requests as 'petty harassment' and, on the basis of earlier experience, fruitless.

Jurisdiction

The DSS argued that the AAT did not have jurisdiction to hear this matter because the SSAT had no power to make the decision under review. Reliance was placed on s.182(5) and comments by the AAT in *Stanik* (1991) 60 *SSR* 820.

The AAT noted that in *Stanik* the Tribunal said that, in reviewing a decision, the SSAT may not exercise the power of the Secretary to request a person to attend at a CES office. The AAT went on to decide

> 'In the present matter, the SSAT affirmed the decision which it reviewed, that is the decision to cancel Mr Mifsud's unemployment benefit. In so doing, it was not exercising any power or discretion conferred by sub-section 170(3). It was affirming a decision made under sub-section 168(1) and made in consequence of Mr Mifsud's failure to comply with the requirement under sub-section 170(3). The SSAT did not itself exercise the power to make such a requirement. Accordingly, as in Stanik, the SSAT had jurisdiction to review the decision.'

(Reasons, para. 15)

'Person in receipt of unemployment benefit'

A difficulty in this case was whether Mr Mifsud was 'in receipt of unemployment benefit', and covered by s.170(3), on 11 January 1990 even though he had not received benefit in respect of a period since 28 December 1990. The AAT decided that:

> 'If sub-section 170(3) is to operate effectively, it must be able to operate in respect of a person who has received payment of unemployment benefit in respect of a fortnightly period and who then seeks to lodge an "application for payment of unemployment benefit" a fortnight after the expiry of the period in respect of which payment was made, and who appears on the face of that "application for payment" to be prima facie entitled to payment of unemployment benefit in respect of that intervening period. It appears to us that the expression "a person who is in receipt of an unemployment benefit" must be intended to refer to such a person, who has a continuing entitlement to unemployment benefit on the basis set out in Hurrell. (1984) 23 SSR 266.'

(Reasons, para. 19)

No reasonable excuse

The AAT stated that the policy and purpose of s.170(3) was —

> 'clearly related to a policy of encouraging persons in receipt of unemployment benefit to seek and obtain employment, in the interests of the person in question, the public purse and the community generally'

(Reasons, para. 23)

and decided that

> 'We do not consider that either of Mr Mifsud's reasons for not complying with the requests to attend the CES office can be described as a "reasonable excuse" of the kind which would have been in the contemplation of the legislature in enacting sub-section 170(3).'

(Reasons, para. 24)

Formal decision

The AAT affirmed the decision under review.

[D.M.]