(1915) 20 CLR 425, *Milner* v *Raith* (1942) 66 CLR 1 and *McKenzie* v *Secretary, Department of Social Security* (1989) 18 ALD 1, the AAT found that a provision such as that contained in s.2(4) has retrospective effect. Since the intention was clear, it was not relevant that neither the Act nor the Explanatory Memorandum made mention of any retrospective operation.

Accordingly the law to be applied was the *Social Security Act* 1991 as amended by the *Social Security Legislation Amendment Act* 1992 which has effect from 1 July 1992.

Since the 1992 amendments were retrospective, it was unnecessary to consider the interpretation of the repealed s.1221(2A) given in *Stefanou.*

Formal decision

The AAT set aside the SSAT decision and substituted a decision that from 1 July 1991 the correct rate of pension to be paid was to be calculated in accordance with the Pension Portability Rate Calculator in s.1221 of the *Social Security Act* 1991.

[PO'C]

Rent assistance: waiting period

ROBSON and SECRETARY TO DSS

(No. 7985)

Decided: 28 May 1992 by P.W. Johnston.

The applicant asked the AAT to review a DSS decision not to pay rent assistance to him.

The facts

Mr Robson was in receipt of job search allowance until he commenced a period of employment on 19 August 1991. This employment was a temporary position of 6 weeks. His job search allowance was cancelled during his employment. Prior to commencing this job he was not receiving rent assistance as he was not paying rent but he had accumulated the necessary 26 credit weeks to satisfy the waiting period for rent assistance.

Robson lodged a new claim for job search allowance on 1 October 1991 when his employment ended. He also applied for rent assistance as he was now paying rent. He was not granted this assistance on the basis that he had not satisfied the 26-week waiting period which was taken to run from the date he became eligible for job search allowance after his employment ceased.

Was the applicant 'unemployed' at all times?

The AAT considered (as the SSAT had also done) whether Robson was unemployed during his 6-week period of employment in order that, for the purposes of rent assistance, that period could be disregarded.

Section 516 of the *Social Security Act* 1991 allows the Secretary to treat a person as unemployed during a period when the person undertakes paid work, if —

> 'the Secretary is of the opinion that, taking into account:
>
> (i) the nature of the work; and
>
> (ii) the duration of the work; and
>
> (iii) any other matters relating to the work that the Secretary considers relevant;
>
> the work should be disregarded . . .

Section 1068-F1 provides that 'an amount to help cover the cost of rent is to be added to a person's maximum basic rate' of job search allowance in certain circumstances.

The Tribunal found that s.516 could not be applied in this case. It held that

> '[T]he primary purpose behind s.516 is to allow short term periods of employment of a somewhat unusual or sporadic character to be disregarded for the purpose of calculating job search allowance. The provision is designed to ensure a person who otherwise should receive support by way of an unemployment benefit is not prejudiced by undertaking, say, a short-term part-time job. . . . Further, eligibility for rent assistance is dependent on payment of the primary job search allowance. In my opinion, the link between the two, which is expressed in s.1068-F1, is such that one cannot regard someone as unemployed for the purpose of the latter but employed for the former.'

There was nothing exceptional about the work undertaken by Robson according to the Tribunal. He was 'employed' during this period. It would have been inconsistent with the statutory scheme to regard him as ineligible for job search allowance during this period but eligible for rent assistance on the basis that he was 'unemployed' for the purposes of the latter payment.

When should the waiting period commence?

Section 1068-F6 required the applicant to have 'a current accumulated rent assistance waiting period of credit of at least 26 weeks.' Section 1068-F9 provides:

> 'For the purposes of point 1068-F6, a person is to be taken to have accumulated 26 weeks of eligible rent assistance waiting periods if:
>
> (a) the person has an eligible waiting period that is a continuous period of 26 weeks; or
>
> (b) the person has eligible waiting periods that together form a continuous period of 26 weeks; or
>
> (c) the person has eligible waiting periods that add up to 26 weeks and none of the eligible waiting periods start more than 4 weeks after the end of the immediately preceding waiting period.'

Section 1068-F11 further provided that

> 'A person's accumulated rent assistance credit ceases to be current at a particular time if the person's last eligible rent assistance waiting period ended more than 4 weeks before that time.'

This latter provision was the critical provision against Robson. The Tribunal found that once a person's accumulation of credit was interrupted by a period of four weeks, as occurred in this case, the waiting period for rent assistance must start again. The provision allowed no discretion.

The AAT noted that ss.1068-F6 to 1068-F11 had now been omitted, effectively abolishing the waiting period for most persons from March 1992. But this was of no assistance to Robson in the present matter.

Formal decision

The AAT affirmed the decision under review.

[B.S.]