form in respect of her payments for 1990 informing the Department that Mr Patriki had started a new sales job, working on commission, and that he expected his income to be at least 25% more than previously. His income for 1987/88 was $17 904. On 13 November 1989, Patriki asked that her FAS be cancelled as the family income was over the limit. The Department did so and wrote to Patriki advising her of her appeal rights on 17 November 1989. On 6 July 1990 Patriki lodged a new claim for FAS, providing proof that her husband's taxable income for 1988/89 was $23 431. Estimates for taxable income for 1989/90 of $20 644 and for 1990/91 of $21 000 were provided in early November. FAS was granted from the first pay-day after the claim. In November 1989, maximum FAS was payable if taxable family income was below $16 648 ($17 998 in July 1990) with part payment up to a taxable income of $24 336 ($25 333 in July 1990). Patriki sought arrears of FAS from 30 November 1989 to 28 June 1990. She appealed to the SSAT against failure to pay these in December 1990.

Legislation

The AAT decided that it should apply the substantive law of the 1947 Act, given the provisions of sub-clause 15(1) of the 1991 Act. The then s.72 of the Act provided that the eligibility for and the amount of FAS to be paid was based on taxable income for the previous year; this could be either the actual amount assessed by the Commissioner, or an estimate. If neither was provided, the relevant taxable income became an unascertainable amount and according to s.74C, FAS was not payable. Section 76 provided that FAS was payable from the first allowance pay-day after the day before the day the claim was lodged. Section 168(1) gave the Secretary power to cancel payments and s.168(4) provided that where a person was notified of such a decision and failed to seek review of it within 3 months, arrears could only be paid from the date review was sought not the date of the decision.

Decision under review

The AAT stated that although the decision the SSAT said it was reviewing was the decision to cancel FAS, applying the decision in *Moore* (1991) 62 *SSR* 867, the correct decision under review was the decision of the review officer affirming the original departmental decision, and effectively the SSAT was reviewing both the decision to cancel the first claim and the decision not to pay arrears on the second claim.

The arguments

The DSS argued that Patriki's FAS was correctly cancelled in November 1989 regardless of the request to cancel because the family income had become an 'unascertainable amount'.

It was also argued that the claim lodged in July 1990, based on the 1989/90 income year, was correctly granted from the first pay-day after the claim, though it could not be paid until estimates of income were lodged in November 1990.

Thirdly, the DSS argued that no arrears could be paid on the July 1990 claim because Patriki, although notified of her rights of review in November 1989, did not seek review until December 1990 of the decision to grant FAS only from July 1990, well outside the three month limit in s.168.

Mr Patriki, acting for his wife, submitted that the legislation was unfair to self-employed people. He argued that a period longer than three months should be provided to allow such people to provide an accurate assessment of income.

The legislation applied

Whilst the Tribunal expressed sympathy with Patriki's position, it accepted the DSS arguments that the legislation did not allow FAS to be paid from the time Mr Patriki changed jobs in November 1989 until the new claim was lodged in July 1990.

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Unemployment benefit: entitlement

KERNYI and SECRETARY TO DSS

(No. 7275)

Decided: 3 September 1991 by B.H. Burns.

The applicant sought review of a decision made by the SSAT to affirm a decision of the DSS rejecting his claim for unemployment benefit.

The facts

Kernyi lodged a claim for unemployment benefit on 26 July 1990. This was rejected on the grounds that the delegate did not accept that Kernyi was willing to undertake suitable work, or was taking reasonable steps to find full-time work.

Kernyi had moved to Coober Pedy in 1989 when a friend offered him work in a jewellery shop there. The work offer fell through and in April 1989 his unemployment benefit was cancelled. It was accepted by an SSAT that he had moved to Coober Pedy to take up an offer of work and did not make his chances of obtaining employment more remote. His benefit was then restored.

On 31 October 1989 his entitlement was reviewed and benefit was cancelled. On review, the SSAT decided that Kernyi was not willing to undertake suitable work and had not taken reasonable steps to find work. On 26 July 1990 he again applied for unemployment benefit and the rejection of this claim was the subject of the present appeal.

The legislation

The issue was whether Kernyi could satisfy s.116(1)(c) of the *Social Security Act* 1947. Under s.116(1)(c) an applicant for unemployment benefit must 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 him, and that he had taken reasonable steps to obtain such work.

The Tribunal said there were 2 limbs to s.116(1)(c) and Kernyi must satisfy both to qualify for unemployment benefit. Willingness to undertake work was a subjective test referring to the person's state of mind at the relevant time. The second limb imposed a more objective test; but what was 'reasonable' for the purposes of the section would depend upon the particular circumstances of the applicant at the time he applied for benefit.

The findings

The DSS argued that, at the relevant time, Kernyi was engaged in opal mining. He had a mining licence, had pegged a claim and informed DSS that he was engaged in hand noodling for approximately 10 hours per week. He said he had earned approximately $150 from this activity since his arrival in Coober Pedy. The DSS relied upon the fact that Kernyi had remained in

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.]