The Full Court rejected the Secretary's argument: once the cancellation decisions were set aside, the Full Court said, O'Connell and Sevel were entitled to be paid the moneys attributable to the decisions (made well before the January 1990 cancellation decisions) granting each of their claims for family allowance without the necessity of any new decision within s.168(3) of the *Social Security Act* 1947.

This was because s.168(3) 'referred to decisions creating an entitlement to a pension, benefit or allowance; not accounting or clerical decisions to implement an entitlement', such as the issuing of an authority for payment to each of O'Connell and Sevel.

Even if the decisions to pay arrears to O'Connell and Sevel had been decisions of the type referred to in s.168(3), the Full Court said, those decisions would not have been subject to the time limits fixed by s.168(4) of the 1947 Act (that is, time limits dependent on review being sought within 3 months), because they were not decisions of the Secretary but decisions of the AAT.

The date of effect of the AAT's decisions was controlled by s.183 of the 1947 Act: the respondents having applied to the SSAT within 3 months of the decisions not to pay arrears of family allowance, there was no impediment to the AAT fixing, as the date of effect of its decision, the date of the cancellation decision.

If ss.168(3) and 168(4) had applied to the AAT's decisions to set aside the cancellation decisions, the Full Court said, those provisions would not have prevented the AAT from directing the payment of all arrears of family allowance. Section 168(4)(a) did not operate to prevent payment of arrears because the notices of cancellation had not been 'given' to O'Connell or Sevel. Section 29 of the *Acts Interpretation Act* 1901 did not operate to deem notice to have been given by posting pre-paid letters to the respondents. As Gummow J had said in *Secretary to DSS v Garratt* (1992) 68 *SSR* 981, 'the rights of persons should not readily be constructed so as to fix upon something less than the giving of notice and to accept an imputed notification as sufficient for the operation of the legislation'.

After observing that, in *Garratt*, there had been no decision to set aside the cancellation of family allowance so that recourse to ss.168(3) and 168(4) had been necessary, the Full Court concluded by offering some guidance to the Secretary for the 'thousands of other cases [which] depended on the outcome of these cases':

> 'It may assist the consideration of those cases if we summarize the situation by saying that, in our view, in any of those cases in which the cancellation decision has been — or, hereafter, is — set aside, s.168(3) will have no application. Consequently, the limitations imposed by s.168(4) will be irrelevant. If the person receiving the allowance remained otherwise qualified, including in relation to the income test, that person will be entitled to payment of arrears of the allowance to the same extent as if the cancellation decision had never been made. There will be no statutory impediment to the Secretary making that payment.
>
> In cases where the cancellation decision has not been — and is not hereafter — set aside, Garratt will apply. If the beneficiary in fact received notice of the cancellation decision, s.168(4)(a) or (b) will apply to the new claim; with the possible result that arrears cannot be paid. If the beneficiary did not receive notice of the cancellation decision, a notice sent to the last-known place of residence not being sufficient to fulfil this condition, s.168(4)(ca) will apply. The Secretary will have a discretion as to the date from which the allowance should resume, the matters mentioned above being all relevant to the exercise of the discretion.'

(Reasons for judgment, p. 29-30)

Formal decision

The Full Court dismissed the appeal.

[P.H.]

Unemployment benefit: moving residence

SECRETARY TO DSS v CLEMSON

(Federal Court of Australia)

Decided: 29 January 1993 by Neaves J.

Sandra Clemson was retrenched from her employment in February 1991. The next day, she moved her residence from Sydney to Young. On 8 March 1991, Clemson claimed unemployment benefit.

The DSS decided that Clemson had reduced her employment prospects by moving her place of residence and that she did not have a sufficient reason for the move. The DSS imposed a non-payment period of 12 weeks on Clemson, under s.126(1)(aa) of the *Social Security Act* 1947.

On appeal, the SSAT set aside that decision. The AAT affirmed the SSAT's decision, on the basis that s.126(1)(aa) did not apply to a person who moved her residence before claiming unemployment benefit: see *Clemson* (1991) 63 *SSR* 888.

The Secretary to the DSS appealed to the Federal Court under s.44 of the *AAT Act* 1975.

The legislation

Neaves J said that the AAT's decision was handed down after the repeal of the 1947 Act and the commencement of the 1991 Act; and noted that the appeal had been conducted on the basis that the 1947 Act controlled the issues before the Court.

Section 116(1) of the 1947 Act set out the qualifications for unemployment benefit. It required that, during the relevant period, the person be unemployed, willing to undertake and capable of undertaking suitable employment, have taken reasonable steps to obtain employment and be registered with the CES.

Section 116(6A) provided that a person was not qualified for 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 reasons for the move'.

Section 125(1) provided that unemployment benefit was payable from the 7th day after the day on which a person became unemployed or after the day on which he or she claimed unemployment benefit, whichever was the later.

Section 126(1) provided that unemployment benefit was not payable to a person for a period determined by the Secretary in a number of situations. These included the situation where a person's unemployment was due to the person's voluntary act without sufficient reason: para. (a) or due to the person's misconduct as a worker: para: (b).

They also included the situation covered by s.126(1)(aa), where —

> 'a person has reduced his or her employment prospects by moving to a new place of residence without sufficient reasons for the move'.

According to s.126(4), the non-payment period for a person covered by s.126(1)(aa) was 12 weeks.

Section 116(6A) not applicable to Clemson

Neaves J said that s.116(6A) could only operate to prevent qualification for unemployment benefit on the actual day when the person moved her or his residence; and was irrelevant to the qualification of a person who moved outside the period in respect of which the person was seeking to qualify.

Section 126(1)(aa) not applicable to Clemson

Neaves J said that each of the paragraphs of s.126(1) (addressing such matters as voluntary unemployment, misconduct as a worker and failure to accept a job offer) —

> 'was intended to have an operation only where, by virtue of the operation of the other provisions of the statute, including ss.116 and 125, an unemployment benefit was payable to a person in respect of an identifiable period . . . [Section] 126(1) was to be read as requiring that the circumstances referred to in each of the lettered paragraphs have a close relationship to the period in respect of which the unemployment benefit would have been payable by virtue of the provisions of the statute other than s.126'.

(Reasons for Judgment, p. 22)

In particular, s.126(1)(aa) required, before it would be applicable, that the change in a claimant's residence during the period for which unemployment benefit would otherwise have been payable occurred:

> 'Thus the paragraph would operate in a case where a person already in receipt of an unemployment benefit moved to a new place of residence with the consequent lessening of his or her employment prospects. The paragraph would also operate in the case of an initial application for unemployment benefit provided the change in residence occurs during the period in respect of which benefit would, apart from the provisions contained in s.126, have been payable.'

(Reasons for Judgment, pp. 24-5)

Neaves J said that he had 'taken a somewhat different view of the relevant statutory provisions from that taken by the Tribunal': Reasons for Judgment, p. 25. However, the AAT had been correct in concluding that ss.116(6A), 126(1)(aa) and 126(4) did not apply so as to prevent payment of unemployment benefit to Clemson.

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

Background

DISABILITY AND SICKNESS LEGISLATION

Policy objectives of the legislation

A year after the commencement of the *Social Security (Disability and Sickness Support) Amendment Act* 1991, Anne Anderton, Senior Member of the Social Security Appeals Tribunal in Perth, identifies issues of interpretation of the Act which have yet to be considered by the AAT.

Just over a year ago, on 12 November 1991, the *Social Security (Disability and Sickness Support) Amendment Act* 1991 came into operation replacing invalid pension and sickness benefit with the new payment types of disability support pension and sickness allowance.

The shifting emphasis of the legislation is well expressed in the Department's own motto for the new legislation: 'Disability Reform Package — Focus on Ability'.

Peter Staples, in moving that the Bill be read a second time in Parliament referred to it as 'the introduction of an entirely new strategy which will help us deal far more effectively with the needs of people who have disabilities in the 1990s'.

Over the past 20 years there has been a significant increase in the number of people in receipt of disability income payments. Over the past ten years the number of people in receipt of invalid pension increased by 66%, far in excess of the population growth.

The increase has been attributed to a number of factors:

- The structural changes in employment and the ageing of the population with a consequential increase in the chance of being injured at work.
- The loosening of the eligibility criteria, referred to by the Government as follows:

  'The AAT went a considerable way in taking account of socio-economic factors and the labour market in assessing a person's incapacity for work.'

  The Government suggested that in the case of long-term recipients of invalid pension 'The concept of permanent incapacity for work became self-fulfilling' as a result of which only 2% of invalid pension recipients returned to work.'
- In referring to sickness benefit the government suggested that a number of problems existed in the old legislation, the main one being that the level of incapacity was not specified. This led to differences of opinion as to whether total or merely partial incapacity for work was required.

These problems resulted in many applicants, who had medical problems too insignificant to enable them to receive invalid pension, receiving sickness benefit for many years.

The overhaul of the disability legislation started in the late 1980s. The initial review recommended changes to income support payments and suggested a far greater level of assistance for retraining and rehabilitation to positively assist people with disabilities to return to work.

The review recommended that eligibility for a new payment, to be called disability support pension (DSP) be clarified and that it should rely on the interaction of three major factors:

- the level of medical impairment and its functional effects;
- relevant socio-economic factors affecting the individual's employment chances such as qualifications, education and English language skills;
- the labour market opportunities which are available to the person.

In the event, the legislation disregarded all but the first of these factors.

The Disability Reform Package was announced in the 1990/91 Federal Budget and was finally implemented in November 1991.

The main aims of the legislation are as follows:

- to help people with disabilities obtain employment and become independent while at the same time ensuring that they receive income support as long as required;
- to target DSP to people with significant medical disabilities; and