in a desperate condition (as 'many undoubtedly now are') was denied social security assistance. Section 124 of the Act was 'apt to deal with a situation in which a primary producer is "unable to earn a sufficient livelihood for himself and his family" [the basic qualification set out in that section for a special benefit]'.

But, in this case, the Tribunal felt it could not exercise the discretion to grant special benefit to Vavaris because he owned a house in Wollongong which he had 'declined to sell or let because of family considerations derived from his ethnic and cultural background':

> [I]t does not seem to me that s.124, which I repeat involves an exercise of discretion, can be invoked so as to assist from the public purse someone who will not for family reasons make the full use of his assets to ensure his continuing sustenance. If the family will not let him sell or let the Wollongong house, the family will no doubt have to continue to support him. Of course, even since the hearing it is notorious that there has been a serious downturn in the employment situation in Wollongong and it may be that the property market has been affected. If so, a decision by the applicant to sell or let might not now even be realistic. Beyond saying that it is obviously open to the applicant or his advisers to make representations to the respondent about the matter accordingly, I say no more about it.

(Reasons for Decision, para. 35)

Formal decision

The Tribunal affirmed the decision under review.

Unemployment benefit: industrial action

SAVAGE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/165)

Decided: 15 December 1982 by McGregor J.

Savage appealed to the AAT against a refusal by the DSS to grant him unemployment benefits from 11 November 1980 to 19 December 1980. The DSS refused on the grounds that he was engaged in injustrial action during that period.

Facts

Savage was a member of the Amalgamated Metal Workers and Shipwrights Union, employed as a fitter by Toohey's Limited at Auburn. In September 1980 the AMWSU and a number of other unions commenced industrial action in support of demands for improved wages and working conditions in the brewing industry, in particular for a 35 hour week. The campaign, in which Savage participated, included stoppages, bans and restrictions on performance of work. On 11 November 1980 the applicant was asked to sign a letter saying that he was prepared to work in terms of the award without further disruption of normal production. The applicant, along with some 420 others refused to sign and was summarily dismissed. None of the employees was paid until all were reinstated on 19 December 1980.

Legislation

S.107(4) and (5) of the *Social Security Act* state:

> (4) A person is not qualified to receive an unemployment benefit in respect of a period unless –
>
> (a) the person satisfies the Director-General that the person's unemployment during that period was not due to the person being, or having been, engaged in industrial action;
>
> ...
>
> (5) Sub-section (4) does not disqualify a person from receiving unemployment benefit in respect of a period occurring after the cessation of the relevant industrial action.

Was there industrial action?

Savage argued that he was not engaged in any industrial action on the morning of his dismissal and that the reason for the dismissal was his refusal to sign the letter, which did not constitute industrial action. His dismissal, he argued, ended the relationship of employer and employee and thus ended any industrial action. He was thus entitled to unemployment benefits coming within the terms of s.107(5), which overrode s.107(4).

The Tribunal rejected these arguments and concluded that there had been industrial action, from some time before 11 November 1980 and continuing up to 19 December 1980. They cited in support the following 'evidence':

- that there had been industrial action up to 11 November 1980 at the Auburn brewery by AMWSU members, including the applicant;
- that, after 11 November 1980, the applicant (by refusing to sign the letter) was refusing to indicate willingness to work in terms of his award;
- that, on 11 November 1980, there had been a mass meeting at Auburn brewery where employees refused to sign the letter and were dismissed; a letter from Toohey's Limited to the DSS in May 1981, which gave as a reason for dismissal of the employees, including Savage, their refusal to perform work in accordance with the terms of the Award, and referred to an existing campaign for improved pay and conditions;
- statements by counsel for Toohey's in proceedings before the NSW Industrial Commission on 12 and 13 November 1980 to pickets at the Auburn brewery;
- a statement by the President of the NSW Industrial Commission on 20 November 1980 concerning a union campaign in the brewing industry; and
- a calendar of events supplied by Toohey's Ltd.

It followed that the AAT was 'satisfied that the applicant is not qualified to receive any employment [sic] benefit for the period 11 November 1980 – 19 December 1980.'

Formal decision

The AAT affirmed the decision under review.

Procedure: application for 'stay' of cancellation

ROUMELIOTIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/392)

Decided: 17 December 1982 by W. Prentice.

Constantino Roumeliotis had been granted an invalid pension in 1980. The DSS cancelled this pension in September 1982. He then applied to the AAT for review of this decision.

At about the same time, he asked the AAT to use its power under s.41 of the *Administrative Appeals Tribunal Act* to 'stay' the operation of the cancellation. (that is, to order that the pension continue to be paid) pending the hearing of the application for review.

The Tribunal noted that Roumeliotis was living in Athens with his wife and young daughter; that his elder daughter was sending about $50 a week to him from Australia; that he was allegedly suffering from 'manifold disabilities'; and that his wife was 'ill and suicidal'.

However, the Tribunal said, it was 'by no means apparent that the applicant is experiencing any particular financial difficulties, maintaining himself in his own home with the monies being sent him': Reasons for Decision, para.6. The AAT continued:

> 8. On such an application, one must bear in mind not only that should the application to review prove successful back payments of the pension would normally be ordered, but also that in the event of failure, payments during a stay of cancellation might well be irrecoverable.
> 9. The pattern of facts revealed in the affidavit and submissions put to me, indicate to my mind that should a stay be granted, far from the effectiveness of the hearing being secured and the application determined thereby, its result could well be the contrary, namely an extended delay in the final determination of the issue: Though I feel considerable sympathy for

the difficulties being experienced by the applicant's daughter and son-in-law, I do not believe the facts to have established that jurisdiction could be, or should be, exercised under s.41 of the *Administrative Appeals Tribunal Act*.

The Tribunal refused to make any order under s.41 of the *Administrative Appeals Tribunal Act*, but directed that a preliminary conference be held in February 1983, when a request could be made for an early hearing of the review application.

Invalid pension: permanent incapacity

Di PALMA and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/232)

Decided: 2 December 1982 by A. N. Hall, A. Marsh and H. E. Hallowes.

Antonio di Palma was born in Italy in 1935 and migrated to Australia in 1959. He worked as a labourer until 1969 when a back injury forced him to give up his job, and he had not worked since.

In 1979 and 1980, two applications for invalid pension were rejected by the DSS. He asked the AAT to review the second rejection.

Di Palma told the Tribunal that he suffered constant pain and could not sit or stand for any length of time.

The AAT found that there was 'no detectable organic basis for the applicant's continuing complaints of pain in the back, neck and right leg'. However, none of the medical witnesses suggested that di Palma was malingering, and all apparently accepted that he genuinely experienced pain and that he was convinced of his own incapacity for work. He had, the AAT said, 'a functional abnormality for which there is no apparent organic cause'.

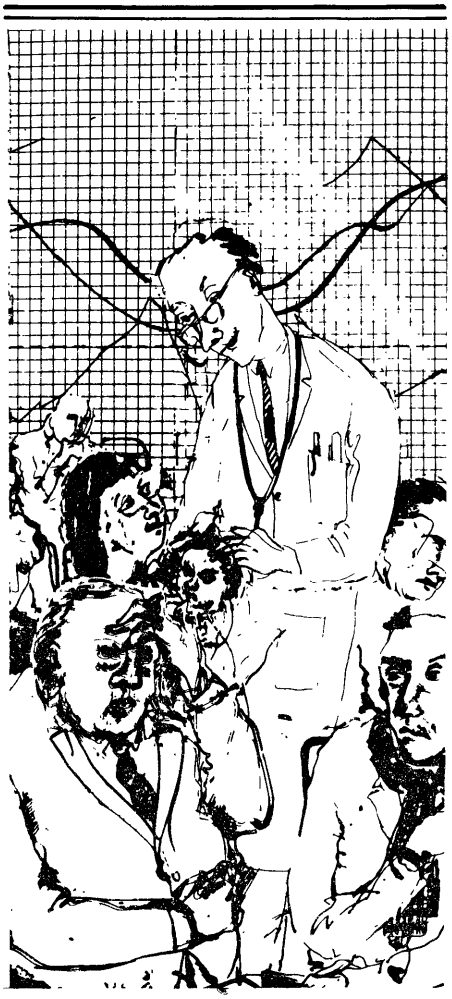
The Tribunal referred to *Sheely* (1982) 9 *SSR* 86 where the Tribunal had said that the incapacity for work referred to in ss.23 and 24 of the *Social Security Act* 'must result from a physical disability', whether that disability be physical or psychic . . . The concept of permanently incapacitated for work . . . is not unlimited and at its boundary there is a distinction between a person who is sick and a person who merely thinks he is sick'. The Tribunal continued (in this case):

> 29. The present case, in our view, is very close to the line referred to by the President . . .
>
> 30. If we felt that the applicant's perception of himself as an invalid was the product of a conscious and deliberate decision to present symptoms which would qualify him for an invalid pension, we would have no hesitation in rejecting his claim [cf. s.25(1)(c) of the *Social Security Act* 1947] . . .
>
> Whilst the applicant's symptomatology may defy any precise psychiatric description, we accept Dr Blashki's evidence that underlying the applicant's problems, there is a psychjatric disorder which characterises the applicant as sick in psychiatric terms. We find that the psychological pain from which the applicant suffers is real to him and that it is likely to continue indefinitely [cf. *Re Panke* (1981) 4 ALD 179]. Having regard to his psychological state we consider him to be effectively unemployable and likely to remain so. He is therefore, in our view, permanently incapacitated for work within the meaning of ss.23 and 24 of the *Social Security Act* 1947 and qualified to receive an invalid pension.

(Reasons for Decision, paras 30-31)

Formal decision

The AAT set aside the decision under review and granted di Palma an invalid pension from the date of his 1980 application.



GNOATO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/167)

Decided: 24 December 1982 by J.O. Ballard

Alfredo Gnoato was born in Italy in 1930 and migrated to Australia in 1950. He suffered an injury to his back in 1969 but, with some breaks, worked on relatively light duties until about 1977 when he travelled to Italy.

On his return to Australia he was granted an invalid pension. The DSS reviewed this pension when Gnoata told it that he intended to return to Italy; and the DSS then cancelled his pension. Gnoato applied to the AAT for review of the cancellation.

The AAT found that Gnoato suffered mild hypertension which was not disabling and that his 1969 back injury had resolved. The Tribunal accepted that Gnoato genuinely believed that he was suffering a significant back problem and that he had become entrenched in the role of an invalid. However, the Tribunal found that Gnoato was capable of light work.

The Tribunal also decided that he had given up his job in 1977 to look after his ill wife.

After referring to *Sheely* (1982) 9 *SSR* 86 (where the AAT had said that an 'incapacity for work' must result from a medical disability rather than from a person's belief of illness), the AAT said:

> In my view, this case is indistinguishable from *Sheely*'s case. On these facts, the applicant's inability to work is caused by his fixation that he is unable to work together with, and quite understandably, an inability to leave his wife alone at home and I so find.

(Reasons for Decision, para. 14).

Having concluded that Gnoato was not 85% incapacitated for work, the AAT criticised the initial grant of pension 'without due consideration been [sic] given to whether that incapacity was permanent ... [T]here is sound medical evidence for the proposition that the very grant of such an invalid pension encourages the person to whom it is granted to assume the invalid role': Reasons for Decision, para. 16.

Formal decision

The AAT affirmed the decision under review.

McGEARY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/372)

Decided: 18 November 1982 by A.N. Hall

Thomas McGeary was born in 1946 and worked as a labourer until a back injury forced him to change jobs in 1974. He worked as a car stripper until 1979 when he was retrenched, and had not worked since then. His applications for invalid pension, in 1980 and 1981, were rejected by the DSS and he applied to the AAT for review of the second rejection.

The Tribunal found that McGeary's lower back condition was permanent and that he could not perform heavy physical work; but that light work was within his physical capacity.

The AAT also found that McGeary had 'poor personality resources', had 'difficulty in establishing close contact with anyone', and was severely depressed by his inability to find work (he had made 26 unsuccessful job applications)