In July and August 1980 he was examined on behalf of the DSS and the examining doctors found that he was not qualified for invalid pension. The DSS then cancelled his invalid pension.

Webb then sought review by the AAT of the cancellation decision.

The law

Section 24 of the *Social Services Act* provides that a person who meets the age and residence requirements and 'is premanently incapacitated for work' is qualified to receive an invalid pension. Section 23 amplifies s.24:

> 23. For the purposes of this Division, a person shall be deemed to be permanently incapacitated for work if the degree of his permanent incapacity for work is not less than eighty-five per centum.

The AAT referred to *Panke*, 2 *SSR* 9 and adopted the analysis of Hall and Glick in that case: to determine incapacity for work, there must be, first, a medical evaluation of the person's physical or medical impairment and, second, an assessment of the extent to which the impairment affects the person's ability to engage in paid work; and any incapacity must be likely to last indefinitely (so that is can be described as 'permanent').

The evaluation and assessment of incapacity

On the medical evidence presented by Webb and the DSS, the AAT found that Webb's physical impairment was not much more than 10%, although it was permanent. But, because of his work history, his family background and socio-economic circumstances this impairment had severely affected his work motivation and, perhaps, made him at least 85% incapacitated for work:

> He is and has been surrounded by a variety of social, familial and attitudinal factors that have led to his being very pessimistic about obtaining a job and handling the work involved. He is a man who had a very limited education, who has never had other than a manual job, and who has never been able to find a job that has not at some stage had to be abandoned because of a back problem . . . He is of the view that no employer wants to hear about him if his back condition is revealed and that if he obtains a job by concealing that condition he gets into trouble.

Reasons for Decision, para. 18.

Permanent or temporary?

However, the AAT said, to the extent that his incapacity was due to problems of motivation it could not be regarded as permanent because there was a prospect that a rehabilitation and training scheme offered by the Commonwealth Employment Service could place Webb in employment with an employer willing to give him a chance. Until this scheme had been tried and failed, Webb's incapacity could not be said to be permanent.

If it did fail, 'the conclusion would almost inevitably follow not only that the incapacity had become permanent but also that, because of what would no doubt by then have become the decisive effect of the functional component of the incapacity, the degree of the incapacity had become more than 85 per cent':
Reasons for Decision, para. 22.

The AAT concluded by stressing that the onus was on the DSS and the CES to take positive steps to assist the applicant, especially because Webb had been paid an invalid pension for almost six years and had lost the pension at a time when his condition had not improved.

The AAT affirmed the decision under review.

MARKOVIC and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/84)

Decided: 24 December 1981 by J.O. Ballard.

Josep Markovic, described by the AAT as 'a Yugoslav, who speaks little English', was electrocuted in an industrial accident in July 1979. He was paid workers compensation for a time and received a lump sum payment of $16,000 early in 1981. A common law claim for damages was pending in the Supreme Court of Victoria at the time of the AAT hearing.

Markovic's application for an invalid pension was rejected by the DSS and after an unsuccessful appeal to an SSAT. he applied to the AAT for review of that decision.

Permanent incapacity

The AAT said that there was a clear conflict between Markovic's specialist medical advisers and the specialists who had examined him for the DSS. The AAT accepted the opinion of Markovic's psychiatrist who had been consulted 28 times by Markovic, apparently because of the opportunity this specialist had had to study Markovic's condition. This psychiatrist was supported by another specialist who had seen Markovic twice. On the basis of their opinions, the AAT found that Markovic's psychiatric disturbance (the result of his accident) rendered him at least 85% incapacitated for work. The AAT found that, 'on the balance of probabilities', Markovic's condition would not improve with the conclusion of the Supreme Court proceedings.

He was therefore qualified for invalid pension under ss.23 and 24 of the *Social Services Act*.

Enforceable claim for adequate compensation

The AAT then considered whether s.25(1) of the *Social Services Act* prevented the grant of an invalid pension to Markovic:

> 25.(1) An invalid pension shall not be granted to a person –
>
> . . .
>
> (d) if he has an enforceable claim against any person, under any law or contract, for adequate compensation in respect of his permanent incapacity or permanent blindness.

The AAT referred to *Buhagiar*, 4 *SSR* 34, where the AAT had suggested, in passing, that s.25(1)(d) was a barrier to payment of invalid pension while a claim to workers' compensation was pending; to *Bradley*, 4 *SSR* 35, where the AAT said that s.25(1)(d) was no barrier once a compensation claim had been settled; and to a High Court decision, *National Insurance Co. of N.Z. Ltd.* v *Espigne* (1960) 105 CLR 569.

In this last case Menzies J had said that s.25(1)(d) did not apply to a common law claim for damages (at pp. 568-9); Windeyer J said it had no application to 'rights of action in tort' – that is, common law damages claims (at p. 587). Those judges thought s.25(1)(d) referred to statutory (such as workers compensation) or contractual rights to compensation; and they doubted that a common law claim could be described as a claim to 'adequate compensation' because of the chance of any award being reduced by the plaintiff's contributory negligence.

In *Espagne*, Dixon CJ agreed with Menzies and Windeyer JJ and Fullagar J agreed with Windeyer J. The AAT decided that it should 'be regarded as binding authority'. Accordingly, Markovic's action for damages was no bar to the payment of invalid pension because –

- the section did not apply to common law claims;
- any damages awarded might be reduced because of contributory negligence and could not, therefore, be 'adequate'; or
- the defendant in the action might not be liable and the claim would not, therefore, be 'enforceable'.

The AAT set aside the decision under review and granted an invalid pension to Markovic.

Overpayment: discretion to deduct from pension

PFEIFFER and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. S81/17)

Decided: 4 December 1981 by J.O.Ballard.

In this matter the AAT reviewed a decision by the Director-General to recover an overpayment of invalid pension by deducting the overpayment from future payments of pension, as provided by s.140(2) of the *Social Services Act*.

Cynthia Pfeiffer was a married invalid pensioner. In March 1977 the DSS fixed her fortnightly rate of pension at $29.10, taking account of her husband's income of $297.26 a fortnight. The DSS did not review her husband's income until June 1980 when the husband's employer provided details of increased income from 31 March 1977 onwards.

The DSS then calculated that there had been an overpayment of $1234.20 and decided to withhold all of her invalid pension until this amount was recovered. This was done under s.140(2) which gives the Director-General a discretion to deduct from a current pension any amount paid by way of pension, 'which should not have been paid'.

The AAT found that Mrs Pfeiffer's husband's earnings fluctuated and this made it difficult for her to keep the DSS informed. But the AAT accepted 'that she probably did telephone the Department to explain her dilemma' although the DSS had no record of these calls.

Section 140(2) (unlike s.140(1)) does not require that the overpayment be due to any failure on the part of the pensioner. So it was clear that there was a recoverable overpayment here, regardless of whether Mrs Pfeiffer had failed to keep the DSS informed.

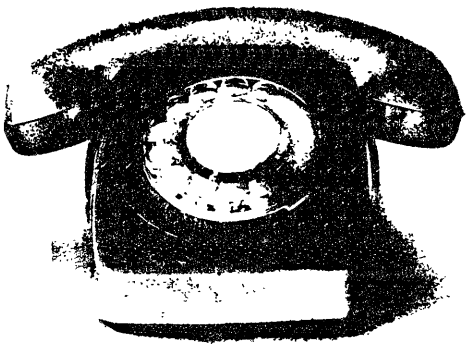
The issue before the AAT was whether it should exercise the Director-General's discretion under s.140(2). The AAT found that there would be no financial hardship to Mrs Pfeiffer in withholding all her pension. (The AAT did not set out the evidence on which this conclusion was based.)

The AAT then asked whether the fact that Mrs Pfeiffer had telephoned the DSS twice to inform them of fluctuations in her husband's income should persuade it to exercise the discretion in her favour. Could it be said that the overpayments were due to administrative error by the DSS? The AAT said:

> I do not think two telephone calls, both of which seem to have slipped through the system, can be said to amount to administrative error or are such as to make it inequitable that she should not now be obliged to repay the overpayments.

Reasons for Decision, para, 13.

The AAT affirmed the decision under review.



GEE and DIRECTOR-GENERAL OF SOCIAL SERVICES
No. N80/108

Decided: 25 November 1981 by J.D. Davies, I. Prowse and M.J. Cusack.

Patricia Gee was granted a supporting mother's benefit in July 1974, calculated on the basis of wages of $48 a week. She was told that, if her income increased, she should notify the DSS, as required by s.74(1) of the *Social Services Act* (in substantially the same terms as s.45 which applies to age and invalid pensioners).

However, Mrs Gee did not report any increase in her income until October 1978 when she was sent, and she completed, an entitlement review form, showing wages of $68 a week. This was the first DSS review of her income – from 1975 to 1978 there were no regular reviews of rates of pension, the AAT found. The suspension of regular reviews was apparently due to shortage of staff and the installation of a computer: Reasons for Decision, pp. 14-5.

When Mrs Gee advised the DSS of the increase in her income, the DSS decided there had been an overpayment of $1310 which it would recover from her supporting parent's benefit under s.140(2) of the *Social Services Act*. The DSS made 14 deductions, totalling $224, up to October 1979 when the benefit was cancelled at Mrs Gee's request because she had taken a full-time job.

Mrs Gee had, meanwhile, appealed to an SSAT against the DSS decision and, eventually, the AAT was asked to review this decision.

The AAT discussed the various ways in which an overpayment might be recovered by the DSS:

(1) As money paid unlawfully – see *Commonwealth* v *Burns* [1971] VR 825. Recovery would depend on showing that the decison to pay the money to the recipient was an invalid decision.

(2) Under s.140(1) (which is discussed at length in *Matteo*, *Forbes* and *Woodward* in this issue of the *Reporter*). The AAT pointed out that the same, perhaps strong, causal link would have to be shown between the act or omission of the pensioner and the overpayment. The Tribunal also said that the Director-General would have a discretion not to recover under s.140(1) and he should take account of financial hardship and any part which the DSS had played in the overpayment:

> In determining whether to seek a recovery, the Director-General may, in our view, have regard to all the particular circumstances of the case and to all other matters relevant to the administration of social welfare legislation.

Reasons for Decision, p.12.

(3) Under s.140(2) used by the DSS in this matter as the AAT had decided in *Buhagiar* (4 *SSR* 34), this provision allows the DSS to recover, by deduction, sums which were overpaid, even if paid pursuant to valid decisions of the Director-General or his delegates. So. s.140(2) was to be read widely to allow 'the making of appropriate adjustments, albeit in the discretion of the Director-General'. But recovery 'back over a long period' should not be a substitute for regular reviews of income and pension undertaken by the DSS: Reasons for Decision, p. 14.

It seems that the AAT was satisfied that there was, in the case of Mrs Gee, a recoverable overpayment under s.140(2). Reviewing the discretion which s.140(2) attaches to the recovery by deduction, the AAT felt that it had not been unfair to Mrs Gee to recover $224 from her benefit before the benefit was cancelled. If the benefit had continued, the AAT would have had to consider whether it was proper to continue the deductions. This decision would have been based on Mrs Gee's circumstances. But that decision did not arise here.

Shortly before Mrs Gee applied to the AAT for review of the decision to deduct, a delegate of the Director-General decided that the balance of the overpayment should be fixed as $1210 and recovered from Mrs Gee under s.140(1). The AAT pointed out that this decision had not been considered by an SSAT and so was not before the AAT. The AAT emphasized to the DSS that Mrs Gee should be given an opportunity of appealing to an SSAT if the DSS intended to proceed with this recovery. (The AAT had earlier suggested that there was real doubt whether the overpayments were made in consequence of any omission by Mrs Gee, whether they were payments which would not have been made but for her omission; rather, the AAT had suggested, they were overpayments caused by the failure of the Director-General to carry out his duty of calculating, and regularly recalculating, her benefit rate: Reasons for Decision, pp. 18-20. This was substantially the point on which the AAT later decided *Forbes*, noted in this issue of the *Reporter*.

The AAT varied the decision under review so as to authorize deduction from Mrs Gee's benefit of $224 by 14 instalments of $16 each from 12 April 1979 to 11 October 1979.

Overpayment: caused by pensioner's failure to notify?

WOODWARD and DIRECTOR-GENERAL OF SOCIAL SERVICES
No. N81/21

Decided: 24 December 1981 by A.N. Hall

The applicant asked the AAT to review a decision of the Director-General that she had been overpaid $232 as invalid pension in consequence of her failure to inform the DSS of increases in her husband's income. The facts and issues raised in this matter were similar to those in *Matteo* and *Forbes* (in this issue of the *Reporter*).

Lorraine Woodward had been granted an invalid pension in December 1978, at the rate of $5.20 a fortnight. She was advised by letter of 18 December 1978 that this was based on her husband's income of $497.38 a fortnight, a figure based on accurate information supplied by Mrs Woodward and her husband's employer about one month earlier.

In November 1979 Mrs Woodward completed an entitlement review form, showing a fortnightly income of $520, and her pension was adjusted accordingly. In January 1980 the employer told the DSS that the husband's fortnightly income was $657.19 and the DSS cancelled Mrs Woodward's pension.

The DSS then calculated, on the basis of information supplied by the employer, that the husband's income had been such as to preclude any entitlement to pension on the part of Mrs Woodward and it