10. While a question of this kind is not to be resolved simply by looking at which action (i.e. the stand down by the Company or the strike by the FEDFA) occurred first, it is in my view relevant that it was the Company's action in standing down the members of the FEDFA, and not action on that Union's part, that caused Mr Gadd to become unemployed. The absence of written stand down notices leaves some degree of uncertainty as to the intended duration of the stand down, but Mr Gadd's evidence—and he impressed me as a man of integrity—leaves me in little doubt that the stand down was intended by the Company to be for the duration of the AWU strike. The 'renewal' of that stand down on 4 October—a matter not communicated to Mr Gadd at the time (see paragraph 6 above)—was probably prompted by the ending by the FEDFA on 30 September (the last working day before 4 October) of their decision to strike made on 23 September. Whatever the Company's motives, or their interpretation of the situation as at 4 October, what has to be decided is whether Mr Gadd's unemployment between 22 September and 30 September was 'due' to his being, or having been, engaged in industrial action (i.e. the strike decided on by the FEDFA) or his being stood down by the Company.

What s.107(4) had in mind, the AAT said, 'is unemployment that is caused by, or is the result of, the person being, or having been, engaged in industrial action': Reasons, para. 11. The AAT concluded:

13. Looking at the events that unfolded between 21 September and 15 October 1982, and accepting as I do . . . that the stand down of the applicant by the Company on 22 September was intended to operate as a stand down while the AWU strike continued, I am satisfied that the applicant's unemployment between 22 September and 30 September was due to his being stood down and not to his engaging in industrial action. Whether or not the FEDFA had, after the original stand down, made a decision to strike, the applicant would have been unemployed, as the stand down would have prevented him from working. As I have already observed . . . the fact that the Company saw fit to renew its stand down in some form (not in any event communicated to the applicant) does not in my view affect the position.

Back-payment?

The Tribunal then turned to s.119(1)(a) which makes unemployment benefit payable seven days after the unemployment commences or after benefit was claimed, 'whichever was the later'. [The effect of this would be to date payment of Gadd's benefit from 7 October 1982.] Section 119(1A) obliged the Director-General to back-date payment, up to seven days, if the Director-General was satisfied that a person had been unemployed before making a claim and

- had been capable of undertaking and willing to undertake suitable work; and
- had taken reasonable steps to obtain such work.

There was no evidence of Gadd making any attempt to find new work. The Tribunal observed:

It may seem strange that a person stood down and consequently 'unemployed' for what is expected to be only a comparatively short period should be required to establish that he was in fact looking for other work over that time, as s.119(1A) requires if advantage is to be taken of the exclusion from the waiting period. But that is what the sub-section clearly requires and the respondent's representative confirmed that that was in accordance with the then Government's policy when the sub-section was enacted.

(Reasons, para. 14)

Therefore, s.119(1A) would not apply and the seven day waiting period imposed by s.119(1)(a) was applicable.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Gadd be paid unemployment benefit in accordance with the AAT's findings.

WHITTENBURY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S82/32)

Decided: 16 May 1983 by I.R. Thompson.

Rhonda Whittenbury's husband was on strike from 11 July 1980 to 1 September 1980. On 22 July 1980 she applied to the DSS for unemployment benefit which was granted on 31 July. During the period of the strike Mr Whittenbury received various amounts from his union as dispute benefit; however, these amounts were not disclosed by Rhonda Whittenbury in her income statement when applying for continuation of unemployment benefit on 11 August and 25 August.

Upon receiving details of the dispute benefit from the union, the DSS decided that, having regard to the income of her spouse, Mrs Whittenbury should have received a reduced rate of benefit and requested a refund of $86.

'Income'

The AAT was asked to decide whether the dispute benefits were income as defined in section 106(1) of the Act. Section 106(1) says:

'income' in relation to a person, means any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever, within or outside Australia, and includes any periodical payment or benefit by way of gift or allowance, . . .'

Whether the dispute benefit was income within this meaning depended upon the nature of Mr Whittenbury's beneficial interest in the moneys comprising the union's funds and to be paid out in accordance with its constitution.

It was argued for the applicant that when her husband received the dispute benefit he was receiving his own money, the money being held in trust for him by the union until paid to him as dispute benefit. (The analogy was made with a person's withdrawal of money from his own bank account.)

The AAT held that the dispute benefit was to be regarded as income. The benefit was received by Mr Whittenbury for his own use or benefit from a source, the union's funds. Even if he could be said to have been the beneficial owner of the money prior to receiving it in cash, then he "received" the money at the (earlier) time when he became entitled to it.

Income required to be taken into account

The AAT was also asked to decide whether the operation of s.112(6A) means that that income be not taken into account. The effect of s.112(6A) is to pay, to a married person, the single rate of unemployment benefit where the spouse of that person is unemployed due to an industrial dispute of the type referred to in s.107(4).

As s.107(4) operated to exclude Mr Whittenbury from receiving unemployment benefit, Mrs Whittenbury was deemed to be a single person as s.112(6A) applied. It was argued on her behalf that, as she was deemed to be unmarried, she should also be treated as a single person. (Section 114(3) states that for the purposes of calculating the rate of benefit for a married person the income of the spouse is to be included in that persons's income.) This was submitted on the basis that to hold otherwise

would be "to expose the applicant to double jeopardy", that is to say, she would get only the lower rate of unemployment benefit appropriate to an unmarried person and then have that lower rate reduced still further because of her husband's income.

(Reasons, para. 5).

The AAT did not accept that view. The deeming provisions of s.112(6A) only apply for s.112. The objects of s.107(4) and s.112(6A) were clear.

Where a person has withdrawn his labour because of an industrial dispute his spouse is not to be able to obtain the unemployment benefit of a married person which he himself would normally be able to obtain as a result of being unemployed.

(Reasons, para. 6).

However, that was no reason for not reducing her benefit where her spouse was in receipt of income. An advantage could not be given over the case where the spouse of a person was simply unemployed and to whom s.114(3) would clearly apply. Thus the deeming provisions of s.112(6A) do not extend to s.114.

Formal decision

The decision under review was affirmed.

Overpayment: discretion not to recover

EMERY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/132)

Decided: 12 April 1983 by R.A. Balmford.

Because of an oversight by the DSS, Jean Emery was overpaid $1117 by way of family allowance (then called 'child endowment' in the *Social Security Act*) between 1977 and 1980. The overpay-

ments consisted of double payment of that allowance to a bank account in Australia while she was in Papua - New Guinea. ('It was never suggested', the AAT later noted, 'that any act on the part of Mr or Mrs Emery contributed to the overpayment . . . ')

In 1980, the DSS decided to deduct the amount of the overpayment from Emery's current payments of family allowance. She asked the AAT to review this decision.

At the time of the DSS decision, s.140(2) authorised the Director-General ('in his discretion') to deduct from any current 'pension, allowance or benefit' any overpayment of 'pension, allowance, endowment or benefit'.

It was argued, on behalf of Emery, that these categories ('pension' etc) were strictly separate; and that no overpayment could be recovered by deduction from a current endowment because endowment was not listed as one of the payments from which overpayments could be recovered.

The AAT rejected this argument: the words ('pension' etc) were not 'mutually exclusive'; the categories overlap in the Act as they do in general use.

The point, that current child endowment was available for recovery of the overpayment to Emery, was underlined by s.140(3) which said that an overpayment 'otherwise than by way of child endowment . . . shall not be deducted from child endowment . . .'

(From 1982, when 'child endowment' was re-named family allowance throughout the *Social Security Act*, the minor problem created by the wording of s.140(2) disappeared; and, from 1982, the DSS was 'clearly entitled . . . to recover overpaid child endowment from family allowance payable . . .': Reasons, para. 29.)

The Tribunal rejected a second argument that the DSS should not recover overpayments made so long ago: there is 'no period of limitation provided in the Act', the AAT said.

As there was no hardship involved in this matter (of the type involved in *Buhagiar* (1981) 4 *SSR* 34, and *Forbes* (1981) 5 *SSR* 50), the recovery of the overpayment should be upheld.

Formal decision

The AAT affirmed the decision under review.

RILEY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/91)

Decided: 11 May 1983 by A. N. Hall.

Rae Riley applied to the AAT for review of a DSS decision to recover from her (under s.140(1) of the *Social Security Act*) an overpayment of $4743.90 in invalid pension.

The legislation

Section 140(1) reads as follows:

> 140.(1) Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance, endowment or benefit which would not have been paid but for the false statement or representation, failure or omission, the amount so paid shall be recoverable in a court of competent jurisdiction from the person to whom, or on whose account, the amount was paid, or from the estate of that person, as a debt due to the Commonwealth.

Section 45(3) obliges a pensioner to notify the DSS when, over any period of eight weeks, her average income (which includes her spouse's income: s.29(2)) is higher than the average income last notified to the DSS.

Section 28(2) provides for the rate of pension to be reduced by a portion of the pensioner's income.

The facts

Riley had been granted an invalid pension in 1973. She notified the DSS that her husband was employed and being paid $67 a week. The DSS checked with his employer, found he was being paid at a substantially higher rate ($99 a week) and used that figure to adjust her rate of pension. (There was no suggestion, the AAT said, that Riley had acted dishonestly.)

Over the next six years, Mr Riley's wages varied considerably and, at several times, exceeded the rate last notified to the DSS. However, Mrs Riley did not, at any time, take the initiative to notify the DSS of these changes. In July 1974 the DSS asked Mr Riley and his employer for his current wage level ($122) and used that information to adjust Mrs Riley's pension. At that time, the DSS had a well-established practice of reviewing pension levels each year. Between 1974 and 1978, the DSS suspended its annual reviews; but it did not advise Riley that these reviews had been suspended.

In October 1978, the DSS reviewed Riley's pension and she told the DSS that her husband's weekly wage was now $165. The DSS adjusted her pension accordingly. After checks with Riley's employer (which showed a wage of $208 a week), the DSS again adjusted her pension in March 1979.

At the end of 1979, the DSS found from the employer that Mr Riley was averaging $282 a week and Mrs Riley's pension was cancelled—because that income reduced her entitlement to nil.

The DSS then conducted a full review of Mr Riley's wages and Mrs Riley's pension payments since 1974 and concluded that she had been overpaid $4743.90.

The cause of the overpayment

The Tribunal noted that, in *Director-General* v *Hangan* (1982) 11 *SSR* 115, the Federal Court had held that s.140(1) allowed recovery of an overpayment if a pensioner's failure to comply with the Act was a contributing cause to the overpayment.

The AAT found that 'on a considerable number of occasions between 1974 and 1978 the applicant failed to notify increases in her husband's income as required by the provisions of s.45 of the Act' and continued

> [T]he applicant's failure contributed to some at least of the ultimate overpayment and that if the applicant had correctly notified the Department of the increases in her husband's income from time to time as they occurred, then either there would have been no overpayment or a substantially lower overpayment. Prima facie, therefore, having regard to the principles laid down in *Hangan's* case (*supra*), there is a recoverable overpayment . . .

(Reasons, para. 26)

But, said the Tribunal, 'the Department's abandonment of the sensible practice of annual reviews of pension entitlements contributed, at least as much, to the overpayment that occurred': Reasons, para. 27.

This was especially so 'because the Department was on notice of Mr Riley's employment'. It ignored 'the virtual certainty' that his income had increased.

A discretion not to pursue recovery

The Tribunal then decided that s.140(1) allowed the Director-General a discretion whether or not to take legal proceedings for recovery of an overpayment, and continued:

> 32. As to the discretionary considerations, there is no doubt in my mind that any attempt to recover the overpayment from Mrs Riley would be likely to impose financial hardship upon her. As she and her husband are already heavily in debt; as Mrs Riley has neither income nor property in her own right from which she could meet the repayment of the sum demanded by the Director-General; and as Mr Riley is not legally liable for her debts; the Director-General may well be engaging in an oppressive exercise as well as an exercise in futility if he were to pursue his present demand by instituting legal proceedings for recovery.
>
> 33. If, in the present case, I had concluded that the applicant was wholly or mainly to blame for the overpayment that occurred, I would feel less sympathy for her position than I do. Looking at the substantial merits of the case, however, I cannot escape the conviction that she was the unsuspecting victim of a change in departmental review procedures, the abandonment of which placed the entire responsibility upon her shoulders to notify increases in her husband's wages . . .
>
> 34. Notwithstanding, therefore, that there may be a prima facie case for recovery action against the applicant, I have concluded that no further action should be taken to pursue the overpayment in this case. My main reasons for so deciding are:
>
> (i) the considerable extent to which administrative inaction contributed to the ultimate overpayment;
>
> (ii) the fact that the applicant has never sought to conceal her husband's employment with Toll-Chadwick;
>
> (iii) the hardship which any attempt at recovery would impose upon the applicant; and
>
> (iv) the probability that the overpayment will not, in any event, be recoverable.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that no further action for recovery be taken.

KARABASIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/515)

Decided: 27th April 1983 by J. O. Ballard.

Andreana Karabasis applied to the AAT for review of a DSS decision to recover from her $3490, which the DSS claimed was overpaid invalid pension. The decision that there had been an overpayment and to seek

its recovery had been made under s.140(1) of the *Social Security Act*: the terms of this section are set out in *Riley* in this issue of the *Reporter*.

The facts

Karabasis had been granted an invalid pension in May 1975, at a rate fixed by reference to her husband's income: see s.29(2) of the Act. Although she was informed that she should advise the DSS of any increase in her husband's income (see s.45 of the Act), she did not do this until 1979, when the DSS sent to her an entitlement review form. Nor did the DSS make any enquiry over the period between 1975 and 1979: during that period, the DSS had abandoned its standard practice of regularly reviewing pension levels.

Karabasis promptly returned the entitlement review form sent to her in 1979 and the DSS reduced the level of her invalid pension to reflect the increase in her husband's income. The DSS then reviewed her husband's income over the preceding four years and calculated that she had been overpaid the sum of $3490.

A discretion to enforce recovery

The Tribunal found that Karabasis had failed to report increases in her husband's income between 1975 and 1979, as required by s.45 of the Act. The overpayment had been a result of that failure. According to the decision of the Federal Court in *Hangan* (1982) 11 *SSR* 115, the overpayment was, therefore, recoverable. 'However', the Tribunal said, 'it does not follow that action to recover follows automatically'. The Director-General had a discretion whether to seek recovery under s.140(1) of the Act and that discretion should 'be guided by principles of consistency, fairness and administrative justice' as the AAT had said, of s.140(2), in *Buhagiar* (1981) 4 *SSR* 34. The tribunal continued:

> 14. The function of the tribunal is to make the correct or preferable decision on each case . . . Each applicant to the tribunal is entitled to have his or her application for review decided on its own particular merits . . . Factors which should be taken into account in considering the exercise of the discretion to recover in this case are:
>
> (a) sub-s.140(1) does not authorize recovery against the applicant's husband's income notwithstanding that his income is required to be taken into account in assessing the applicant's pension;
>
> (b) the applicant has always been accepted as being 85% incapacitated; she does not receive the invalid pension only because, through her own determination, she is in fact working; she could, it seems, stop work and go back on the pension;
>
> (c) the department's suspension of the periodic pension reviews was, on any view, as significant a contributing factor to the alleged overpayment as was the applicant's failure to comply with s.45 of *the Act*.
>
> 15. Given these factors and given the undoubted hardship which any attempt at recovery through the courts would impose on the applicant I am of the view that it would be proper to recover from the applicant half of the sum overpaid during the period of the suspension of periodic reviews and, unless the applicant is able to repay in a lump sum, for that recovery to be at a nominal weekly rate of $10.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that only half the sum overpaid during the suspension of periodic review be recovered, at a weekly rate of $10, but that any other overpayment be recovered in full.

Cohabitation

SHEARING and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. T82/43)

Decided: 9 May 1983 by A. N. Hall.

In July 1973 Lorraine Shearing moved with her new-born child into the home of H to take up a position as live-in housekeeper. In return for free board and lodging for herself and her child, Shearing undertook normal housekeeping duties for H and his two children.

In February 1974, Shearing was granted a supporting parent's benefit effective from 1 January 1974. In June 1982, following a routine review, the DSS advised Shearing that, as her relationship with H was 'similar to that of a married couple', she was not a 'supporting mother' within the meaning of the Act and therefore her benefit would be cancelled.

De facto spouse

Section 83AAA of the Act says:

> (1) . . . 'supporting mother' means a woman (whether married or unmarried) who—
>
> (a) has the custody, care and control of a child, being a child who—
>
> (i) was born of that woman . . .
>
> (b) is not living with a man as his wife on a bona fide domestic basis although not legally married to him . . .

Was Shearing living with H as his wife on a bona fide domestic basis although not legally married to him? The difficulties in approaching this question had been recently highlighted in the case of *Sturges* (see this issue) where *Lambe* was quoted as expressing the need to look into 'all facets of the interpersonal relationship of the two persons'.

The issue

Following a field officer's report, the DSS concluded that the evidence *'suggest[ed]* Miss Shearing is enjoying the financial and emotional benefits of living in a situation *similar to that of a married couple'*. (Emphasis added by the AAT.)

However, this was not the issue, said the AAT. The question was whether Shearing lived with H *as if she were his wife*:

> Whilst it is relevant to identify those aspects of the interpersonal relationship of the parties which bear a similarity to that of a married couple, the question which must finally be answered is whether the relationship can fairly be said to be that of living together as if man and wife.

(Reasons, para. 10)

The evidence before the AAT was inconclusive and in parts inconsistent. The tribunal said:

> . . . the true nature of the relationship between the applicant and H is not clearly exposed. There are grounds for suspecting that it is more than the applicant and H are prepared to acknowledge but the question is whether the evidence is sufficient to enable me to conclude that it is more probable than not that the relationship is one in which they live as if man and wife.

(Reasons, para. 21)

The evidence

Certain factors pointed towards a relationship of husband and wife. Shearing continued to live in as housekeeper despite H's daughters leaving home and her two children calling him 'Daddy' (though this was consistent with him being no more than a father figure). Her second child was born after moving into H's home and, whilst he was not acknowledged as the father, conflicting accounts regarding the father were given. H had provided rent free accommodation and food for Shearing and her children in return for minimal housekeeping duties since his daughters left home. Shearing's sister had also lived in the same house with her two children since 1981 and it was inferred that H only tolerated this because of his relationship with Shearing being more than that of housekeeper. Finally, despite no expenses for rent, food, electricity etc., the applicant claimed to be in dire financial straits. It might be inferred that her benefit ($200 per fortnight) was being pooled with H's and used towards household costs.

Against this evidence was the clear point that, when Shearing first entered the household, that she did so as a housekeeper. There was no evidence that Shearing and H were any more than friends. Neither represented the other to be their spouse. There was no evidence of a common social life, nor of any merger of financial resources. The applicant appeared to have bought household furniture in her own name with her own money.

Existence of a sexual relationship: a last resort

On the whole the evidence was inconclusive. The AAT seemed to rely on an examination of whether any sexual relationship existed to determine the question in this case.

> In the final analysis, however, given the inconclusive state of the evidence as to the true nature of the relationship between the applicant and H, I have concluded that, unless I were satisfied on the balance of probabilities that the applicant and H sleep together or otherwise have a regular sexual relationship I am not entitled to reject the applicant's claim that she is no more than H's housekeeper.

(Reasons, para. 30)

Suspicion insufficient

There were strong grounds for suspecting that there was more to the relationship than Shearing and H would acknowledge. However, this could not decide the case.