cant's pension in respect of the overpayment made to the applicant.

HOUGHTON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/455)

Decided: 12 July 1983 by R. Balmford.

Adrienne Houghton applied to the AAT for review of a DSS decision to recover from her (under s.140(1) of the Act) an overpayment of $540.80 in supporting parent's benefit and supplementary assistance.

The facts

Houghton had not notified the DSS of increased income while she was in receipt of the benefit. She had notified them *prior* to commencing two periods of employment but the DSS made no further inquiries. As to a third period she did not notify the department as she had ascertained from them how much she could earn in a year without affecting her pension and she did not expect to exceed that amount.

The applicant had failed to comply with s.65B of the Act. That section provides that increased income should be notified to the DSS within a specified period *after* its receipt. As Houghton notified prior to her employment the DSS procedures had not been triggered to inquire as to the amount that she had earned.

Discretion to recover

The AAT referred to the Federal Court decisions of *Hangan* (1983) 11 *SSR* 115 and *Hales* (1983) 13 *SSR* 136. Those cases made it clear that a discretion not to recover existed in s.140(1), having regard to 'the total circumstances of the case'. The AAT considered that this case was a fit one for the exercise of that discretion.

> Mrs Houghton has three children, two at school and the baby. Her *de facto* husband is receiving unemployment benefit, and they are tenants of the Housing Commission. Her failure to comply with the Act was in two cases of an extremely technical nature, in that her notification was given before, instead of within, the prescribed period. The department's failure to act on that notification by requiring details of her earnings, as sub-section 65B(1) seems to expect, was the effective cause of any resulting overpayments in those two cases. Further, that failure led her to assume that she would earn no more than her permitted income, and, incorrectly, that she therefore need not advise the department of her third period of employment.

(Reasons, para.21)

Formal decision

The Tribunal set aside the decision under review with the direction that no further action be taken for recovery.

ROE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S82/108)

Decided: 5 July 1983 by R. Balmford.

Ada Roe applied to the AAT for review of a DSS decision to recover from her an overpayment of $3490.30 in age pension. Recovery was claimed under s.140(2) of the *Social Security Act* by deductions of $20 per fortnight.

Section 140(2) provides:

> (2) . . . where, for any reason, an amount has been paid by way of pension, allowance, endowment or benefit which should not have been paid; and the person to whom that amount was paid is receiving or entitled to receive, a pension, allowance or benefit under this Act . . . that amount may, if the Director-General in his discretion so determines, be deducted from that pension, allowance or benefit.

The applicant had failed to notify the DSS of increases in her husband's income over the period from August 1977 to March 1979. This was in part due to the department suspending its practice of conducting annual reviews, however, the AAT appeared to have some doubt as to the applicant's lack of awareness as to her obligations under the Act.

While *Babler* (1982) 7 *SSR* 72 showed that s.140 imposed a positive duty on the claimant, *Buhagiar* (1981) 4 *SSR* 34 also demonstrated the need to exercise the discretion to recover in s.140(2) in accordance with principles of 'consistency, fairness and administrative justice'.

In the light of these principles the Tribunal concluded that the decision to recover was correct. However, due to some evidence of hardship on the part of the applicant, it reduced the deductions to $10 per fortnight.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General for reconsideration with the direction that the overpayment be recovered by deductions of $10 per fortnight from any pension received by the applicant.

Special benefit

CONROY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/192)

Decided: 1 June 1983 by R. Balmford.

Brian Conroy, and five other men, applied to the DSS for special benefit. Following rejection of their applications, they asked the AAT to review the DSS decisions.

Conroy (and the five others) were members of an informal group called 'Mother of God Brothers', which was in the process of being formally recognised by the Catholic Church. The function of the group was to run a home for intellectually handicapped men: the members of the group lived with the handicapped men as one community, providing 'the continuous loving presence of a normal family, rather than the usual institutional situation where the staff come on and off duty at fixed times'. It was clear that the applicants' time was fully taken up in helping and caring for the handicapped men.

The only regular source of funds for the community was invalid pensions paid to the handicapped men. The applications for special benefit were supported by several arguments—for example, that this would support the positive work of the group, break down barriers within the home, and avoid the substantial expense to the government involved in placing the handicapped men in institutions.

The legislation

Section 124(1) gives to the Director-General a discretion to grant a special benefit to a person not receiving a pension and not qualified for unemployment or sickness benefit, if the Director-General

> is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).

'Unable to earn a sufficient livelihood'

The Tribunal said that 'domestic circumstances' covered the circumstances of the applicants who lived in a household (despite the fact that its members were not related to each other): Reasons, para. 19.

Again, although the applicants 'received' a livelihood which could be described as sufficient (they received board, lodging and pocket money from their community's resources) they could not be said to be earning that livelihood—the livelihood was received by them

> not . . . *in return* for their work with the handicapped men in their community, but as *a component part* of that work. This is because it is inherent in the whole concept of the community at Guadalope House that the members, whether handicapped or not, live together, as equally as possible, effectively as members of one family. Thus the fact that the helpers receive board, lodging and pocket money from the community's resources, is one of the factors equating their situation with that of the handicapped men.

(Reasons, para. 21)

Accordingly, the AAT was satisfied that the applicants were, 'by reason of their domestic circumstances, unable to earn a sufficient livelihood', and qualified to receive special benefit.

The discretion to pay special benefit

However, the Tribunal decided that the discretion which s.124(1) confers should not be exercised in the applicants' favour. The applicants, although unable to earn, were receiving a sufficient livelihood. The AAT adopted observations made in *Takacs* (1982) 2 *SSR* 88, 'I do not see how it can be said that a person who is, in fact, being maintained . . . at an adequate if straitened level, can be said to be lacking a sufficient livelihood'.

The AAT also referred to the Tribunal's statement in *Te Velde* (1981) 3 *SSR* 23, that 'the degree of control which the person is able to exercise over . . . his inability to

earn . . . must, in my view, be a relevant consideration' in the exercise of the discretion.

While feeling sympathy and respect for the applicants and their work, the AAT observed

> it is not the purpose of s.124 to provide support from the public purse for people who make a voluntary decision to commit themselves to full-time work in social welfare, however desirable that work might be.

(Reasons, para. 25)

Formal decision

The AAT affirmed the decision under review.

HART and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/17)

Decided: 15 March 1983 by E. Smith.

Paul Hart owned a farm which was badly affected by the drought. He usually obtained employment outside his farming activities but during January and February 1981 he suspended such employment to concentrate on his farm, in particular he drove his cattle in order to save them from the drought. On 7 January 1981 he applied for special benefit. This was refused on 9 April 1981 on the basis that as the majority of his income came from employment outside his farm, if that employment ceased the appropriate benefit was unemployment benefit.

Special benefit: exercise of discretion

Section 124 of the *Social Security Act* reads:

> (1) Subject to sub-section (2), the Director-General may, in his discretion grant a special benefit under this Division to a person—
> . . .
> (b) who is not a person to whom an unemployment benefit or sickness benefit is payable; and
> (c) with respect to whom the Director-General is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependents (if any).

The AAT thought that only the phrase 'for any other reason' in s.124 could apply in this case. The Tribunal referred to *Vavaris* (1983) 11 *SSR* 110 where the AAT suggested that special benefit may be appropriate in the case of primary producers suffering from the drought.

The Tribunal adopted the view in *Te Velde* (1981) 3 *SSR* 23 in approaching the expression 'for any other reason'. In *Te Velde* it was said

> Having regard to the nature of the specified reasons, all of which involve circumstances personal to the applicant, I think that the expression 'or for any other reason' was intended to embrace any other reason personal to the applicant which is capable of producing a consequential 'inability' (in the relevant sense) to earn a sufficient livelihood . . . The degree of control which the person is able to exercise over the circumstances which give rise to his inability to earn a sufficient livelihood must, in my view, be a relevant consideration in deciding whether or not a grant of special benefits should be made.

This was not a case in which the discretion should be exercised in favour of the applicant. The reasonableness of Hart's action in preserving his stock was not, of itself, a reason to exercise the discretion in s.124 to grant special benefit.

He recommenced employment when he returned with the cattle in February, and had part of a bank loan of $8000 available to purchase sheep. The AAT thus could 'not see indications of the hardship and difficulties that beset the applicant in *Te Velde's* case'. A relevant inquiry prior to exercising the discretion under s.124 in *Te Velde* was whether the applicant could have borrowed against her property to relieve her difficulties. In the present case this had been done and some of that money was still available.

Formal decision

The Tribunal affirmed the decision under review.

Unemployment benefit: work test

AITKEN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/265)

Decided: 8 June 1983 by R. Balmford.

The AAT *affirmed* a DSS decision to reject Glenn Aitken's claim for unemployment benefit, on the ground that he was not 'willing to undertake paid work' (s.107(1)(c)(i)) and had not 'taken . . . reasonable steps to obtain work'.

Aitken lived in a small town (where no work was available). He had no private transport and refused to travel by bus because exposure to cigarette smoking (not prohibited on rural public transport in Victoria) caused him physical distress and 'mental anguish'.

The AAT decided that this refusal was not reasonable, given the size of the buses, the fact that they were rarely even half full and their good ventilation. This was a case where the applicant had 'demonstrated an unwillingness to undertake paid work of which he was capable and was suitable to be undertaken by him', as another Tribunal had put it in *Pye* (1983) 13 *SSR* 128.

KRAMER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/254)

Decided: 22 June 1980 by E. Smith.

Kramer was granted unemployment benefit from 17 June 1980. On 6 May 1981 he commenced work at a high school as a temporary general assistant. He was dismissed after two to three hours when he indicated that he would reform the swearing habits of his superior.

On 25 May 1981 the DSS suspended his unemployment benefit for six weeks as he had failed the work test by rendering himself unacceptable to his employer. (The period of suspension was later reduced to two weeks.) Kramer applied to the AAT for review of the decision.

The legislation

The power to suspend unemployment benefit is contained in s.120 and s.131 of the *Social Security Act*. Section 120(1) states:

> The Director-General may postpone for such period as he thinks fit the date from which an unemployment benefit shall be payable to a person, or may cancel the payment of an unemployment benefit to a person, as the case requires—
> (a) if that person's unemployment is due, either directly or indirectly, to his voluntary act which, in the opinion of the Director-General, was without good and sufficient reason;
> (b) if that person's unemployment is due to his misconduct as a worker;
> (c) if that person has refused or failed, without good and sufficient reason, to accept an offer of employment which the Director-General considers to be suitable

Section 131(1) of the Act reads:

> If—
> (a) having regard to the income of a beneficiary;
> (b) by reason of the failure of a beneficiary to comply with section 129, 130 or 130A; or
> (c) for any other reason;
> the Director-General considers that the benefit which is being paid to a beneficiary should be cancelled or supended, or that the rate of the benefit which is being paid to a beneficiary is greater or less than it should be, the Director-General may cancel or suspend the benefit, or reduce or increase the rate of the benefit, accordingly.

The AAT concluded that the present case did not come within any of the specific situations set out in s.120(1). It was argued before the Tribunal that s.130(1)(c) gave a broad power to postpone beyond the specific situations in s.120. The AAT expressed no view on that matter.

Was the dismissal justified?

The real issue, according to the AAT, was whether Kramer's conduct justified dismissal. While his views and attitudes were described as unusual, the Tribunal concluded that his actions on the day in question fell short of justifying dismissal.

This led to the finding that the suspension of unemployment benefit that followed from that dismissal was not soundly based.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that the applicant be paid unemployment benefit for the period of two weeks in respect of which suspension was imposed.