The applicant applied to the AAT for review of a DSS decision to recover from her an overpayment of $3480.20 in invalid pension. Recovery was claimed under s.140(2) of the *Social Security Act* by deductions of $12 per fortnight.

The facts

The applicant had an 'extraordinary' medical history consisting of many and various conditions. She spent a substantial amount of time in hospital.

In June 1979 her husband instituted divorce proceedings which alledged separation in 1971. The applicant denied separation from that date alleging the separation was in 1979. In May 1980 the husband instituted new proceedings alleging separation in December 1978.

The applicant had been in receipt of invalid pension since 1973. Between 1974 and 1979 the Department had abandoned its regular reviews of benefits but in May 1979 these reviews were resumed which in the applicant's case led to a reduction in her pension having regard to the income of her husband.

In February 1980 the DSS wrote to the applicant enquiring as to the date of the separation and the present state of the divorce proceedings. The applicant replied to the DSS in February 1980, stating that she had separated from her husband in March 1979. It was not until September 1980 that the DSS wrote to the applicant informing her that an overpayment (calculated on the basis of her date of separation) of $4202.60 would be recovered from her by deductions from her pension.

Exercise of discretion not to recover

The DSS in decicing to recover by deduction under s.140(2) appeared, said the AAT, to have done so without reference to the fact that the discretion in that section could be exercised in the applicant's favour. The DSS merely pointed to the failure to notify changes in income (as required by s.45(2)) and then stated that an overpayment had therefore been made and was recoverable.

The AAT concluded that the discretion in s.140(2) should have been exercised so as not to pursue recovery.

Her financial position was extremely difficult having regard to medical and nursing home expenses. Her disposable income after the deduction was $25 per fortnight.

However it was the delay on the part of the DSS in notifying her of the overpayment which was of crucial importance.

Delay in calculating: prejudice to applicant

The delay in calcuation of the overpayment had a disastrous effect on the affairs of the applicant.

In May 1980 she executed a deed under s.87 of the *Family Law Act* accepting $6000 in satisfaction of all claims against her husband (including claims for maintenance and property). This was approved by the Family Court in August 1980.

The AAT summarised the effect of the delay thus:

> . . . in August 1979, letters from a social worker and the applicant's solicitor informed the Department that divorce proceedings had been instituted. At the latest by 14 July 1980 the Department was aware as a result of a written communication from the applicant's husband that a settlement contained in a deed made under s.87 of the *Family Law Court Act* (sic) of financial affairs between the husband and wife was imminent . . .
>
> It was not until 26 September 1980 that the Department wrote to the applicant informing her of the overpayments and of the proposed deductions. . . . there is little doubt that the Family Court would not have approved of the deed if it had known that a debt of some $4200 was about to be raised by the Department against the applicant, since the proposed settlement would have meant that the applicant, a chronic invalid, was in effect surrendering all claims against her husband in respect to property and for future maintenance, for less than $2000. In fact the claim was subsequently reduced to $3480.20.
>
> Clearly some reasonable period must be allowed after the Department receives relevant information before the claim can be calculated and made, but in my view, the delay which occurred in this case was far too long and irreparably prejudiced the applicant's position.

(Reasons, p. 17)

Formal decision

The AAT set aside the decision under review and substituted the decision that no action be taken by deduction under s.140(2) of the Act to recover the overpayments of invalid pension.

DISNALL and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/22)

Decided: 22 July 1983 by G.D. Clarkson.

The AAT *affirmed* a DSS decision to recover an overpayment of widow's pension in the sum of $1450.60.

The applicant disputed that she had failed to notify increases in her income as required by s.74(1) of the *Social Security Act*. However, the Department had no record of notifications.

It appeared likely that the applicant had notified the DSS on many occasions, however, it seemed that the relevant occasions on which she had failed to notify had become lost in her general recollection of events.

Unemployment benefit: refusal of referral

REEVES and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/43)

Decided: 22 July 1983 by G.D. Clarkson.

On 1 December 1981 Marion Reeves was offered a referral to a position with a building supplies company as a shop assistant. This employment was under a training scheme which provided a subsidy to the employer.

The applicant had been employed under such a scheme in November 1981. That employer had upset her, commenting on her unemployment and that now as a taxpayer he had to support her. Due to this pervious experience Reeves declined the referral to the building supplies company. She did not want another subsidised job unless there was substantial training involved.

The DSS cancelled the applicant's unemployment benefit from 2 December 1981 on the basis that she had 'failed to accept a suitable job offer', thus relying on s.120(1) of the *Social Security Act* which reads (so far as is relevant):

> The Director-General may postpone for such a period as he things 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 –
>
> (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 . . .

Offer of referral not offer of employment

The AAT made it clear that no job was offered to Reeves. She was only offered an opportunity to apply to the employer for the job. (The CES had listed three persons as being suitable for the job.) 'She did not receive and therefore did not refuse an offer to employ her'. Section 120 had no application in this case. The Tribunal commented:

> In the absence of evidence that the Commonwealth Employment Service was expressly or impliedly authorized by the employer to employ the applicant on the employer's behalf, I am unable to accept that an offer to refer the applicant to a prospective employer who may or may not offer her employment is an offer of employment within the meaning of s.120(1)(c), and it follows I am unable to accept that a statement by the applicant to the effect that she wants a job but not a subsidised job in answer to an offer of referral followed by a statement by the Commonwealth Employment Service officer, that in these circumstances it would be a waste of time going to see the prospective employer, amounts to a refusal or failure to accept an offer of employment under the provisions referred to.

(Reasons, p. 8.)

According to the AAT the case properly fell within the provisions of s.107 (the work test) and s.131 (which gives the Director-General a general power to cancel or suspend a benefit).

Reeves had made four approaches to potential employers in the fortnight after her refusal to accept the referral by

the CES. Apart from this incident it appeared that she was taking reasonable steps to obtain work.

However, the AAT considered that her refusal to accept the referral was unjustified.

> Since leaving school, the longest time she had spent in a job was eight months and she had been dismissed on two occasions. When the referral arose in December 1981, she had been out of work since the previous month. She lives in a comparatively small centre where there would be considerably less jobs available for her than for instance in the metropolitan area of Perth. Naturally she would wish to stay where her family and friends were, but at the same time she must recognise the restricted opportunities for employment that wish carries with it.
>
> She gave the impression she was a person who could easily take offence and I can understand that she felt angry and humiliated in her previous employment, but all employers are not the same, and I do not think that without any discussion with Mr Cassie she was entitled to assume that his reactions would be the same as those of her previous employer.

(Reasons, p. 10)

It was therefore a proper case for the operation of s.131(1)(c) of the Act by which the Director-General may cancel or suspend a benefit 'for any reason'.

Suspension of benefit : job no longer available

However, such a suspension should not have lasted beyond the time when the job with the building supplies company had been filled. After that time there was no point in referring the applicant to that employer.

Formal decision

The AAT set aside the decision under review and remitted the matter for reconsideration with the recommendation that the benefit be suspended from 2 December 1981 to the end of the benefit week in which the referral by the CES to Cassie's Building Supplies ceased to be available to the applicant.

Widow's pension: cohabitation

NICKLASON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. T83/5)

Decided: 30 May 1983 by I.R. Thompson.

The applicant had applied for a widow's pension but was refused on the basis that she was 'living with a man as his wife on a bona fide domestic basis although not legally married to him' and so did not come within the definition of 'widow' set out in s.59(1) of the *Social Security Act*. She appealed to the AAT.

The AAT's view

There was no doubt that Nicklason was living with a man on a bona fide domestic basis: but was she living with him as his wife?

There was no evidence of any sexual relationship, nor a common social life. They did not pool their financial resources. They took separate holidays.

The Tribunal referred to *Donald* (1983) 14 *SSR* 140 where it was said that in assessing 'whether a marital relationship exists one should not have regard to a relationship which is merely an approximation to that in what may be called a run-down marriage . . .where there has never been a full marital relationship, it is not sufficient that there is a relationship equivalent to that in a run-down marriage'. That case also emphasised the mutual commitment which was the essence of a marital relationship. This did not seem to exist here.

While certain inconsistencies (regarding sleeping arrangements) raised some suspicion, that alone was insufficient to base any findings (see *Shearing* (1983) 13 *SSR* 132).

The Tribunal was satisfied that on the balance of probabilities this was an arrangement of convenience.

Formal decision

The AAT set aside the determination under review and remitted the matter to the Director-General with a direction that the applicant has been at all relevant times and is now a widow for the purposes of Part IV of the *Social Security Act*.

Sickness benefit: compensation payments

MARTINOVICH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/73)

Decided: 4 August 1983 by G.D. Clarkson.

Matinovich suffered back injuries in a traffic accident in December 1976. He was paid sickness benefit from January 1977 until an action he had instituted in respect of the accident was settled in November 1980. That settlement included a sum of $55,000 for general damages.

A sum representing the total amount of sickness benefit received by the applicant ($16,980.99) was paid direct to the DSS by the insurers of the defendant in that action (see now. s.115D *Social Security Act*).

The applicant appealed against this decision to recover the payment ot sickness benefit on the basis that:

> The general damages paid were for pain and suffering and did not contain any component for loss of earnings. The calculation for the award of damages was not referable to the period during which sickness benefits were paid.

(Reasons, p. 2)

An SSAT recommended that the appeal be allowed but a delegate of the Director-General did not accept that recommendation. The applicant applied to the AAT for review of that decision.

The legislation

Section 115 then read:

> ...
>
> (2) Where a person is or has been qualified to receive a sickness benefit in respect of an incapacity and the Director-General is of opinion that the whole or part of a payment by way of a lump sum that the person has received, or is qualified or entitled to receive, can reasonably be regarded for the purposes of this section as being a payment that –
>
> (a) is by way of compensation in respect of the incapacity; and
>
> (b) is in respect of a period during which that person is or was qualified to receive that sickness benefit,
>
> the payment, or that part of the payment, as the case may be, shall, for the purposes of this section, be deemed to be such a payment.

The question the AAT had to decide was whether the Act, as it then read, authorised the DSS to demand and receive from the insurer any part of the judgment moneys making up the general damages.

Economic loss: no specified amount required

The judgment obtained by the applicant in his common law action did not specify a figure for past economic loss nor an amount for a specified period. This, argued the applicant, prevented s.115(2) from operating as that section required the identification of a sum in respect of the incapacity and in respect of a period during which sickness benefit was received.

The AAT did not accept this. The Tribunal said:

> I read the sub-section [s.115(2)] to mean that where as in the present case the applicant is entitled to a payment of a lump sum and the Director-General is of the opinion that part of that sum can reasonably be regarded as a payment by way of compensation in respect of an incapacity for which sickness benefit has been paid for a particular period then notwithstanding that the sum or any part thereof cannot strictly be regarded as a payment by way of compensation in respect of such an incapacity for which benefit has been paid for such a period, it is nevertheless to be treated as such a payment for such a period for the purposes of s.115.