In 1978 the child was diagnosed as suffering from ear infection and, following an operation at the children's hospital in Perth, Garlett was obliged to undertake intensive care of F. In August 1983, she applied to the DSS for a handicapped child's allowance which was granted with effect from that time.

However, the DSS refused to backdate payment of that allowance to the time when Garlett would have become eligible, namely, the beginning of 1979. Garlett then asked the AAT to review that decision.

The legislation

The central question before the Tribunal was whether there were sufficient 'special circumstances' within s.102(1) of the *Social Security Act* to explain Garlett's delay in lodging her claim for handicapped child's allowance. If there were 'special circumstances', payment of the allowance could be backdated to the date of her eligibility (s.102(1) and s.105R).

'Special circumstances'

Evidence was given to the Tribunal that Garlett had spent most of her life in country areas, had experienced very little schooling, was barely literate and had a very poor memory. Despite these limitations, she had been, in the AAT's words, 'a caring mother figure to the boys she describes as her grandsons', that is, F and another child who had come into her custody at the same time.

Garlett told the Tribunal that she had not known of the existence of handicapped child's allowance, despite being in touch with various welfare and medical agencies over several years. Those agencies had advised her to apply (some time after she started caring for F) for a foster allowance from the State welfare department, but had not mentioned the handicapped child's allowance until 1983. It was clear that she did not, even now, understand what was meant by 'handicapped'.

The AAT referred to the earlier decisions in *Corbett* and *Johns* (1984) 20 *SSR* 210, 211 and *Cox* (1984) 22 *SSR* 252, where the circumstances of 'disadvantaged members . . . of a minority group' had been considered:

> There is no stereotyped member of this or any similar group since the circumstances of any two members are not the same, and indeed may vary substantially. The picture emerges of an elderly Aboriginal widow, fostering in a country town a grandson and his half brother, who is a handicapped child. She is barely literate, physically handicapped herself and displays a defective memory. She is shown by the evidence to have been incapable without detailed guidance and assistance of applying for two allowances to which she was entitled.

(Reasons, pp.7-8)

The AAT noted that, although Garlett was not obliged to apply any backpayments for the benefit of F, extending those backpayments would allow her to discharge debts incurred by her in carrying on the household and so better meet the needs of that household.

There were, the AAT concluded sufficient 'special circumstances' to justify backdating the payment of the allowance to the beginning of 1979.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that backpayments of handicapped child's allowance for F be made to her for the period from January 1979.

Unemployment benefit: 'benefit week'

HEIDEMANN and SECRETARY TO DSS
(No. N84/571)

Decided: 16 April 1985 by Ewart Smith.

Heather Heidemann was being paid unemployment benefit when, in March 1984, she undertook employment for 8 weeks. The DSS then cancelled her benefit.

Heidemann received her last payment of wages and stopped working on 25 April 1984 (a Wednesday); and, on the following day, she applied to the DSS for unemployment benefit. The DSS decided to treat Heidemann as having been 'unemployed' during the 8 weeks of her employment, so that she would not need to serve the 7-day 'waiting period' normally required by s.119 of the *Social Security Act*.

However, the DSS decided that, if Heidemann's unemployment benefit was to be restored, its restoration should be on the same basis as before she took up her employment. That is, the 'unemployment benefit week' for which she was to be paid, should be from Monday to Friday.

As Heidemann had received her last payment of wages on Wednesday 25 April, the DSS decided that these wages should be treated as her income for the current 'unemployment benefit week', preventing her from receiving any benefit until the next unemployment week, which commenced on Monday 30 April 1984.

Heidemann asked the AAT to review that decision.

The legislation

Section 114 of the *Social Security Act* provides for the reduction of a person's unemployment benefit by reference to that person's income, which (according to s.106(1)) includes 'any personal earnings, moneys . . . earned, derived or received'.

Section 132 provides that unemployment benefits 'shall be paid by instalments in respect of such periods as the Secretary determines'.

'Income' for which period?

The AAT said that the decision of the DSS to treat Heidemann as 'unemployed' during her period of employment had superseded the cancellation of her benefit. Accordingly, it was appropriate that, when she reapplied for unemployment benefit, the resumed payment of that benefit should be for the same periods as those for which she had been paid benefit before taking up her employment.

Furthermore, the AAT said,

> income must be considered over the same week as her unemployment benefit week, and it may be apportioned if received in respect of a period longer than a week (s.106(2)). On that basis, Mrs Heidemann received income in the relevant week; she was paid on the Wednesday of the week in question for the two preceding weeks.

(Reasons, para. 11)

Even when apportioned, the part of Heidemann's fortnightly pay which related to the unemployment benefit week was sufficient to prevent, under s.114, any payment of unemployment benefit to her for that week.

Formal decision

The AAT affirmed the decision under review.

Overpayment: not recoverable

IRWIN and SECRETARY TO DSS
(No. T84/46)

Decided: 21 June 1985 by R. C. Jennings.

Lynne Irwin had been granted a supporting mother's benefit in 1976, which was converted into a supporting parent's benefit in 1977.

In December 1980, Irwin asked the DSS to cancel her benefit because she had just taken up employment. A DSS officer then telephoned her and, after establishing that she was earning around $127 a week (a figure which would vary from week to week), the DSS decided that her benefit should not be cancelled but reduced.

Irwin was then advised in writing that her benefit had been reduced from $170 a fortnight to $54 a fortnight; and that this calculation had been based on her current income of $254 a fortnight. The letter told Irwin that if her average income increased she should notify the DSS within 14 days.

Over the next 2½ years, the DSS regularly sought information from Irwin's employer about the level of her wages and adjusted her supporting parent's benefit accordingly. However, because this information was collected at scattered intervals, it failed to take account of significant variations in Irwin's income and the DSS eventually calculated that she had been overpaid some $3777 between the end of 1980 and October 1983. The DSS decided to recover that overpayment and Irwin sought review by the AAT.

The legislation

Section 140(1) of the *Social Security Act* provides that an amount of overpayment is recoverable where that overpayment has been made 'in consequence of a failure or omission to comply with any provision of this Act' and where the overpayment 'would not have been made but for the . . . failure or omission'.

Section 74(1), in combination with s.83AAG, obliges a supporting parent beneficiary to notify the DSS of her or his income 'where the average weekly rate of income . . is higher than the average weekly of the income last specified by her in a claim, statement or notification'.

During the period to which the alleged overpayment related, s.73, in combinaton with s.83AAG, required a beneficiary to provide information to the DSS relating to her income, 'whenever so required by the Director-General'.

No failure to comply with the Act

The AAT said that it was 'very difficult to see how [Irwin] can be said to have failed to comply with provisions with s.74(1)' because she had 'never specified an average weekly rate of income in any claim, statement or notification' under the Act. The only statement which she had made to the DSS was the statement of December 1980 that she had commenced work and that, therefore, her benefit should be cancelled.

The AAT noted that the insertion of s.135TE in the *Social Security Act* in October 1983 had expanded the powers of the DSS, so that, from that time on, a failure to provide information about a change in circumstances could provide the basis for recovery of overpayments. But, the AAT said, this amendment had come too late to be of any assistance to the DSS in the present case.

Discretion not to recover

If it was wrong on this point, the AAT said, this was an appropriate case to exercise the discretion in s.140(1) to waive recovery of the overpayment. In addition to the fact that Irwin was now unemployed and without any substantial assets, and the fact tha the DSS had delayed in following up the overpayment, this was a case where the DSS was largely responsible for the overpayment:

> Whatever sums might be calculated as overpayment during [the relevant] periods I would have to take into account the failure of the respondent to treat this case as one requiring close surveillance by reason of the known facts concerning variations in the applicant's income.

(Reasons, para. 36)

Formal decision

The AAT set aside the decision under review.

Overpayment: discretion to recover

VOCALE and SECRETARY TO DSS (No. V84/125)

Decided: 31 May 1985 by J. R. Dwyer.

The AAT *set aside* a decision to recover an overpayment of $1670 from a former invalid pensioner.

Vocale had been granted an invalid pension in 1976. Between then and August 1980, she had kept the DSS informed of her husband's earnings from his employment. But she did not inform the DSS of payments received by her husband as 'excess travelling time allowance'. In September 1980, after obtaining information about this allowance from the husband's employer, the DSS calculated that his income now precluded payment of invalid pension to Vocale and her pension was suspended. After collecting further information, the DSS calculated (in October 1981) that Vocale had been overpaid and decided to recover this overpayment.

The AAT said that the overpayments made to Vocale were clearly recoverable under s.140(1) of the *Social Security Act*: she had been overpaid in consequence of false statements as to the level of her husband's income (although there was no question 'that the statements were intentionally false . . . they resulted from a genuine misunderstanding as to the meaning of the word "income"'.)

However, the AAT said that this was an appropriate case for the Secretary to exercise the discretion under s.140(1) so as not to proceed to recover the overpayment. The factors which were relevant in the exercise of the discretion were:

(1) Vocale had received public moneys to which she was not entitled;
(2) the payment was a result of an honest mistake on her part;
(3) failure of the DSS to confirm her husband's income over 4 years had contributed to that mistake;
(4) Vocale had no separate income;
(5) Vocale and her husband had limited means and her husband was in poor health;
(6) the DSS had already 'notionally recovered' $895 from Vocale by withholding pension to which she had been entitled;
(7) the alleged overpayment had caused considerable worry to Vocale and her husband; and
(8) there had been a 2 year delay between cancellation of Vocale's pension and notification of the decision to seek recovery.

DOYLE and SECRETARY TO DSS (No. V84/394)

Decided: 3 June 1985 by H. E. Hallowes.

The AAT set aside a DSS decision to recover $1235 overpayment of unemployment benefit from the applicant.

This payment represented unemployment benefit paid to Doyle during a period when, according to the DSS, he had not been 'unemployed'.

A recoverable overpayment

Doyle admitted that, during the period in question, he had worked as a real estate agent, employed on commission; but he said that the money which he had received during this period did not even cover his business expenses.

The AAT said that, given that Doyle was working 5 to 6 hours a day as a real estate salesman, he could not be regarded as 'unemployed' within s.107(1)(c) of the *Social Security Act*; and it said that the present case was very much like the earlier cases of *Te Velde* (1981) 3 *SSR* 23 and *Farah* (1984) 20 *SSR* 222, where applicants who had been engaged in unrewarding activities were nevertheless not 'unemployed'.

Accordingly, the AAT said, there had been an overpayment to Doyle.

Discretion to waive recovery

However, the current financial position of Doyle was such that the discretion to recover the overpayment should be exercised against recovery: he owed substantial debts (and was facing the forced sale of his home), was now unemployed and had very poor prospects of finding employment (largely because of his age—he was 57 years old). The AAT rejected a DSS suggestion that Doyle be asked to repay the overpayment at the rate of $1 a week:

> The administrative difficulties in pursing this course of action and the expectation that a recipient of public moneys to which he was not entitled, aged 57, should look forward to an obligation for almost 25 years is untenable. I intend to exercise my discretion in the applicant's favour.

(Reasons, para. 18)

Handicapped child's allowance: eligibility

RAMACHANDRAN and SECRETARY TO DSS (No. W84/73)

Decided: 30 April 1985 by R. K. Todd, I. A. Wilkins and J. G. Billings.

The AAT set aside a DSS decision to refuse a handicapped child's allowance to the mother of an 8-year-old boy who had severely impaired language skills and below average non-verbal reasoning skills.

The AAT concluded that, because the child's disability required the mother to remain almost always in his vicinity, she qualified for the allowance under s.105JA of the *Social Security Act*—that is, the child required and she provided care and attention which was 'only marginally less than' constant and the child was likely to require this care and attention for an extended period.

The Tribunal also concluded that, because of the care and attention which the mother provided to the child, she was suffering severe financial hardship (as required by s.105JA(b)). Although the applicant held a university degree, and the child attended school each day, she was unable to enter the workforce because of the need to provide close supervision to the child immediately before and after school and the need to attend the child's school regularly in order to participate in the school's language development programme.