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.

V. A. and SECRETARY TO DSS (No. V84/359)

Decided: 21 June 1985 by J. R. Dwyer, H. C. Trinick and G. F. Brewer.

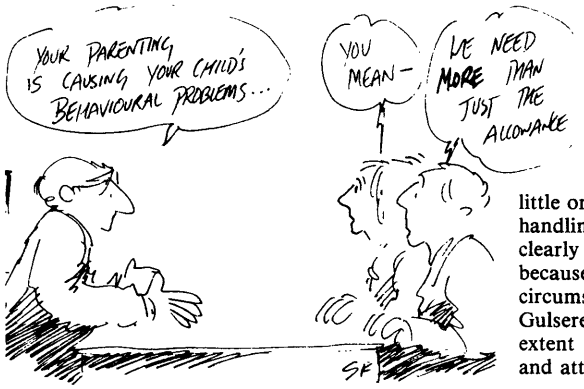
The applicant in this matter, V. A. was the mother of 2 daughters. She had been granted a handicapped child's allowance for the younger daughter, Gulseren, in 1977 on the basis that the child was 'severely handicapped'. In October 1983, after a review, the DSS decided that Gulseren was no longer severely handicapped.

Shortly afterwards, V. A. applied to the DSS for a handicapped child's allowance for her elder daughter, Gunay. However the DSS rejected that application. V. A. then asked the AAT to review both DSS decisions.

The younger child

Evidence was given to the Tribunal that Gulseren, who was 14 years of age, was 'mentally slow' and that she was 'given to throwing tantrums if not given her own way'. The child's parents told the AAT that they found it necessary to provide very close supervision to the child, that she had frequent episodes of destructive behaviour and that the child could not be left unattended.

The principal of Gulseren's school said that, although there were occasional discipline problems, she was not particularly difficult to control. And there was evidence from the two psychologists that the child's behavioural problems owed something to the parent's inability to manage her. One psychologist said that the child would be helped most by a long term programme to change her parent's responses so that the child would learn to modify her behaviour and become more independent.



On the basis of this evidence, the Tribunal concluded that Gulseren was a 'severely handicapped child' within s.105H(1) of the *Social Security Act*. First, she had a mental disability—mental retardation and significant behavioural problems. It did not matter that these problems had in part been aggravated by her parents' limited skills in controlling her behaviour. Secondly, her mental disability did create a need for her parents to provide constant care and attention whenever Gulseren was at home:

> The fact that trained teachers at a special school can manage Gulseren more effectively than her parents can is not in any way surprising and does not detract from the evidence that when she is at home her parents need to give her constant care and attention.

(Reasons, para. 22)

Thirdly, Gulseren was likely to need this care and attention for an extended period:

> Although there was some evidence suggesting that behaviour therapy for the whole family could limit the amount of care and attention required by both girls and could provide them with a more independent life style it is apparent that the professional advice so far had little or no effect on the parents' methods of handling the children. Mrs V. A. stated quite clearly that she has abandoned the advice because in her view it does not work. In these circumstances we think it very unlikely that Gulseren's behaviour will improve to such an extent that she does not need constant care and attention in the foreseeable future.

(Reasons, para. 23)

Finally, the AAT said, V. A. was providing this care and attention in their private home. As the decisions in *Seager* and *Shingles* (1984) 21 *SSR* 230 had established, the fact that Gulseren had attended a special school each day did not prevent the Tribunal finding that she was being provided with 'constant care and attention' in her private home.

The elder child

Turning to the other child, Gunay, the AAT concluded that, although she suffered from some intellectual retardation, she was able to look after herself, did not suffer from any particular behavioural problems and posed no risk of danger or violence. Although Gunay required more care and attention than a normal child, she could not be said to require either 'constant care and attention' or care and attention which was marginally less than constant.

Formal decision

The AAT set aside the decision to cancel the handicapped child's allowance for Gulseren and affirmed the decision to reject the claim for that allowance in respect of Gunay.

Cohabitation

AISTROPE and SECRETARY TO DSS (No. N84/477)

Decided: 8 February 1985 by J. O. Ballard, D. J. Howell and J. P. Nichols.

The AAT *affirmed* a DSS decision to treat Audrey Aistrope as the 'wife' of W because she was living with W as his wife on a bona fide domestic basis although not married to him. The consequence of this decision was that W's income reduced the rate of Aistrope's age pension.

The AAT concluded that Aistrope was living with W as his wife for the following reasons:

- Aistrope had applied for a passport as W's *de facto* wife;
- A had been employed under the name of Mrs W;
- A held a union membership card, a bank card, medical benefits and electoral enrolment in the name of Mrs W.

Aistrope and W told the Tribunal that they shared a house but occupied separate rooms and had never had a sexual relationship. Aistrope explained that she had applied for a passport as W's *de facto* wife because she could obtain a cheaper fare if she travelled under that name. The AAT said:

> 16. We accept the evidence of the applicant and W that they did not have sex together. Nevertheless, the applicant and W cannot have it both ways and claim to the Commonwealth that they have a *de facto* relationship when it helps them for the purposes of passport and then expect it to be accepted by the Commonwealth that such a relationship does not exist for the purposes of the *Social Security Act*.

SMITH and SECRETARY TO DSS (No. N84/530)

Decided: 22 May 1985 by B. J. McMahon, G. D. Grant and G. R. Taylor.

Kathleen Smith had been granted a widow's pension in 1975, following her desertion by her husband. In July 1980, Smith and her two daughters moved into a house occupied by a man, R, and his daughter. Shortly after moving into the house, Smith acquired a legal interest (a tenancy in common) in the house with R.

Smith began employment in October 1983 and, at her request, her pension was cancelled by the DSS. In July 1984, Smith gave up her job and re-applied for a widow's pension, which the DSS rejected on the ground that Smith was living with R as his wife on a *bona fide* domestic basis although not legally married to him. In March 1985, Smith and her children moved out of the house and the DSS granted her a widow's pension.

Smith asked the AAT to review the July 1984 refusal of her application for a widow's pension.

The legislation

Section 60(1) of the *Social Security Act* provides that a widow with the custody care and control of a child is qualified to receive a widow's pension. Section 59(1) defines 'widow' as excluding—

> A woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him.

Living together—but not as 'man and wife'

Smith told the AAT that, during the early part of their joint occupancy of the house, she and R had a brief sexual relationship which had not lasted beyond 1980. Throughout the 5 years of their joint occupancy, Smith was responsible for housekeeping, Smith and R accepted some responsibility for the care of each other's children, Smith and R had some common social life and also shared household ex-