Section 122(2) provides that, where a person receiving sickness benefit becomes qualified for unemployment benefit, the person may be paid unemployment benefit 'from and including the day after the day up to which the sickness benefit is paid to that person . . .'

The s.145 power

The AAT first concluded that it was empowered to treat the claim for unemployment benefit lodged on 22 January 1985 as a claim for sickness benefit. The power to do this was conferred by the old s.145 and the new s.135TB(5), there being no material differences between the 2 provisions.

The AAT noted that the question of the exercise of the s.145 discretion had first being raised before the AAT and had not been considered by an SSAT nor by the Secretary when considering the recommendation of the SSAT. The AAT also noted that, in *Guirguis* (1985) 28 *SSR* 331, the AAT had concluded that, in such circumstances, it did not have jurisdiction to use the s.145 power. The AAT said that, if *Guirguis* could not be distinguished from the present case, it would not follow that decision. The AAT pointed out that, in *Hales* (1983) 13 *SSR* 136, the Federal Court had discouraged the adoption of a 'narrow or pedantic approach . . . in determining whether a decision falls within the scope of review by the AAT.' The AAT continued:

> 'In my opinion it would be taking too narrow a view of this Tribunal's power to review decisions of the respondent to limit it strictly to questions which have been considered by the SSAT . . . this Tribunal is empowered to exercise all the powers and discretions that are conferred on the person who made the original decision (s.43 *AAT Act* 1975). This must include the power to exercise the discretion formerly conferred by s.145 and now conferred by s.135TB(5).'

(Reasons, pp.14-5)

The Tribunal said that, although the claim for unemployment benefit lodged on 22 January 1985 could not be described as a claim for an inappropriate benefit, the discretion in s.145 (now s.135TB(5)) could be exercised by the AAT so as to treat that claim as a claim for sickness benefit for the period when Kay was qualified for sickness benefit and as a claim for unemployment for the period when he was qualified for unemployment benefit. This, the Tribunal said, was the approach adopted in *Dixon* (1984) 20 *SSR* 213 and *Hurrell* (1984) 23 *SSR* 266.

In the present case, the AAT said, it was reasonable to treat the claim for unemployment benefit lodged on 22 January 1985 as a claim for sickness benefit for that part of the period between 14 December 1984 and 21 January 1985 when Kay was qualified for sickness benefit. This was because Kay had not had the advantage of appropriate advice from the DSS as to the course which he should follow when the payment of sickness benefit to him ceased on 14 December. (The AAT was satisfied that Kay had not received the standard form normally sent by the DSS when a person's sickness benefit expired, advising the person to lodge a further medical certificate.)

Eligibility for sickness benefit

The AAT noted that Kay's illness had continued until the end of 1984. It said that, if he could provide a medical certificate that he was unable to work between 14 December 1984 and January 1985, he should be granted sickness benefit to the date specified in that certificate. However, if Kay could not provide such a certificate, the Secretary should consider exercising the discretion given by s.117(1) of the *Social Security Act* to dispense with that certificate. If the Secretary were to decline the exercise this discretion, Kay should be free to re-apply to the AAT.

Eligibility for unemployment benefit

The AAT said that, if sickness benefit was paid to Kay for the period up to early January 1985, then the unemployment benefit granted to Kay from 22 January should be backdated, under s.122(2), to the date when the sickness benefit ended - so as to ensure a continuity of benefit. The Tribunal expressly rejected a DSS argument that the only power to backdate unemployment benefit was the limited power in s.119(A).

The AAT also referred to the situation which might arise if Kay was unable to establish entitlement to sickness benefit beyond 13 December 1984. The AAT said that, in those circumstances, Kay would not be able to rely on s.122 so as to require retrospective payment of a new claim for unemployment benefit. [The AAT did not explain why s.122 would be unavailable in such a situation.]

The question would then arise, the AAT said, whether Kay could be paid unemployment benefit for that intervening period (from 14 December 1984 to 21 January 1985) on the basis of the claim for unemployment benefit lodged on 7 November 1984. The AAT noted that, in *Turner* (1983) 17 *SSR* 174, the Tribunal had decided that a new claim for unemployment benefit was necessary for each period of eligibility; but that, in *Hurrell* (above) another Tribunal had disagreed with this view. In the present case, the AAT said that this difference of opinion would have to be resolved if Kay were unable to establish his entitlement to sickness benefit for the period from 14 December 1984 to early January 1985; and reserved that question should it become necessary to decide it.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with directions -

that Kay be paid sickness benefit upon the lodging of a claim and a medical certificate;

that the Secretary consider dispensing with the need for such a medical certificate if Kay were not able to supply one; and

if sickness benefit were paid for the period from 14 December 1984, Kay should also be paid unemployment benefit from the end of the sickness benefit period to 21 January 1985.

The Tribunal also reserved liberty to either party to apply should any further difficulties arise.

Widow's pension: proof of age

ALAMEDDINE and SECRETARY TO DSS
(No.N85/428)
Decided: 14 February 1986 by A.P.Renouf.

The AAt *affirmed* a DSS decision to cancel payment of widow's pension as from 19 April 1985 on the ground that the widow no longer had the 'custody, care and control' of a child.

By virtue of s.60(1) of the *Social Security Act*, if a widow has not reached the age of 45 at the time when she loses custody, care and control of a child under 16, then she loses her pension. If she has reached that age at that time, she qualifies for a class B widow's pension (normally paid to widows over 50 without the custody etc of a child).

As Alameddine's last child had turned 16 and given up full-time studies on 8 December 1984, she would need to have been born on or before 8 December 1939 in order to remain qualified for widow's pension.

The applicant said that she did not know her date of birth, but believed that she was over 45 years of age. A card from the Alfred Hospital in Sydney gave her date of birth as 5 August 1939, but this was merely a record of her statement.

Alameddine's Lebanese passport stated that she was born in 1943 but she claimed that her family had reduced her age when they went to Lebanon so that she would qualify for free milk and food.

The NSW Registrar-General's Department recorded her year of birth as 1940 or 1942. Her family allowance file recorded her year of birth as 1940 or 1943.

The Tribunal concluded that the dates of birth given on her behalf on

official documents over the years showing that she had not reached the age of 45 years should be given more weight than the applicant's own conviction and recollections. The preponderance of the evidence indicated that she was born later than 8 December 1939.

Overpayment: discretion to recover

MARMONT and SECRETARY TO DSS (No.N85/306)
Decided: 4 February 1986 by Ewart Smith, J.H. McClintock and A.P. Renouf.

Ernest Marmont sought review of a DSS decision to recover overpayments of some $5000 paid to him by way of sickness benefit. The DSS alleged the overpayment was in consequence of Marmont's failure to advise the DSS of, and false statements about, his wife's income.

Jurisdiction

The decision to recover was made under the 'old' s.140(1). The AAT suggested that the 1985 amendment to s.140(1) may have removed its jurisdiction to review the decision. The DSS argued the case on the basis that either the old s.140(1), or the new s.140(1) plus the discretion to waive recovery in s.146, applied. The AAT concluded that the same principles governed the exercise of the discretion in the old s.140(1) and the new s.146 and, as the case was argued on the merits, they would proceed on that basis.

An overpayment?

Marmont married in December 1980 and told the AAT that he and his wife had separated in February 1981. If this was accepted, there would have been no overpayment because his wife's income from employment would not have been attributed to him.

The AAT reviewed what it described as'a maze of conflicting evidence', and eventually relied on written statements, signed by Marmont and his wife, that they had separated on 27 September 1982. Consequently, Marmont's wife's income should have been reported to the DSS.

The AAT then considered Marmont's claim that he had not known that his wife was working, even though she had left home at 5 a.m. some days and was absent for 5 working days a week. This claim, the AAT said, 'stretches our credulity far beyond breaking point': reasons, para.10. It followed that Marmont's failure to advise the DSS of his wife's income had been deliberate.

The discretion

The AAT adopted the principles for the exercise of the discretion from the Federal Court decision in *Hales* (1981) 13 *SSR* 136, as articulated in *Ward* (1985) 24 *SSR* 289. The Tribunal agreed with the DSS representative that this case was 'more towards the fraudulent area, rather than the area of innocent mistake'. It noted:

> 'The applicant has employment and is no longer in receipt of social security. He has voluntarily undertaken a number of commitments which indicate his ability to pay these amounts (some $600 per month in all). It is hardly a case of considerable financial hardship to require him to repay the amount he has obtained from the Department ... We do not consider it to be appropriate that a person should be relieved of liability to repay moneys to the Commonwealth on the ground that he has voluntarily undertaken heavy financial commitments to others.'

(Reasons, para.16)

The AAT recommended that the DSS make arrangements with the applicant to repay the amount owing which took into account his present liabilities.

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: 'unemployed'?

WEST and SECRETARY TO DSS (No.N85/209)
Decided: 10 December 1985 by J.O. Ballard

James West asked the AAT to review a DSS decision to cancel his unemployment benefit.

West had purchased a perpetual lease of a 2400 acre property, outside Glen Innes, NSW, with a rent of some $100 a year. He intended to make a living from primary production or handicrafts.

He had been employed as a car detailer prior to the primary production venture and sought similar employment in Glen Innes, while the farm became viable. He could not find employment, and applied for, and was granted, unemployment benefit in February 1982. His benefit was cancelled in July 1984. Early in 1985, after the prospect of employment in a local tin mine fell through, West returned to Sydney to look for work and asked the AAT to review the cancellation of his unemployment benefit.

The issue - 'unemployed'?

The issue in this application for review was whether West was 'unemployed' for the purposes of s.107(1)(c) of the *Social Security Act*.

West said that he could look after the 900 sheep on his farm on weekends and was available for work during the week. His contention was supported by a letter from a firm of pastoral agents.

The Tribunal compared the decision in *Guse* (1981) 6 *SSR* 62 with that in *Vavaris* (1982) 11 *SSR* 110:

> 'The test that emerges ... is whether the person in question is so seriously engaged in the conduct of a business as to lead to the conclusion that he is not unemployed; it is not whether he is unoccupied or underemployed. Little importance attaches to the fact that in the absence of work the tasks he did on the farm were compatible with full-time work if it became available.'

(Reasons, para.13)

The Tribunal decided that, as West's usual habitat was Sydney, his move to Glen Innes should be treated as a move to an area where work was virtually unobtainable: his commitment was to his farm, a commitment evidenced by his taking out a loan and an additional lease.

Once the tin mine opened in the Glen Innes area, West had employment prospects consistent with work on the farm. His eligibility for unemployment benefit arose from that date (July 1985) and continued after he had moved back to Sydney to look for work.

Formal decision

The Tribunal set aside the decision under review and decided that the applicant was entitled to unemployment benefit from July 1985.

Income test: whether debt repayments deductible

CROSBY and SECRETARY TO DSS (No.W85/118)
Decided: 24 January 1986 by G.D. Clarkson.

Mr and Mrs Crosby were age pensioners who, until 1984, had operated a motel business in a country town. The DSS had calculated the rate of their age pensions on the basis of the net profits from their business, deducting from their receipts from the business payments made by them on account of trading debts.

In 1984, Mr and Mrs Crosby sold the business. Under the contract of sale, $50 000 of the purchase price plus interest was to be paid to Mr and Mrs Crosby over 7 years. At the time of the sale of the business, Mr and Mrs Crosby owed trading debts of some $54 000.

The DSS then re-calculated their income for the purposes of the age pension income test: it took into account the interest paid by the purchasers on the outstanding balance of the purchase price but refused to deduct payments still being made by Mr and Mrs Crosby on account of the trading debts which they had incurred when carrying on the business. Mr and Mrs Crosby asked the AAT to review that decision.