retirement. He would not have been placed in a position where it was necessary to seek new employment at the age of 57. Even at the age of 57 Mr Segon may well have been able to attract a new employment if he could still offer his skill as a draughtsman. It is solely due to his loss of vision in the left eye that Mr Segon is now in a position of having to seek employment in restricted fields for which he is not qualified and thus having to compete with much younger and fitter people who are more attractive to employers. In my opinion Mr Segon is in a similar position to the applicant in *Panke* (1981) 2 *SSR* 9.'

MERCURIO and SECRETARY TO DSS
(No.N85/625)
Decided: 28 April 1986 by J.O. Ballard, D.J. Howell, and J.P. Nicholls.

The AAT affirmed a DSS decision to refuse an invalid pension claimed by a 71-year-old former labourer under s.24A of the *Social Security Act*.

Mercurio had migrated to Australia in 1950 and worked here until 1959 when he returned to live in Italy. He lodged his claim for an Australian invalid pension in December 1982.

Mercurio suffered from a variety of disabilities, including a blood disease, a serious spinal problem and contact dermatitis.

Section 24A of the *Social Security Act* provides that a person who is permanently incapacitated for work and who has not resided in Australia since May 1973 will qualify for an invalid pension if the person became permanently incapacitated for work in Australia and is in 'special need of financial assistance'.

Mercurio claimed, and the DSS accepted, that he had developed contact dermatitis while working in Australia. (His other disabilities had developed since he left Australia.) However, it appeared that Mercurio had worked in Australia for 4 years after the time when he developed contact dermatitis. None of his employers in Australia nor a public hospital where he claimed to have been treated had kept records relating to his medical condition or capacity for work.

Mercurio did not attend the hearing of this matter; but it appeared that after his return to Italy in 1959, he had continued to work and it was possible that he was now receiving an Italian pension.

The AAT said that the evidence did not establish that Mercurio had become permanently incapacitated for work in Australia. The AAT was not prepared to adjourn the case to call for further information from the applicant, as had been done in Baldt (1984) 21 SSR 240:

> '[T]his procedure places excessive repsonsibilities upon the respondent in relation to applicants who have made their homes elsewhere and have little claim on the Australian taxpayer for their social security needs after the conclusion of their working lives. Plainly an applicant is entitled to be told the relevant requirements of the Australian law; but we doubt whether the respondent's officers can be expected to investigate claims made by overseas applicants in the same way as they would for a resident applicant.'

(Reasons, pp.6-7)

The AAT also noted that Mercurio may have held an Italian pension, which might have meant that he was not 'in special need of financial assistance within s.24A. However, the AAT made no finding on this issue.

JABALLAH and SECRETARY TO DSS
(No V85/366)
Decided: 6 May 1986 by R. Balmford, J. Brewer and L. Rodopoulos.

The AAT *set aside* a DSS decision to refuse an invalid pension to a 55-year-old woman, who had migrated to Australia from Egypt in July 1982.

It was agreed that Jaballah now suffered from carpal tunnel syndrome which permanently incapacitated her from work. But the DSS argued that s.25(1) of the *Social Security Act* prevented the grant of an invalid pension to Jaballah because she had become permanently incapacitated for work before migrating to Australia.

A medical report prepared in Egypt for the Australian immigration authorities had noted only a diabetic condition but no other abnormality or defect in Jaballah. (This medical report had been prepared on a form which stressed the importance of ensuring that immigrants were 'not suffering from a medical disability likely to make them . . . a charge to public funds after their arrival in Australia'.)

Jaballah said that she had experienced pains in her hands while still in Egypt but that she had been able to work until her departure from that country. She said that the condition of her hands became worse after her arrival in Australia. A doctor consulted by Jaballah immediately after her arrival in Australia had recorded no indication of any disability in Jaballah's hands. However, she had returned to that doctor within a month complaining of pains in her hands. A specialist, who had operated on Jaballah a few months after her arrival in Australia, said that she must have had the condition for at least 5 years before 1982 although it was possible that she had got worse since coming to Australia.

On the basis of this evidence, the AAT found, on the balance of probabilities, that Jaballah's condition had not been incapacitating until some time after her arrival in Australia; and that, therefore, s.25 did not operate to disqualify her from an invalid pension.

Income test: 'annual rate of income'

TIMMINS and SECRETARY TO DSS
(No.V85/223)
Decided: 18 April 1986 by J.R. Dwyer, R.A. Sinclair and G.F. Brewer.

Eileen Timmins was granted an invalid pension in December 1977. The rate of that pension was calculated on the basis that her husband had an income from employment of $320 a fortnight. A letter from the DSS told Timmins to advise the DSS 'if over any consecutive 8 weeks the average income of you or your husband increases'.

In February 1978 the DSS learned from her husband's employer that he was being paid substantially more than $160 a week; the DSS re-calculated Timmins' pension entitlement as 'nil' and advised her that her pension was no longer payable. However, the DSS did not tell Timmins that she had failed to comply with her notification obligations.

In June 1978, Timmins' husband was retrenched and, when Timmins advised the DSS, payment of her invalid pension was resumed; and the DSS again informed her of her obligation to report increases in her or her husband's income.

In August 1978, Timmins notified the DSS that her husband had resumed working, and was receiving $300 a fortnight. The DSS reduced the level of her pension accordingly; and again told her of her obligation to report increases in income. Over the next 2 years, Timmins notified the DSS of a number of changes in her husband's income. Some of those notifications were found to be inaccurate when checked with her husband's employers; on each occasion, after checking with the employer, the DSS adjusted the level of Timmins' pension and reminded of her continuing obligation to report increases in income.

According to the DSS file, there was no contact between Timmins and the DSS from April 1980 to March 1982. Timmins claimed that she 'phoned the DSS to tell them of a change in her husband's employment; but the DSS had no record of her call.

The DSS did not review the level of Timmins' pension during this 2-year period. In April 1982, Timmins completed a review form at the request of the DSS, revealing an increase in her husband's income. In May 1982, the DSS checked with her husband's employer; and, upon learning that he was receiving more than Timmins had stated, re-calculated her pension entitlement as 'nil' and cancelled her pension from May 1982.

In April 1983, the DSS calculated that Timmins had been overpaid $2072 between April 1980 and May 1982; and in May 1983, the DSS asked her to repay this amount. Following review by an SSAT, the DSS re-calculated the amount of the overpayment as $2387 and decided that Timmins should repay this amount at the rate of$5 a fortnight.

Timmins asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.140(1) of the *Social Security Act* provided that an amount of pension paid to a person in consequence of the person's failure or omission to comply with the Act was 'recoverable in a court of competent jurisdiction from the person . . . as a debt due to the Commonwealth'.

From 1 November 1985, s.140(1) provides that such a payment 'is a debt due to the Commonwealth'. And s.146(1) now gives the Secretary power to waive recovery of such a debt or to accept payment by installments.

At the time of the decision under review, s.28(2) provided that a pensioner's 'annual rate of pension' should be reduced by reference to the pensioner's 'annual rate of income', which (under s.29(2)) included half her spouse's income.

Section 45(2) obliges a pensioner to notify the DSS of any increase in her 'average weekly rate of . . . income' over 'any period of 8 consecutive weeks'.

'Annual rate of income'

As in many overpayment cases, the difficulty in the present matter arose out of the fact that Timmins' income had fluctuated widely over the 2-year period in question: how was her 'annual rate of income' to be determined, given these fluctuations? Timmins conceded that she had been overpaid her pension during the period in question. But she disputed the DSS calculation of that overpayment. The DSS had calculated Timmins' income and pension entitlements over the July-June financial years. The DSS accepted that, if it had used a rolling 8-week period as the basis of its calculations of her 'annual rate of income' and pension entitlements, the amount of the overpayment would have been only $1799.

The AAT said that, in *Harris* (1985) 24 *SSR* 294, the High Court had said that the rolling 8-week period might be misleading in some cases; but the Court had not ruled out the possibility of using such an approach: 'the circumstances of the case must determine what is a fair method of ascertaining the current rate of income at a particular time', the High Court had said.

In *Ruggeri* (1985) 28 *SSR* 345, the AAT had expressed a preference for using the financial year to calculate 'annual rate of income'; but, in the interests of administrative consistency, had adopted the pension year. In *Blanusa* (1985) 28 *SSR* 346, the AAT had affirmed a DSS decision based on the financial year, while accepting that other approaches might be appropriate in different cases.

After noting that in *Harris* the High Court had said that different methods of calculation 'in theory ought not to produce a substantially different result', the AAT noted that using the pension year produced an overpayment some $120 more than using the financial year; and using the rolling 8-week period produced an overpayment of some $600 less.

The AAT said that the High Court had not ruled against the use of the rolling 8-week period in *Harris*. The AAT could see nothing to suggest that such a method of calculation was unfair or inaccurate:

> 'In fact it could well be more accurate in that it would show the exact rate of pension to which Mrs Timmins would have been entitled taking into account Mr Timmins' actual earnings throughout the relevant period.'

(Reasons, para.37)

The AAT decided that the rolling 8-week method should be used in the present case because it was a fairer method in the circumstances of this case:

> 'The reason why both the pension year and the financial year method of calculation yield a considerably higher overpayment is that they do not recognise that once a pensioner's income reaches a level where pension entitlement is lost, future earnings, so long as that level is maintained or exceeded, are irrelevant to the calculation of pension entitlement. From that time on there is simply no pension entitlement and all payments of pension are overpayments. In our opinion it is inaccurate and unfair to allow earnings once pension entitlement has ceased to bolster earnings during the period of pension entitlement by bringing them into account as part of an annual rate of income. A pensioner's annual rate of income is only relevant so long as it is necessary to calculate the rate at which pension is to be paid. If earnings after entitlement to pension has ceased are brought into account in calculating an annual rate of income they will create the illusion of higher income during the period of pension entitlement than was actually the case.'

(Reasons, para.39)

For this reason, the AAT concluded that the amount of the overpayment was $1799.

The discretion to recover

The AAT said that the amendments to s.140, which came into effect on 1 November 1985, had not significantly altered the effect of that section. In particular, 'the Secretary retain[ed] a discretion as to whether to recover a debt due to the Commonwealth' as the Federal Court had said the Director-General had under the former version of the section (in *Hangan* (1982) 11 *SSR* 115 and *Hales* (1983) 13 *SSR* 136):

> 'If Parliament had intended to remove the Secretary's discretion it would have done so explicitly in amending the Act.'

(Reasons, para.43)

The AAT expressed concern at the complexity of the obligation to notify increases in income imposed on pensioners by s.45:

> 'The words of the Act are too complex to expect the average pensioner to be able to understand his or her obligation from a reading of the Act if indeed they had access to the Act. [The standard form sent to each pensioner] does not . . . clearly state that the obligation to notify the DSS is a statutory one and that any breach of it is a failure to comply with the provisions of the Act. We suggest that the notices of grant and variation of rate should make this clear.
>
> . . . It was clear that Mrs Timmins had never understood the obligation which rested upon her, but even if she had, we believe she would have had difficulty in doing the required calculation.'

(Reasons, paras 46-7)

The AAT also expressed concern at the failure of the DSS to carry out entitlement reviews between April 1980 and March 1982. Such reviews not only benefited the public purse but also assisted pensioners who might have overlooked the notification requirements of s.45(2).

The AAT noted that Timmins and her husband (now retired) had income of about $175 a week. Although not well off, she could afford to repay the overpayment. However, if she were to repay at the rate of $5 a fortnight, the money would not be repaid until the year 2000. That, said the AAT, 'would be an unreasonable length of

time for Mrs Timmins to have this debt hanging over her': Reasons, para.54. The AAT concluded that the s.146(1) discretion should be exercised to waive half the debt:

> 'We believe that this is warranted because of the complexity of the legislative provisions with which Mrs Timmins failed to comply, the fact that we have found her failure was due to an honest mistake and our view that her error was no doubt contributed to by the fact that even when officers of the Department learned in 1978 that Mrs Timmins had not complied with her obligation under s.45(2) of the Act they took no steps to make sure she understood the nature of her obligation.'

(Reasons, para.54)

Formal decision

The AAT affirmed the decision to raise an overpayment but varied the amount of the overpayment to $1799.

The AAT set aside the decision to recover the whole of the overpayment and substituted a decision to waive half the overpayment and to recover the balance at the rate of $5 a fortnight.

BOUGHTON and SECRETARY TO DSS
(No.D85/1)
Decided: 21 April 1986 by R.A. Layton.

Robert Boughton was granted a supporting parent's benefit in August 1982. He continued to receive that benefit until June 1983, when the DSS cancelled the benefit because Boughton had commenced full-time employment. He told the DSS that he had been working 'on an off' over the past 6 months.

After checking with his employer, the DSS found that Boughton had earned $3413 between February and June 1983 and calculated that he had been overpaid. The amount of the overpayment was eventually calculated at $1072. Boughton asked the AAT to review that decision.

The legislation

The DSS based its recovery decision on s.140(1) of the *Social Security Act*, which provided that an amount paid by way of benefit in consequence of a failure or omission on the part of the payee to comply with the Act was recoverable from the payee as a debt due to the Commonwealth.

Failure to comply with the Act

It was not disputed that Boughton should have advised the DSS of his earnings, so that the level of his benefit could be calculated according to his 'annual rate of income': s.63(2).

The AAT found that Boughton had not notified the DSS of his earnings; he had merely inquired at a DSS office about the effect which increased income would have on his benefit.

Amount of overpayment

Boughton disputed the method used by the DSS in calculating his 'annual rate of income' and the amount of the overpayment. He pointed out that his income had fluctuated considerably throughout the 15 weeks in question. The DSS had averaged his receipts of income over that period.

The AAT referred to the High Court decision in *Harris* (1985) 24 *SSR* 294. The AAT said that the Court had declared that 'the circumstances of the case must determine what is a fair method of ascertaining the current rate of income at a particular time'. The AAT said that, in this case, these principles had been followed and, accordingly, the calculations should not be disturbed.

Discretion

Boughton then argued that the DSS had failed to extend to him the 'earnings concession'. Under DSS procedures at the time when the overpayment occurred, this concession had been available to pensioners and supporting parent beneficiaries with variable incomes. However, the DSS only extended the concession if a pensioner or beneficiary applied for it in writing. If Boughton had been granted the concession, the overpayment would have been calculated at $752.

However, Boughton had not applied for the earnings concession, because the DSS had not told him of its availability. The AAT said that, because Boughton had not attempted to conceal his earnings and because he could have received the benefit of the earnings concession, the discretion in s.140(1) should be exercised so that the amount recovered from Boughton 'should be no greater than the amount which would have been recoverable had the applicant been entitled to an earnings concession': Reasons, para.44

Formal decision

The AAT set aside the decision under review and directed that the amount recoverable from Boughton be no greater than $752.

Unemployment benefit: work test

MALIN and SECRETARY TO DSS
(No Q85/69)
Decided: 25 March 1986 by J.B.K. Williams.

Robert Malin, in partnership with his father and brother, owned a 400-acre and cattle farm. Malin worked full-time on the farm from June to December each year - the sugar cane season. But, during the balance of each year, when there was no work for him on the farm, he tried to find employment off the farm. In December 1984, Malin claimed unemployment benefit from the DSS and when his application was rejected he asked the AAT to review that decision.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person meets age and residence requirements and if the person satisfies the Secretary that he was 'unemployed' during the relevant period (and meets the other elements of the 'work test').

'Unemployed'?

Malin told the AAT that, when he had claimed unemployment benefit in December 1984, he had been uncertain about whether he would return to the farm in the following June because of the low prices then prevailing for sugar cane. He also told the AAT that in the year to June 1984, his taxable income from the farm had been $4,631. When the Tribunal asked Malin if he would have given up any job in order to return to the farm during the sugar cane season, Malin said that this was a hypothetical question which he would answer when it arose.

The AAT said that the central question was the same question as that asked in such cases as *Guse* (1981) 6 *SSR* 62 and *Vavaris* (1982) 11 *SSR* 110 - was Malin 'so seriously engaged in an economic enterprise, that is conduct of a business, as to lead to the conclusion that he is not unemployed':

> '[The] evidence indicates to me that despite serious problems presently facing those engaged in the sugar industry, the applicant has not abandoned the farm in preference to employment outside the farm. He is in my view still engaged in a serious business enterprise, notwithstanding the substantial diminution in income from that source.
>
> In all the circumstances, I think it true to say, as was observed in *Re Vavaris* that the applicant is underemployed rather than unemployed within the meaning of s.107(1)(c) . . . It appears to me that in colloquial or popular language the applicant is a cane farmer and not an unemployed person.'

(Reasons, pp.7-8)

Formal decision

The AAT affirmed the decision under review.