invalid role, his lack of motivation to work, his limited work skills, his age, gaol sentence and lack of skills in English. Taken cumulatively, these factors were likely to have the effect that San did not have the ability to attract an employer who was prepared to engage and remunerate him. He was therefore incapacitated for work. The Tribunal also found his incapacity to be not less than 85% and permanent.

The applicant also satisfied the requirements of s.27(b), in that at least 50% of the incapacity was directly caused by some permanent physical or mental impairment, namely San's psychiatric condition and his arthritis.

[B.W.]

Moneys wrongly withheld: payment of interest?

TRIMBOLI and SECRETARY TO DSS
(No. N86/837)
Decided: 28 September 1990 by E.T. Perrignon.

Trimboli received sickness benefits from October 1978 to May 1983 following a work related injury in 1975. On 12 April 1984, he received a lump sum worker's compensation payment of $50 000.

Initially, the DSS sought to recover $15 114 (representing sickness benefits paid to Trimboli) from the worker's compensation insurer as the relevant pay-back figure for the sickness benefit. This sum was paid by the insurer to the DSS on 16 October 1984. Trimboli sought review of the decision of the Secretary's calculation of the pay-back figure by the AAT alleging that:

(1) the worker's compensation payments did not relate to the same incapacity as that for which the sickness benefits were paid;
(2) in the alternative, the Secretary should exercise his discretion under s.115E to disregard the worker's compensation payments; and
(3) interest should be paid by the Secretary to Trimboli on any wrongfully withheld moneys which the Secretary had claimed from the worker's compensation insurer.

Three days before the AAT hearing, the DSS refunded to Trimboli the sum of money being an amount the DSS considered to have been an excess collection from the worker's compensation insurer. When the matter came before the AAT for hearing, the Tribunal found against Trimboli in all 3 points referred to above. The Tribunal did, however, allow certain medical costs to be deducted from the recovery figure.

Trimboli then appealed to the Federal Court on the grounds, *inter alia*, that the Tribunal had failed to take account of the losses caused to Trimboli by the Secretary's belated decision to refund the sum of the previously withheld moneys 3 days before the hearing of the Tribunal.

The Federal Court held that the Tribunal had failed to take into consideration this issue in the exercise of discretion under s.115E and that this constituted an error of law: *Trimboli* (1989) 49 *SSR* 645. The Federal Court remitted the matter to the AAT for a fresh exercise of its discretion under s.115E. There were suggestions in the Federal Court that the lost interest to the applicant by reason of the Secretary's over-collection from the worker's compensation insurer should be remedied by the AAT by way of exercise of its discretion under s.115E.

Legislation

Section 115E [now s.156] provided:

'The Secretary may, for the purposes of this Part, treat the whole or part of a payment by way of compensation that has been, or that will be made as not having been made or as not likely to become liable to be made, if the Secretary considers it appropriate to do so in the special circumstances of the case.'

The decision

The AAT found as a fact that the initial over-collection by the Secretary from the worker's compensation insurer was due to miscalculation by the DSS and that this miscalculation was the cause of Trimboli's losses.

The Tribunal proceeded to calculate, on the basis of the Supreme Court scale of interest, Trimboli's losses by reason of the wrongful withholding of the excess collections. These losses amounted in all to $2459. The Tribunal, in exercise of its discretion of s.115E, determined to treat this sum as having not been received by Trimboli. In so far as the full amount claimed by the Secretary had already been recovered from the worker's compensation insurer, this sum of $2459 represented a debt due from the Secretary to Trimboli.

The Tribunal seems to have allowed the applicant interest on the money paid to him by the worker's compensation insurer for the period that those sums were held by the worker's compensation insurer pending negotiations and advice from the Secretary as to the correct pay back figure.

Formal decision

The Tribunal set aside the decision of 24 February 1988 and decided that 'so much of the payment to the applicant by way of compensation should be treated as not having been made as will result in the payment by the respondent to the applicant, in addition to the payment which has already been made by the respondent to the applicant, with the sum of $2459'.

[A.A.]

Income test: German pension

SECRETARY TO DSS and SVOLAKS
(No. 590/4)
Decided: 19 September 1990 by J.A. Kiosoglous, D.B. Williams, D.J. Trouse.

The Secretary sought review of a decision of the SSAT concerning an alleged overpayment. The SSAT had decided that certain payments received by Svolaks from the Federal Republic of Germany were compensation payments for Nazi persecution within the meaning of para. (ka) of the definition of income in s.3(1) *Social Security Act* 1947, and accordingly were exempt from the definition of income.

The Secretary argued that the payments did not come within the exclusion of para. (ka) and accordingly were income for the purposes of income testing. In so far as Svolaks' German payments had not been taken into account in calculating his previous entitlements, it was the Secretary's position that an overpayment had occurred.

The facts

Svolaks lived in Latvia during World War II. He was aged 26 when the German and Soviet armies came into conflict in Latvia. Svolaks was a civilian farmer at the time. On one occasion he was caught in cross-fire and sustained an injury to his leg. He was hospitalised and treated in Germany until the end of the war.

After the war, Svolaks commenced receiving a pension in Germany called a '*Bundesversorgungsgestz*' (BVG) pension. In 1950 Mr Svolaks migrated to Australia, and in 1962 commenced receiving an invalid pension under the *Social Security Act*, which was converted to an aged pension in 1980. Throughout this time and up to the date of the hearing before the AAT, Svolaks continued to receive the BVG pension.

Evidence was received from the West German equivalent of the Department

of Social Security, that the BVG pension was essentially an invalid pension and carried no prerequisite that the individual had been the subject of Nazi persecution. Evidence from the same source indicated that there existed another pension in West Germany called a *'Bundesentschadigungsgestez'* (BEG) pension which was specifically for persons who suffered persecution under the Nazis.

Legislation

For the purposes of income testing aged pensions (s.33(12)), it is first necessary to determine the extent of the pensioner's income. Section 3(1) of the Act defines income in general terms but specifically exempts certain receipts from that definition. Receipts exempt from the definition of income are not taken into account for income testing purposes under s.33(12). One of the exemptions from the definition of income in para. (ka) which exempts:

> '(ka) an amount paid by way of compensation by the Federal Republic of Germany, or by a State of that Republic, under the laws of that Republic, or of that State, relating to compensation of victims of national socialist persecution.'

Decision

The AAT noted the distinction between the BVG and BEG pensions and found that the BVG pensions were not specifically related to compensation for Nazi persecution. The Tribunal did not go beyond this point in its reasoning and held by the BVG pension did not answer the description in para. (ka) of s.3(1) of the Act. Several earlier AAT decisions were referred to without explanation, including *Kelleners* (1988) 47 *SSR* 616, *Kolodziej* (1985) 26 *SSR* 315, *Teller* (1985) 25 *SSR* 298 and *Evans* (1987) 38 *SSR* 480.

The effect of the Federal Court's decision in *Kelleners* was that pensions received from overseas sources, albeit pensions payable by reason of persecution which pensioners had undergone during the war, were nevertheless income within the meaning of s.3(1) unless they were specifically exempted by the definition of income.

Formal decision

The decision of the SSAT, that no overpayment had occurred, was set aside.

[A.A.]

Unemployment benefit: receipt of Austudy

SECRETARY TO DSS and BRYCE (No. 6259)

Decided: 11 October 1990 by K.L. Beddoe.

The DSS applied to the AAT to review a decision of the SSAT to grant Susan Bryce unemployment benefit from 25 July 1988. Bryce had been a full-time student until that date, when she changed her status to part-time student. She had been in receipt of Austudy benefits since the commencement of 1988. When she went to the CES in July 1988 to register for full-time employment, she did not apply for unemployment benefit because she thought that she was still entitled to Austudy benefits. This apparently arose from incorrect advice given to her by a CES officer.

Bryce continued to receive Austudy benefits until 1 December 1988. She applied for unemployment benefit on 3 November 1988 and began to receive that payment on 7 November 1988. A review of her Austudy entitlement at about the same time determined that she had received $1302 to which she was not entitled as she had ceased to be a full-time student on 25 July 1988. Bryce refused to repay this amount to the Department of Education, Employment and Training until she was paid unemployment benefit from 25 July 1988.

The effect of the Austudy payment

The AAT referred to s.127 of the *Social Security Act* which postponed unemployment benefit for 13 weeks where the applicant had ceased a full-time course of education. The Tribunal noted that, even if it was assumed that Bryce was deemed to have applied for unemployment benefit on 25 July 1988, s.127 would have postponed her entitlement until 23 October 1988. This was 2 weeks prior to the date on which unemployment benefit was in fact paid.

However, it was the operation of s.136 that decided the case against Bryce. Section 136(1)(a) provides that, where a person is in receipt of a payment under a prescribed educational scheme, the person is not entitled to unemployment benefit. Section 136(4) provides that Austudy is a 'prescribed educational scheme'.

According to the AAT, there had clearly been an Austudy payment made in this case. It was argued by Bryce that an Austudy payment had not been made because it was now claimed that this was an overpayment. To this the Tribunal responded:

> 'I do not think that can be the correct interpretation of the provision because it of necessity requires that the meaning of "payment" must be qualified to mean "payment to which the person is entitled under the *Student Assistance Act*". In my view "payment" when used in the context of subsection 136(1) is not so qualified and means amount paid or disbursement. It does not reflect a qualification as to entitlement to the amount paid; merely the fact of an amount paid.'

Although the AAT expressed its sympathy with Bryce – she had always acted *bona fide* and without intent to defraud – it could not find her eligible for unemployment benefit on any basis before 23 October 1988. But her continued receipt of Austudy benefits until 1 December precluded her from unemployment benefit until that date.

This was also not a proper case for the exercise of the discretion in s.125(2)(b) to treat the application for unemployment benefit as being made within a reasonable time of the application for employment. The erroneous advice from the CES would seem to suggest its consideration, but to so exercise it would be to circumvent the sections of the Act mentioned.

Formal decision

The AAT set aside the decision of the SSAT.

[B.S.]