Accordingly the AAT decided that no additional pension could be paid to Perecz for her son; and rejected the appeal against the decision to reduce the rate of invalid pension paid to her.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

MONAGHAN and SECRETARY TO DSS
(No. 5732)
Decided: 28 February 1990 by J.A. Kiosoglous, J.T.B. Linn and D.B. Williams.

Marion Monaghan asked the AAT to review a decision to cancel the payment of child disability allowance to her in respect of her son and also to review a decision to recover from her an overpayment of $456 in unemployment benefit. The relevant legislative criteria can be found in *A. Perecz*, reported in this issue of the *Reporter*.

Cancellation of child disability allowance

Monaghan's 16-year-old son suffered from a hole in the heart. According to the applicant this caused him to become extremely tired and as a consequence he did not wake for 'calls of nature'. The applicant then had to change his bed linen up to 3 times a night. Extra water and electricity were required to clean the linen and it was contended by Monaghan that the linen wore out more quickly than would normally be the case. The son also suffered from allergies and asthma and required a special diet. This diet apparently avoided the need for him to undergo open heart surgery. Monaghan's son was in year 11 at school. He usually walked or rode a bicycle to school. He ran errands and scored for his favourite football team.

The medical evidence indicated that Monaghan's son needed some additional care compared with the level of care required by a child without a disability, but it was not satisfied that the child needed 'substantially more' care as required by the Act. The Tribunal referred to *Re Whiteford and Commissioner for Superannuation* (1987) 6 AAR 70, where the AAT had said that the word 'substantially' (albeit in a different context) meant 'higher up the scale of substantiality than "not trivial, minimal or nominal"'.

The AAT, citing *Sachs* (1984) 21 *SSR* 232, said that the test as to whether the child, compared to other children without a disability, 'needed' substantially more care and attention was an objective test. The Tribunal commented with respect to Monaghan's claim:

> 'It may be that in her commendable efforts to ensure [her son] is not disadvantaged by his heart-condition, the applicant provides more care and attention than is, or may be, strictly needed. There is no evidence before the Tribunal which establishes that [the son] needs an amount of care and attention substantially more than that needed by any 15-year-old . . .'

(Reasons, p.8)

The medical evidence suggested a steady improvement in the child's condition and that he was capable of changing his own bed linen. The AAT also referred to an unemployment benefit claim form completed by Monaghan which stated that she had not been prevented from looking for work by the need to care for her children as they were 'sufficiently capable of caring for themselves' while she worked. All of this evidence taken together led to the conclusion that the cancellation was proper.

Overpayment of unemployment benefit

An overpayment of unemployment benefit had been raised on the basis that The applicant's husband had earned $2230 during the period when she had received unemployment benefit. The applicant gave evidence that this amount was not declared as it was not actually received by her husband because the work had been done to repay a debt owed to his employer. She also said that a DSS officer had told her that in those circumstances it was not necessary to declare it. The DSS did not accept that such advice would have been given.

It was decided by the Tribunal that the overpayment occurred as the result of the omission by the applicant to inform the DSS of the amount earned by her husband. This satisfied the requirements of s.246 of the Act which provides that an amount paid in consequence of such an omission is a debt due to the Commonwealth. The AAT also found that the amount earned was 'income' for the purposes of the Act and that the overpayment was thus properly raised.

Discretion to waive recovery

The Tribunal then considered whether recovery should be waived pursuant to s.251 of the Act. The AAT gave the benefit of the doubt to the applicant on the point that she had been advised that it was not necessary to declare the amount. There was no evidence to disprove this claim. The fact that her husband had declared the income in his tax return and had received a group certificate with the amount included did not mean that the applicant would have understood the need to declare the amount in relation to her unemployment benefit application.

The AAT also acknowledged the financial hardship that the applicant's family was suffering. Out of an income of $570 per fortnight, $350 was going towards the repayment of debts. The Tribunal referred to *Hales* (1983) 13 *SSR* 136 and the need to balance the competing considerations of recovering public money paid where there was no entitlement and the need to consider the reason for the payment and the circumstances of the applicant. In this case the amount was small and the AAT considered that the compassionate circumstances outweighed other considerations. Thus the conclusion was that there should be an exercise of the discretion to waive recovery in favour of the applicant.

Formal decision

The AAT affirmed the decision under review with respect to the cancellation of child disability allowance, but with respect to the overpayment of unemployment benefit the AAT decided that the debt should be written off pursuant to s.251 of the Act.

[B.S.]

Reciprocal agreement with New Zealand

THOMPSON and SECRETARY TO DSS
(No. 5819)
Decided: 11 April 1990 by J.A. Kiosoglous.

David Thompson, a New Zealand citizen, arrived in Australia in September 1979. In January 1986 he went to Botswana as a member of the Australian Volunteers Abroad program. He returned to Australia in February 1988 then visited New Zealand for 2 weeks before finally returning to Australia in March 1988. He then applied for unemployment benefit and special benefit.

The DSS rejected his claims apparently on the basis that he had been

outside Australia for over 2 months. When he appealed to the SSAT, this rejection was clarified as being on the grounds that a Reciprocal Agreement, that had come into force between Australia and New Zealand on 1 October 1987, precluded New Zealand citizens from receiving unemployment benefit for 6 months from the date of their most recent arrival in Australia. It was stated by the DSS that the Department had no discretion to treat Thompson's time in Botswana as a period spent in Australia. The claim for special benefit was rejected on the grounds that the applicant was not in financial hardship as he had $6000 in savings.

In July 1988, the SSAT recommended that the applicant's appeal against the rejection of unemployment benefit be upheld on the basis that his most recent arrival in Australia was September 1979. In that case the Reciprocal Agreement did not affect his entitlement. The appeal against special benefit was dismissed. The DSS did not adopt the SSAT's recommendation as to the applicant's eligibility for unemployment benefit and Thompson appealed to the AAT.

The reciprocal agreement

Article 13, paragraph 2(a) of the Reciprocal Agreement between Australia and New Zealand then provided:

> '2. Subject to paragraph 4, a person to whom this Article applies shall be entitled to the payment of unemployment benefit by a Contracting Party only if the person:
>
> (a) has been continuously present in the territory of that Contracting Party for not less than 6 months since the date of his or her most recent arrival in that territory.'

Paragraph 4 of that Article provided:

> 'Where a person to whom this Article applies has been resident in the territory of a Contracting Party for the period of 12 months immediately preceding the date on which the person lodges a claim for unemployment benefit in that territory, the person shall be required to meet, in relation to that claim, only the criteria specified for that benefit by the social security laws of that Contracting Party.'

Paragraph 5 provided:

> 'For the purposes of paragraph 4, a period of residence in the territory of a Contracting Party in relation to a person shall include any period or periods of temporary absence by that person from that territory that do not exceed in the aggregate 2 calendar months, and that do not break the continuity of that period of residence.'

Eligibility for unemployment benefit

It was accepted by the AAT that, had Thompson not gone to Botswana, he would have been eligible for unemployment benefit as he had been resident in Australia for over 6 years when he left for that country. It was also accepted that he went overseas as a volunteer with the intention that his absence from Australia would be temporary. The only obstacle to his entitlement to unemployment benefit was the Reciprocal Agreement.

The AAT said that Article 13, paragraph 2(a) required that a person be 'continuously present in Australia for not less than 6 months since the date of his most recent arrival' to be eligible for unemployment benefit. The emphasis in this paragraph was on presence rather than residence. As the applicant was not present in Australia for the 6 months preceding his application he could not qualify under this paragraph.

The only other way in which Thompson could qualify for unemployment benefit was under paragraph 4 of Article 13. A person who has been a resident in Australia for the 12 months preceding their claim for unemployment benefit only had to meet the normal eligibility requirements. However, the AAT noted that paragraph 5 restricted the length of temporary absences to a total of 2 months before continuity of residence was broken for the purposes of paragraph 4. Thus, although Thompson was a resident of Australia for the whole time he was in Botswana, because he was temporarily absent for more than 2 months he could not rely on paragraph 4 to qualify for unemployment benefit.

Amendment of Agreement suggested

The Tribunal commented that it did not seem to be intended by the framers of the Reciprocal Agreement to catch a situation such as this one. The AAT arrived at its conclusion on a strict interpretation but suggested that the two governments give some consideration to amending Article 13 to provide for people in the applicant's position.

Special benefit

The AAT also considered Thompson's eligibility for special benefit. The Tribunal agreed with the SSAT and the DSS that he was not in financial hardship given his available funds and was not eligible for special benefit.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

[Comment: The decision of the AAT is puzzling in that it held that the applicant was a resident of Australia for the whole time he spent in Botswana, yet he could not be regarded as resident for the 12 months immediately preceding his application for unemployment benefit. It seems that the Tribunal has read the requirement in paragraph 4 that the applicant be 'resident in the territory' as meaning 'present in the territory'. If paragraph 5 is read as confined to allowing a person to have short periods of absence disregarded so that they do not break the overall continuity of residence, then it could be argued that the applicant was not precluded from receiving unemployment benefit by that paragraph as it would not be applicable in his case.

The new Reciprocal Agreement of October 1988 between Australia and New Zealand (*Social Security Act*, Schedule 3) reproduces in Article 9 the same essential restrictions as those contained in Article 13 above. However, the new Article 9, paragraph 4, provides that a person who has been an *Australian resident* for the 12 month period prior to lodging a claim for unemployment benefit has only to satisfy the usual eligibility requirements. Paragraph 5 provides that a period as an Australian resident shall include periods of temporary absence that do not exceed 2 months and that do not break continuity of residence. The problem is that the paragraph is unclear as to whether it means temporary absence from the territory or from residence in the territory. The answer must be that the paragraph will only operate where there is some doubt as to the person's residence. If it is decided that the person is a resident, and has been so for the past 12 months, then they will qualify for the benefit according to domestic law. However, where a person has ben away from the territory and this raises some doubts as to their residential status, paragraph 5 operates to grant some flexibility to persons who, given the context, will often be moving between countries.

[B.S.]