The AAT found the facts in this matter unusual. The legislation presumes that, where an amount has been paid by way of sickness benefit for a period of incapacity for work, it is recoverable if the beneficiary later receives a lump sum payment of compensation. The AAT was of the opinion that, in the special circumstances of this case, it would be unjust for the legislation to operate in this way.

Formal decision

The AAT set aside the decision under review and substituted a decision that the amount of lump sum compensation representing the amount paid to Smith as sickness benefit be considered as not having been made and thus not recoverable.

[C.H.]

Family allowance supplement: estimated income too low

JOHNSON and SECRETARY TO DSS

(No. 6626)

Decided: 7 February 1991 by P.W. Johnston.

The applicant asked the AAT to review a decision to cancel her family allowance supplement (FAS) and to raise an overpayment of $3312 in FAS.

The facts

Johnson had been in receipt of FAS since May 1988. In November 1988, she forwarded an income and assets return for 1988 to the DSS. She advised that at that date she was unemployed and her husband had commenced his own business with drawings of $100 per week. They also received rental income of $240 per week. Their total income was $340 per week. Based on that information, the payments of FAS were continued.

A later review of Johnson's eligibility led to the cancellation of FAS from November 1989. The Taxation Office later assessed the family's taxable income for 1988-89 at $30 902. This led to the overpayment of $3312 being raised in respect of the period from December 1988 to November 1989. The overpayment was being recovered by deduction from Johnson's family allowance.

The legislation

It was not disputed that Johnson was qualified to receive FAS under s.73 of the *Social Security Act*. Section 74B provides for reduction of the rate of allowance by reference to 'relevant taxable income'. Section 72(1) defines 'relevant taxable income' to include, in the case of a married person, the taxable income of the person's spouse in addition to the taxable income of the person. Section 72(2) provides that the amount of taxable income of a person for a year of income shall be taken to be either the amount assessed by the Commissioner of Taxation or an estimate made by the person or the person's spouse.

Where there is a difference between the amount estimated by the person or their spouse and the amount subsequently assessed by the Commissioner of Taxation s.74B(5) applies. This provision treats as a recoverable overpayment payments of FAS based on a person's estimate of income where that estimate is less than 75% of the actual taxable income assessed by the Commissioner of Taxation.

Actual income versus assessed income

Johnson had put to the SSAT that the actual income of the family was considerably lower than the amount assessed by the Commissioner of Taxation. This occurred because the assessment took into account income on an accrual basis rather than on a cash basis. She had argued that, when it was considered that about $12 000 was outstanding in debts to the partnership she had formed with her spouse, the actual income received from the business was much lower than the assessment.

Johnson conceded in the AAT that the SSAT were correct in rejecting this submission as to the application of s.74B(5). The section is mechanical. Once the actual figure assessed by the Commissioner of Taxation is determined, the section operates automatically. It is not open for the parties to go behind the figures to question the actual income of the applicant.

Discretion to waive recovery

The only issue for consideration for the AAT was whether the DSS should exercise its discretion under s.251 to waive recovery of the overpayment or otherwise vary the terms of recovery.

The Tribunal referred to the decision in *Hales* (1983) 13 *SSR* 136, which set out the matters to be considered in the exercise of the discretion. The Federal Court in that case indicated that the matters to be considered included the fact that the applicant had received public moneys to which he or she was not entitled, whether the overpayment occurred as a result of innocent mistake or deliberate fraud, the financial circumstances of the applicant, the prospect of recovery, whether a compromise was offered, whether recovery should be delayed because there was a prospect that the applicant's circumstances may improve, and any other compassionate considerations including financial hardship.

Johnson had argued that the legislation was unfair and discriminated against self-employed persons. The AAT said that it could not comment on the fairness of the legislation. In any event the Tribunal noted that Johnson's argument could be debated either way. The trading situation of the partnership would be subject to artificial variations which could result in advantages as well as disadvantages at certain times.

The Tribunal still had to consider the criteria in *Hales*, even though it rejected Johnson's submission with respect to the fairness of the legislation. There was no question of dishonesty on the part of Johnson. The financial circumstances of Johnson and her spouse at the time of the SSAT decision had indicated that there was then no reason for the exercise of the discretion in their favour.

However, the family's financial circumstances had since deteriorated. The business had incurred debts which exceeded its income and the family were considering selling their home to pay those debts. Johnson's spouse was considering paid employment. The AAT commented:

> 'Even though in all this there is no suggestion of immediate dire financial hardship, the fact that the overall situation of the family has declined severely sets the stage for considering other factors. Remembering too that the purpose of FAS is basically to provide benefit for the children in a family (of which the applicant and her husband have three who are still fairly young) the Tribunal should also take into account against that background the continuing loss of FAS to the family unit for some considerable time yet.'

(Reasons, p.7)

The AAT also referred to the form which was used by the DSS to obtain the information upon which the payment of FAS was based. The form was entitled

'Estimate of Income for Family Allowance Supplement' and contained a statement to be acknowledged by Johnson that she understood that she might have to repay any FAS to which she was not entitled if her estimate was 'substantially wrong'. The Tribunal criticised the form in the following terms:

> 'It cannot be debated that the form in its final sentence puts recipients of benefit upon notice that they may be liable to repay the allowance if their "estimate is substantially wrong". That statement, however, falls well short of bringing to the minds of those who fill out and sign the form the stringent operation of s.74B(5). The vague expression "substantially wrong" could mean many things to different minds and it fails to convey what is in fact a fairly precise relationship between the estimated income and the figure that emerges, retrospectively, from the Commissioner's assessment.'

(Reasons, p.8)

The AAT asked Johnson and her spouse about how the form came to be filled in. It concluded that they had approached the matter openly and honestly. Their error was attributed to their misunderstanding of the legal requirements imposed by the *Social Security Act*. The Tribunal also concluded that the 'vague and inadequate phrasing' of the warning in the form in part induced the error that led to the overpayment.

When the Tribunal had regard to all of the above considerations, it formed the view that a fair result would be to terminate recovery from the family allowance paid to the applicant after 1 July 1991 and for recovery of the outstanding amount to be waived. This would result in about half of the overpayment being foregone by the Commonwealth. Although this was not a precise apportionment of responsibility for the overpayment, the AAT considered that it reflected the circumstances of the overpayment and had regard to the current financial circumstances of the family.

Formal decision

The Tribunal varied the decision of the SSAT to the extent that recovery of the overpayment by deduction from future payment of Family Allowance should cease after 1 July 1991 and that recovery of the balance be waived under s.251(1) of the *Social Security Act*.

[B.S.]

Family allowance arrears: decision under review

SHANAHAN and SECRETARY TO DSS

(No. Q90/353)

Decided: 4 March 1991 by S.A. Forgie.

The facts

Mrs Shanahan was receiving family allowance for two children. On 14 October 1989 the DSS sent an annual review form to her address which the DSS had on its records. Mrs Shanahan had moved from that address without notifying the Department, and did not receive the form until July 1990.

When the DSS did not receive the completed review form, it decided to cancel her family allowance from 29 December 1989 and notified her of this by letter dated 1 January 1990. That letter was also sent to her old address and she did not receive it.

When she noticed that family allowance had ceased to be paid, Mrs Shanahan contacted the DSS and notified it of her new address. She was sent a form by mail which she lodged on 10 April 1990. Payment of her family allowance resumed on 19 April 1990.

She applied to the SSAT for review of the decision 'not to pay arrears of family allowance from 11 January 1990'. The SSAT decided:

> 'that the decision to cancel the payment of family allowance and/or not to apply arrears of family allowance from 11 January 1990 to 19 April 1990 be set aside and that payment be made to Mrs Shanahan for this period.'

The DSS asked the AAT to review the decision, arguing that the SSAT was wrong in finding

> '1) that notification had not been given of decision to cancel, and
>
> 2) that arrears could be granted despite the appeal having been lodged more than three months after the cancellation'.

The legislation

Section 163(2) of the *Social Security Act* empowers the Secretary to give, personally or by post, to a recipient of an allowance, a notice requiring the person to furnish to the Department within a specified period a statement in an approved form. Failure to comply with such a notice is a ground for cancellation of the allowance: s.168(1).

Section 183 specifies the date from which a decision of an SSAT, determining an application for review, has effect. Where the SSAT makes a decision granting a person an allowance or increasing the rate of payment and the person applied to the SSAT more than 3 months after notice of the decision under review was given, the operative date of the decision is the date on which the application for review was made to the SSAT: s.183(5).

Section 82 sets out the qualifications for family allowance.

Section 158(1)(c) provides that the payment of the allowance shall not be made except upon the making of a claim for the allowance.

Section 159(4A) and (4B) make provision for deeming a claim to be lodged on a day earlier than the day of actual lodgment in specified circumstances.

Was the notice 'given'?

The AAT found that the review form sent to Mrs Shanahan's old address was a notice under s.163(2), since it required her to furnish information within a specified time and in accordance with an approved form.

Applying s.29 *Acts Interpretation Act* 1901 (and following previous decisions in *Todd* (1989) 52 *SSR* 691, *Dossis* (1989) 59 *SSR* 799 and *Pesu* (1990) 53 *SSR* 700) the AAT concluded that the notice had been 'given' as required by s.163(2) because it had been properly addressed and sent by prepaid mail to the last address notified by Mrs Shanahan. It did not matter that she did not receive it.

The DSS had therefore correctly cancelled her family allowance in accordance with s.168(1).

What was the decision under review?

The AAT did not find it necessary to consider whether s.183(5) operated to prevent payment of arrears on setting aside the cancellation decision of 1 January 1990, since it found that this was not the decision under review.

Mrs Shanahan had applied for review of the decision 'not to pay arrears of family allowance from 11 January 1990'. The AAT found that this was a decision made on 10 April 1990, in the course of considering her new claim.

Can arrears be paid on the grant of a new claim?

The AAT concluded that a person cannot be paid family allowance until a claim is lodged, and then only from the date of the claim or the date on which it is deemed to have been lodged by virtue