nerate the injured person.

The AAT found that factors (other than the medical factors) which needed to be taken into account included the fact that he had no formal qualifications, and no skills or experience for clerical work. Job prospects in Port Augusta were very poor and Ashton's prospects were exacerbated by his medical conditions. The AAT decided that Ashton was virtually unemployable, considering the nature and extent of his disabilities, his inability to sustain his work effort throughout a normal working day, or week, his low educational standard and the absence of work in the community where a person with those same characteristics may reasonably be expected to perform. He thus satisfied the criteria set out in s.27(a) of the Act.

In finding that Ashton satisfied s.27(b) the AAT considered that he lacked the ability to attract an employer prepared to engage and remunerate him, and that this was directly related to his physical impairment.

Formal decision

The AAT set aside the decision under review and substituted a decision that Ashton was entitled to invalid pension from the date of his claim.

[B.W.]

Invalid pension: incapacity and impairment

HOCKING and SECRETARY to DSS

(No. 7798)

Decided: 5 March 1992 by S.A. Forgie.

Barry Hocking lodged a claim for invalid pension which was rejected by the DSS in December 1989. The SSAT affirmed that decision and Hocking asked the AAT to review the SSAT decision.

The legislation

The AAT said that there was no dispute between the parties that ss.27 and 28 of the *Social Security Act 1947* were the applicable provisions in the present case.

Section 28 provided that a person who met age and residence requirements and was 'permanently incapacitated for work' (or permanently blind) was eligible for invalid pension.

Section 27 provided that a person would be permanently incapacitated for work if the degree of the person's permanent incapacity for work was not less than 85% and at least 50% of that incapacity was directly caused by a permanent physical or mental impairment.

The evidence

Hocking was born on 27 September 1940. After leaving school at the age of 15 and undergoing 4 years' training, he worked as a pharmaceutical assistant for about 20 years, and as a hotel manager for 4 years.

In 1984, Hocking moved to Queensland, where he could not find a job.

Hocking suffered from degenerative changes to his lumbar spine, and suffered pain in his back. He was unable to sit or stand for any significant period without changing his position.

Although his doctor expressed the opinion that Hocking was unfit for work, other medical practitioners said that he could undertake sedentary work, particularly if he reduced his weight, increased his fitness and adopted pain management strategies. Two medical practitioners who had examined Hocking on behalf of the DSS assessed his medical impairment at no greater than 20%.

The AAT's conclusion

The AAT noted that, although Hocking's doctor had said that Hocking was unfit for work, the doctor had not addressed the degree of disability suffered by Hocking. The only evidence of that, the AAT said, was the evidence of the two practitioners who had reported for the DSS.

The AAT accepted their evidence: because they had put the degree of Hocking's medical impairment at no greater than 20%, the AAT was 'unable to find that the degree of any impairment of Mr Hocking's is at least 50% of any permanent incapacity from which he suffers': Reasons, para. 22.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Backdating invalid pension: claim for another payment

CALDERARO and SECRETARY TO DSS (No. 2)

(No. 7038A)

Decided: 5 June 1992 by I.R. Thompson.

Rosanna Calderaro was born in 1959 and left school at the end of 1975. She abandoned a business college course a few months later because of ill health and had never been in paid employment.

In November 1976, Calderaro claimed sickness benefit, which was granted and paid until July 1977. In July 1983, she claimed unemployment benefit, which was granted and paid until October 1986.

On 31 March 1989, Calderaro claimed invalid pension, which the DSS granted from 13 April 1989.

Calderaro appealed to the SSAT against the decision to pay her invalid pension from 13 April 1989. When her appeal was dismissed, she applied to the AAT for review. The AAT affirmed the SSAT's decision: *Calderaro* (1991) 62 *SSR* 874.

On appeal, the Federal Court set aside the AAT's decision and remitted the matter to the AAT for reconsideration: *Calderaro* (1991) 65 *SSR* 924.

The legislation

At the time of the first AAT decision, s.159(5) of the *Social Security Act 1947* gave the Secretary a discretion to treat a claim for one payment under the Act as a claim for another payment that was 'similar in character'.

The Federal Court decided that, although the AAT was correct that Calderaro's 1983 claim for unemployment benefit could not be treated as a claim for invalid pension (because the 2 payments were not 'similar in character'), the AAT had taken too narrow an approach when considering whether the 1977 claim for sickness benefit should be treated as a claim for invalid pension.

By the time the matter came back to the AAT, the 1947 Act had been repealed and replaced by the *Social Security Act 1991* (from 1 July 1991); and provisions in the 1991 Act dealing

with sickness benefit and invalid pension had been repealed and replaced with provisions dealing with sickness allowance and disability support pension (from 12 November 1991).

Section 159(5) 'right' extinguished

The AAT found, on the medical evidence before it, that Calderaro had become qualified for invalid pension in 1982, 6 years after lodging her claim for sickness benefit and 7 years before lodging her claim for invalid pension.

The lodgment of the claim for invalid pension in 1989 gave rise to the Secretary's discretion under s.159(5) of the 1947 Act to treat the earlier claim for sickness benefit as a claim for invalid pension. When Calderaro had requested that the Secretary exercise this discretion, the Secretary was placed under a duty to consider whether to exercise the discretion.

However, the AAT said, Calderaro had not acquired any right to have the discretion exercised in her favour. Because she had no 'vested right' under the 1947 Act, the repeal of that Act and its replacement by the 1991 Act from 1 July 1991 meant that Calderaro's position had to be considered under the 1991 Act, consistent with the decision in *Cirkovski* (1992) 67 *SSR* 955.

The 1991 Act had, until 12 November 1991, conferred a discretion on the Secretary to treat a claim for a pension, benefit or allowance as a claim for invalid pension: s.100(2).

However, the AAT said, the repeal from 12 November 1991 of the provisions relating to invalid pension and sickness benefit and their replacement with provisions relating to disability support pension and sickness allowance had removed any discretion which the Secretary had to treat Calderaro's claim for sickness benefit as a claim for invalid pension. Calderaro had no vested right which might have survived that repeal.

Even if the Secretary's discretion to treat a claim for sickness benefit as a claim for invalid pension had survived the legislative changes, the AAT said, the addition to the 1947 Act, from 1 July 1986, of s.158(2) created a barrier to an exercise of that discretion in favour of Calderaro.

Section 158(2), in combination with s.159(2), deemed a claim for invalid pension 'not to have been made' where the claimant was not qualified for that pension within 3 months of the claim being made.

Calderaro had lodged her claim for sickness benefit in November 1976. It followed that the Secretary and the AAT lacked the power to grant her an invalid pension on the basis of that claim from any date after February 1977.

Sections 158(2) and 159(2) were to be applied in the present matter, the AAT said, notwithstanding that they were introduced some 4 years after Calderaro had become qualified for invalid pension (in 1982). Calderaro had no accrued right to be paid the pension from 1982 as no claim for invalid pension had been made until 1989.

As the AAT was satisfied that Calderaro had become qualified for invalid pension some 6 years after lodging her claim for sickness benefit, the treatment of that claim as a claim for invalid pension (under s.159(5) of the 1947 Act) must lead to the notional claim for invalid pension being deemed not to have been made (under s.158(2) of the 1947 Act) — thereby removing the basis on which Calderaro might have been granted invalid pension prior to her 1989 claim for that pension.

The AAT concluded by observing that the present case was one where an exercise of the discretion given by the former s.159(5) 'would have been appropriate' if the AAT had possessed the power to grant that pension from 1982.

Formal decision

The AAT affirmed the decision of the SSAT not to grant invalid pension before 13 April 1989.

[P.H.]

Recovery of overpayment: alternative benefit?

SECRETARY TO DSS and BURWELL

(No. 7928)

Decided: 10 April 1992 by W.J.F. Purcell.

Jodie Burwell received payments of sole parent's pension between September 1990 and June 1991. She then applied for unemployment benefit. In her claim, Burwell sought additional benefit for her dependent de facto spouse, L.

The DSS then decided that Burwell had been living in a marriage-like relationship with L since 9 March 1991; that she had failed to advise the DSS of the relationship; that she had been overpaid sole parent's pension while living in that relationship; and that she was now indebted to the Commonwealth.

Burwell appealed to the SSAT, which affirmed the DSS decision that she had been overpaid but decided to reduce the amount to be recovered from Burwell by the amount that she would have received if she had been advised by the DSS to apply for unemployment benefit in February 1991.

The DSS applied to the AAT for review of the SSAT's decision.

The evidence

Burwell told the AAT that she had spoken with a DSS officer in February 1991 and asked the officer for advice on her social security entitlements if L were to move in and live with her. Burwell said that, at that time, L was then in Australia on a visitor's visa and was not permitted to work nor eligible for any social security benefits.

According to Burwell, the DSS officer had advised against this course of action, but had offered no advice as to Burwell's eligibility for unemployment benefit if she and L were living together.

Burwell told the AAT that, as L had nowhere to live and they had developed a close relationship, L moved in with her on 9 March 1991. In April 1991, Burwell was confirmed to be pregnant; and, in June 1991, L was granted permanent resident status by the Department of Immigration, Local Government and Ethnic Affairs.

The DSS officer who had interviewed Burwell in February 1991 gave evidence to the AAT. The officer said that he had advised Burwell that she would need to claim an alternative benefit (probably unemployment benefit) if she commenced to live in a marriage-like relationship. A file-note made at the time confirmed this, as did the evidence given by another DSS officer.

The AAT's conclusion

The AAT accepted the evidence given by the DSS officer that Burwell had been advised in February 1991 on the alternative benefits available to her. She had understood that, once she started living in a marriage-like relationship, her eligibility for sole parent's