the application for reinstatement, suggesting instead that he should lodge a new claim for DSP.

The DSS referred to a decision of O'Connor J in *Re Mulheron and Australian Telecommunications Corporation* (1991) 23 ALD 309 where she set out the principles to be applied in considering an application for an extension of time. The matters canvassed included whether the person had rested on his rights; prejudice that would be caused to the respondent; wider prejudice to the general public; the merits of the application; and the fairness as between the applicant and other persons in a like position if an extension of time is granted. The advocate for the DSS further argued that there was little merit in Manoli's case under s.94. An appeal would have to consider his qualification for DSP as at the time of his application (November 1992) or during a period of 3 months immediately from that date (s.100(3)).

The AAT then went on to consider s.42A, as recently amended, and canvassed other decisions in which the issue of reinstatement of the matter to the list were considered.

The AAT concluded that Manoli had received appropriate notice of the 2 conferences and that he had forgotten to attend both. The AAT was not satisfied that he had given a reasonable explanation of his failure to appear, and considered that he had had a reasonable opportunity to present his case. Nor had he provided any further evidence with respect to his qualification for DSP, indicating that the likelihood of his success in his application was remote. The AAT also pointed out that it was open to him to lodge a fresh claim for DSP.

Formal decision

The AAT rejected the application for reinstatement under s.42A of the *AAT Act*.

[R.G.]

Stay application

SECRETARY TO DSS and HERON (No. 9521)

Decided: 23 May 1994 by H.E. Hallowes.

The DSS applied for review of a decision of the SSAT setting aside decisions of 2 authorised review officers of DEET which cancelled Heron's newstart allowance and imposed a 2-week non-payment period. The DSS also asked for an order staying the effect of the SSAT decision under s.41 of the *AAT Act*.

The legislation

Section 41 provides that an application to the AAT for a review of a decision does not, subject to this section, affect the operation of the decision. However, the AAT may stay the operation or implementation of a decision if it considers it appropriate.

The AAT attempted to inform Heron of the application and the orders sought, but he did not appear when it was first listed for hearing. The matter was then adjourned and a new address was found for him. A further letter of advice was sent to him but the two listings notices and the further letter were returned to the Tribunal by Australia Post as unclaimed. Finally, a new address was obtained again and he was advised of a hearing date of 23 May 1994 There was still no appearance but the departmental officer explained that she had arranged for a hand-delivered copy of the DSS's statement of issues to be given to him before the time of the hearing. On this basis, the AAT was satisfied on the balance of probabilities that Heron was aware of the date and time of the hearing.

After considering s.37 of the Act, the AAT went on to consider the arguments for the stay. It was noted that the amount involved was $527.40 and the DSS argued that if the SSAT decision was implemented an issue arose as to recoverability of the amount if the AAT set aside the SSAT decision. The AAT then considered the decision in *Wan and Secretary to DSS* (1992) 72 *SSR* 1035 which was also concerned with the issue or whether or not a person had failed to attend an interview which could be characterised as a 'course', and noted the complexities of these issues. After considering other relevant cases, the AAT decided to stay the decision and was satisfied that Heron was in receipt of some financial support even though he did not provide any evidence on this to the AAT.

Formal decision

The AAT stayed the operation of the SSAT decision.

[R.G.]

Overpayment: income from a family trust

KING and SECRETARY TO DSS (No. 9481)

Decided: 19 May 1994 by J.R. Dwyer, I.L.G. Campbell, W.G. McLean.

The SSAT affirmed a decision of the DSS to cancel payment of newstart allowance to King from 12 May 1993, and to raise an overpayment of $17,713.63 being social security payments made between 15 August 1990 and 11 May 1993 (including tax payments).

King was granted unemployment benefits from 15 August 1990. On 14 April 1993 the DSS wrote to King and advised that a data-matching exercise with the Tax Office had revealed that King had an income of $13,666 for the financial year 1991-92. The amount did not accord with the income advised to the DSS for the same period. King told the DSS that, although he had received $13,666 from the King family trust, he did not know that he had received the money as he was not aware that he was a beneficiary under the trust. He had never actually received the money. King stated that he did not read the tax returns prepared by his father's accountant on his behalf, and did not understand that he money declared was his income. He came to an arrangement with his father, that his father would pay him the tax refund which would have been payable from the Tax Office. King told the AAT that the money (the trust distribution) was not his as it really belonged to his father.

King's father, L. King, told the AAT that money had been distributed to his son under the trust, but that the distribution was on paper only. He stated that this arrangement was 'a way of minimising the tax as far as I was concerned': Reasons, para.21. A letter from the trust's accountant states that King had received a distribution from the trust, but pursuant to an agreement between King and his father this money had been loaned back to the trust for 5 years interest free, in consideration for L. King providing free lodging to his son. Both King and his father denied this agreement. The AAT was given copies of King's tax returns which revealed a distribution from the trust in each year that he had received a social security benefit, except for the year 1992-93.

The law

If the distribution from the trust was considered to be income, it was sufficient to preclude King from receiving any social security benefit. Section 8(1) of the *Social Security Act 1991* defines income as 'an income amount earned derived or received by a person for that person's own use or benefit'. An 'income amount' includes moneys. The AAT concluded that King had received the amounts set out in his tax return. The trust had assets of $776,990, and King was entitled to $97,321 accumulated distributions. There had never been an agreement between King and his father that King would lend the money back to the trust. The AAT did not accept L. King's evidence that he did not know how a loan account worked. He was a self-employed insurance broker who would be well aware of how these financial structures worked. L. King had set up the trust to minimise his tax. He had never advised his son of the distributions from the trust, even when his social security benefits were cancelled. The AAT was satisfied that the statement by King to the DSS concerning his income was incorrect, but found that King did not know that the statement was incorrect when he made it.

The overpayment

Section 1223(1) of the *Social Security Act 1991* provides that a debt to the Commonwealth has occurred:

> 'wherever a social security payment has been made to a person who was not qualified for that payment. Section 1224 in contrast only applied if the amount has been paid because:
>
> "the recipient or another person:
>
> (i) made a false statement . . . "'

(Reasons, para.31)

The issue for the AAT to determine was whether a statement is 'false' simply because it is incorrect, or whether the person must also know that the statement is incorrect. The statements to the DSS by King about his income were incorrect, and as a result of those statements King was paid a benefit he was not entitled to receive. The AAT referred to previous AAT decisions of *Pepi and Director-General, DSS* (1984) 23 *SSR* 270, and *Vocale and Secretary, DSS* (1985) 26 *SSR* 313 in which it had been stated that the corresponding section in the repealed *Social Security Act 1947* did not only apply to those situations where a criminal offence had occurred. In *Cameron* v *Holt* (1980) 142 *CLR* 342, the High Court had said that 'false' must mean knowingly false or misleading, and in a later judgment that the meaning of 'false' is ambiguous, and can mean 'merely "untrue" or "wrong" or can mean "purposely untrue"': Reasons, para. 42. The AAT found that the statements made by King were clearly untrue and therefore false within the meaning of s.1224, in that the statements were wrong or incorrect.

Even if the AAT had not found that the statements made by King were false, it would have been satisfied that King was not entitled to the social security payments paid to him, and that they were not payable, so that a debt to the Commonwealth would have been incurred under s.1223(1).

Waiver or write off

In his appeal King had stated that he had done nothing wrong, and he believed he was entitled to receive the payments. He had not received any distribution from the trust since 1991-92. King obtained employment in August 1993 and since then the DSS had not been recovering the debt from him. The AAT noted that the trust owed King $97,321 and stated that it could see no reason why the overpayment could not be recovered from the moneys owed to King by the trust. As there were funds available to repay the debt, the AAT could see no reason to consider the write off or waiver provisions in the *Social Security Act*.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

Age pension: overpayment

UMANSKI and SECRETARY TO DSS
(No. 9489)

Decided: 23 May 1994 by H.E. Hallowes.

The DSS had decided that Mr Umanski had been overpaid age pension, including rental assistance, totalling $21,536 as he had failed to advise the DSS of income he had received from investments in AGC and IOOF, and from a UK pension, and because he had been paid rental assistance during a period when he had owned a home. The amount of the debt had been recovered by garnishee from Umanski's account with the IOOF. After an internal review by the DSS, the amount of the overpayment was varied to $15,932, being an amount paid within the period from 23 February 1984 to 25 February 1993, and the balance was refunded to Umanski.

The SSAT set aside the decision and substituted a new decision that the amount of the overpayment was $15,272, as it was not satisfied that Umanski had been overpaid rental assistance for a period prior to 21 March 1985.

Umanski contended that the money recorded as invested in his name with AGC and IOOF was assitance given to him by his son who lived overseas and that, in availing himself of the interest, he was receiving no more than the equivalent of assistance received by the average pensioner in Australia who is provided with meals and assistance in kind rather than cash. Umanski had no family on whom to rely in Australia.

From the evidence, the AAT was satisfied that:

- the investments in AGC and IOOF were assets belonging to Umanski and that the interest from the investments was not exempt income under para.8(8)(z) of the *Social Security Act 1991* as a periodical payment or benefit by way of gift or allowance from his son;
- Umanski was not entitled to receive rent assistance after 21 March 1985;
- Umanski failed to tell the DSS of the purchase of a home in which to live; and
- Umanski derived income from an overseas pension and failed to comply with the relevant provisions of the *Social Security Acts 1947* and *1991* with respect to notices sent to him requiring him to notify the DSS of any changes in his circumstances including any variation in his income.

The Tribunal decided that there were no grounds to waive or write-off the debt.

Formal decision

The AAT afirmed the decision of the SSAT.

[B.W.]