the discretion, the reasons for the decision should always relate to the nature of the marital relationship. It also stated that financial hardship alone was not a sufficient reason to exercise the discretion. It would only be exercised if the marital situation was unusual, uncommon or abnormal. The guideline provided that the whole of the circumstances must be examined before deciding to regard someone as not a member of a couple.

The issue

The AAT had to decide whether the circumstances of the marital relationship were 'unusual, uncommon or abnormal' so as to warrant treating Kaddous and Mikhail as not a married couple for the purposes of the payment rate of DSP.

Submissions

The Department argued that there were no grounds to warrant the exercise of the discretion conferred by s.24(1). The AAT commented that financial hardship alone was not a sufficient reason to regard a person as not a member of a couple. The AAT referred to *Hawkins* (1997) 2(8) *SSR* 109 where Hawkins and his Filipino wife had no assets, income, earning capacity or financial resources to pool as their only income was his DSP. As the AAT found that Hawkins' wife was in a position of 'extreme impecuniosity' due to her inability to lawfully earn any income, the Tribunal was satisfied that there did exist grounds warranting that Hawkins be regarded as not a member of a couple. However, the AAT stated that in this case the financial difficulties experienced by the Kaddous family did not amount to 'extreme impecuniosity'.

The AAT stated that it had considered the disabilities of Kaddous. However, the AAT indicated that it had to take into consideration the legal obligations of Dr Ramzy who had signed the assurance of support. Due to the assurance of support, and due to Mikhail's possible entitlement to a pension income, the AAT said that Mikhail had access to financial resources that could be pooled. The AAT was not satisfied that Kaddous should be treated as if he were not a member of a couple.

Formal decision

The decision under review was affirmed. Kaddous would be paid DSP at the married rate.

[H.B.]

Reduction of newstart allowance: whether resignation was reasonable

BENDER and SECRETARY TO THE DFaCS (No. 19990119)

Decided: 8 March 1999 by E.K. Christie.

Bender was a 54-year-old man who lived in Tennant Creek. From 1986, he had been mainly employed as a cleaner, maintenance worker and caterer. From 8 to 12 December 1997, he was employed as a cleaner at the Tennant Creek Hotel. He resigned this job as he was dissatisfied at the reduced hours available to him and the lack of an assurance as to the continued availability of work.

Bender told the AAT he had an oral agreement to commence work as a cleaner at the hotel 7 days a week for 35 hours a week. He said he arrived at the hotel to find that his allocated work had already been done. He had been unable to obtain a concrete reassurance that his work hours would be guaranteed. He told the AAT he resigned as this represented an 'intolerable situation'.

The issue

The AAT had to decide whether it was reasonable for Bender to have resigned his job as a cleaner due to the uncertainty of his hours and the continued availability of work. At issue was whether his newstart allowance should be reduced for breach of his activity agreement.

The legislation

Section 628 of the *Social Security Act 1991* provides that a person's newstart allowance may be reduced where they are unemployed due to their voluntary act, and the Secretary is not satisfied that this voluntary act was reasonable.

Submissions

The Department argued that it was not reasonable for Bender to resign his job. The Department contended that there were other avenues available to him. For example, he could have continued to work and looked for an alternative job or he could have negotiated further with his employer. Bender argued that, in a small, remote town, it was important to maintain his reputation as a good cleaner. He said that if the work was performed by another, it might affect his reputation as a reliable and thorough worker.

The AAT conceded that Bender had to be careful to protect his reputation so as to ensure his future employment prospects, especially given his limited work skills in a remote area. The AAT was satisfied that his unemployment was not due to an unreasonable act.

Formal decision

The AAT set aside the decision. It was not unreasonable for Bender to have resigned his job in these circumstances. Bender would not be penalised for breach of the activity test. Bender's newstart allowance would not be reduced by 18%.

[H.B.]

Newstart allowance: carries on a business; deductions

HAYNES and SECRETARY TO THE DFaCS (No. 19990062)

Decided: 5 February 1999 by B.H. Burns.

Haynes appealed against 2 decisions of the SSAT affirming decisions of the delegate of the Secretary, to raise and recover a debt of newstart allowance of $1247.75 for the period 4 July 1997 to 28 August 1997 and to raise and recover a debt of newstart allowance of $589.90 for the period 29 August 1997 to 9 October 1997.

Haynes was a registered tax agent, who, while in receipt of newstart allowance, conducted his own accountancy business and also did work for H&R Block. Haynes notified his income from both these sources on the fortnightly form he completed for his newstart allowance. In providing this information, Haynes consistently provided figures representing his total net income, after deductions for business losses and outgoings.

Section 1072 of the *Social Security Act 1991* (the Act) states that a person's ordinary income for the purposes of the Act is the 'person's gross ordinary income from all sources . . . calculated without any reduction, other than a reduction under Division 1A'.

Section 1075 in Division 1A provides:

> 'that if a person carries on a business, the person's ordinary income from the business is to be reduced by losses and outgoings that relate to the business and are allowable deductions for the purposes of section 51 of the *Income Tax Assessment Act 1936.*'

The issues

The main issue for the AAT was whether Haynes was an employee of H&R Block in the relevant periods, it being agreed that he was carrying on a business in his private practice.

If he were an employee of H&R Block, then he would not have been entitled to deduct business losses and outgoings against that income. If, however, he were carrying on a business, then the deductions would be allowable. Haynes would then have stated his income correctly, and there would be no debt.

A secondary issue was whether, should the AAT find that a debt existed, it could be waived on the basis of administrative error (s.1237A).

Findings of fact

The evidence was that Haynes had signed a document headed 'Terms and Conditions of Employment', which indicated that he was an employee. He had filled in an employment declaration, which was lodged with the tax office, in order to take advantage of the tax free threshold, while superannuation payments and Workcover levy were paid by H&R Block on his behalf.

Business or employee?

The AAT held that no single criterion will be determinative in deciding whether there is an employment relationship, although there will be certain criteria ordinarily looked to. The AAT quoted, and relied on the statement of Mason J in *Stevens v Brodribb Sawmilling Co. Pty Ltd* (1986) 160 CLR 16:

> 'Rather it is the totality of the relationship between the parties which must be considered . . . Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.'

Wilson and Dawson JJ in the same case, said that other relevant indicia include the right to have a particular person do the work, and the right to suspend or dismiss the person.

The AAT followed the observations of the Court in *Federal Commisioner of Taxation v Barrett* (1973) 129 CLR 395, holding that where the work performed is that of a professional, the lack of supervision by the employer does not derogate from a finding that the professional is an employee.

The AAT held that the fact that Haynes maintained a regular working timetable indicated that he was in fact an employee. The wording of the contract he had signed was also of considerable importance. The other criteria also pointed in the same direction.

With respect to the work performed for H&R Block Haynes was not carrying on a business. He was therefore not entitled to make deductions from that income. As he did do so, the statements of income on the fortnightly forms for the period constituted false statements for the purposes of the Act.

The AAT said that a false statement does not have to have been made intentionally for it to constitute a false statement for the purposes of s.1224 of the Act (relating to debts arising from a recipient's contravention of the Act). The AAT found that Haynes owed debts to the Commonwealth of $1247.75 for the period 4 July 1997 to 28 August 1997 and $589.90 for the period 29 August 1997 to 9 October 1997.

Administrative error and waiver

In relation to the issue of waiver, the AAT did not accept that Haynes had been given incorrect advice by an officer of Centrelink as to the method of filling in the fortnightly forms. Even if the AAT had accepted that incorrect advice had been given, Haynes had made an error in filling in the forms in that he had provided net income, although the form clearly required him to declare the amount before tax and other deductions. As Haynes made that error, the debts could not be attributable solely to administrative error.

Formal decision

The AAT affirmed the decisions under review.

[A.B.]

Compensation payment: preclusion period

JONES and SECRETARY TO THE DFACS
(No. 13549)

Decided: 17 December 1998 by B. Burns.

Background

Jones was seriously injured when he was 14 years old, and was granted an invalid pension (now called disability support pension) on turning 16 in 1988. On 21 November 1995 his damages claim was settled for $1 million including costs. As part of this amount was for lost earnings and lost capacity to earn, the Department applied Part 3.14 of the *Social Security Act 1991*. It effectively deems 50% of a settlement amount to be for economic loss (the 50% rule), and divides that amount by the average weekly earnings (at that time) to work out the number of weeks the person is precluded from receiving specified social security payments. As a result the Department recovered $56,672.90 from the insurers, equivalent to the amount of pension paid to Jones since grant until 30 November 1995, and it refused further payments until 5 June 2004.

The issue

The issue was whether the preclusion period should be reduced by an exercise of the discretion in s.1184(1) of the Act that states:

> **'1184.(1)** For the purposes of this Part, the Secretary may treat the whole or part of a compensation payment as:
>
> (a) not having been made; or
>
> (b) not liable to be made;
>
> if the Secretary thinks it is appropriate to do so in the special circumstances of the case.'

The discussion

Referring to *Secretary to the DSS v Banks* (1990) 23 FCR 416 and *Ivovic and DGSS* (1981) 3 ALN N95, the AAT concluded that a decision-maker must be satisfied the 50% rule would operate to bring about a clearly unjust or unreasonable result in the circumstances of a particular case in order to exercise the discretion in favour of an applicant. It noted that in *Secretary to the DSS and Beel* (1995) 38 ALD 736 the AAT was satisfied that the portion of a lump sum payment for lost earnings was in fact less than the 50% deemed to be so under the Act, and it was an example of a case where the evidence enabled it to say categorically that the