applying for a job approximately once a month. He had also sold dried flowers, which he had purchased in 1980, spending about half an hour a week packing and posting them, and again did not consider the activity income-producing, although in some months he did make a profit. Between December 1982 and October 1983, Mr Hunt had answered 'no' to questions as to whether he had done any casual or part-time work, or received any income or payments.

The AAT considered whether, during the relevant period, Mr Hunt was unemployed, capable and willing to undertake suitable work and had taken reasonable steps to obtain such work.

In relation to the dried flowers, the Tribunal found that up until the end of 1982, his packing and selling of the previously purchased dried flowers was not a business and did not detract from him being unemployed in 1982. In January 1983 Hunt bought more flowers and the AAT concluded that at that point Hunt had decided to establish a business. Further, most of the sales were made at the door, requiring him to be present.

The development of the sale of solar dryers indicated a similar conclusion so that the Tribunal decided Hunt was no longer unemployed by January 1983.

Although there was little evidence, the AAT concluded Hunt was willing to undertake work during 1982, and that it was reasonable for him not to look for unskilled work. By January 1983, the Tribunal thought he should have broadened his job searches and was not taking reasonable steps to obtain work, thus not qualified for unemployment benefit.

The AAT also found that given that Hunt commenced to carry on a business he had failed to comply with the notification provisions in the then s.103A. He had also failed to notify the Department of his income during the period when he was unemployed, and had thus been overpaid unemployment benefit. Both amounts paid were debts due to the Commonwealth (under s.181) and should not be written off under s.186.

[J.M.]

Sickness benefit

RYAN and SECRETARY TO DSS (No. V87/223)

Decided: 17 March 1988 by H.E. Hallowes.

The AAT *affirmed* a DSS decision to reject a claim for sickness benefit from a man who was injured on 22 May 1984. He was charged with various offences on 23 May 1984 while in hospital where he remained until 12 June 1984. He was then transferred to Pentridge Hospital and was formally remanded in custody on 22 June 1984 until his conviction on 3 September 1984. Thereafter he remained in prison under sentence throughout the period in issue. Ryan had been in receipt of unemployment benefit on 22 May 1984 when he received a number of injuries, including gunshot wounds, which, according to the AAT, rendered him incapacitated for work. The issue was his eligibility for sickness benefit, both in the period before his conviction and, subsequently, during his term of imprisonment.

The legislation

In order to qualify for payment of sickness benefit under s.108 [now s.117], it was necessary for the claimant to establish either that he was:

- s.108(1)(c)(i) : incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he has thereby suffered a loss of salary, wages or other income; or
- s.108(1)(c)(ii) : incapacitated for work by reason of sickness or accident ... and that he would, but for the incapacity, be qualified to receive an unemployment benefit in respect of the relevant period.

The period prior to conviction

The AAT decided that although Ryan was incapacitated for work by reason of his accident, he did not suffer a loss of wages thereby. The AAT then considered his eligibility under s.108(1)(c)(ii), by reference to the statutory criteria for eligibility for unemployment benefit, s.107 [now s.116], and determined that throughout the relevant period Ryan was not capable of undertaking paid work and, because of his incarceration in Pentridge Prison, he was unable to take steps to obtain work.

The period after conviction

Although there was evidence that Ryan had written to the DSS on 3 September 1984 seeking advice as to his entitlement to income support, he did not formally lodge a claim for sickness benefit until 20 June 1986. He had been advised by the DSS that 'persons in custody are not eligible to claim a benefit but only to continue to receive an existing sickness benefit, in some circumstances, and generally, only for a limited period'. The DSS rejected his June 1986 claim as he was not considered 'to have suffered either an actual or potential loss of income'. In addition, it was considered that he was not eligible pursuant to s.135THA [now s.167] which at the relevant time provided:

> '(4) Where -
>
> (a) a person would, but for this sub-section, be entitled to be paid a benefit under Part VII [now part XIII]; and
>
> (b) the person is imprisoned in connection with his or her conviction for an offence,
>
> that benefit is not payable to that person in respect of the period during which the person is imprisoned.'

The AAT said it was clear that, prior to the conviction, this section, as it then provided, did not apply to Ryan. [Note however, that it has now been amended: s.167(7) extends the definition of 'a period of imprisonment' to a period spent held in custody pending trial or sentence.]

The AAT went on to decide that, as Ryan was not qualified for sickness benefit, it was necessary to consider the date from which benefit was payable under s.119(2) and (3) [now replaced by s.125(3) and (4)]. Nor was it necessary to consider s.122(1) [now s.128(1)] which provides that cessation of unemployment benefit for a person on unemployment benefit who becomes qualified to receive sickness benefit shall be regarded as a loss of income for these purposes. This was because, although Ryan had been in receipt of unemployment benefit, he had not become qualified to receive a sickness benefit.

[R.G.]

Family allowance: husband's fraud

HARTMAN and SECRETARY TO DSS (No. T87/109)

Decided: 8 April 1988 by R.C. Jennings.

Constanze Hartmann who was unable to read or speak English, was deceived by her husband into signing forms relevant to an application for, and mode of payment of, family allowance. In a subsequent application for payment of the allowance for a second child, the husband had fraudulently signed her name in order to receive the allowance. She claimed that the allowance had

been misappropriated by her husband. The AAT 'reluctantly' concluded that

> 'even if the applicant could demonstrate that none of the family allowance was applied by the husband to the maintenance, training or advancement of the children in respect of whom it was granted, she would have no remedy under the present application.'

The legislation

The relevant sections of the *Social Security Act* were (at the time):

- s.94(2) [now s.79(5)], which provided, in effect, that a wife was the person eligible for family allowance where she and her husband were living together and sharing custody of a child;
- s.99A [now s.86], which prevented family allowance being paid to 2 persons for the same child unless the Secretary to the DSS declared in writing that 2 persons qualified for the allowance which was to be shared between them;
- s.135TC [now s.161], which authorised the Secretary to direct payment of a benefit or allowance (1) to a person to whom it was granted, or (2) to a person on behalf of a person specified in 135TC(1).

Decision

The husband had not been charged or convicted of any offence and the AAT said that even if he were, 'the fact that... payments were recoverable from him could not oblige the respondent to pay any moneys to the applicant'. Section 135TC [now s.161] confers the power on the DSS to pay family allowance to the husband's account and 'is ... in absolute terms. There is no indication of any specific matters which may or ought to be taken into consideration': Reasons, pp.6-7.

The Tribunal found that the DSS could not be held responsible for either the ignorance of an apparent claimant or any fraud committed upon her to secure her signature. Even though a comparison of signatures between the two claims 'would have put any reasonable person on enquiry', there was nothing in the Act to oblige the DSS to satisfy itself that a claim was signed by the person entitled to make it.

Conclusion

The AAT noted that neither the Act nor the claim forms paid attention to circumstances such as those in the present case:

> 'One wonders what special provision has been made to ensure that migrant mothers who have little knowledge of our language and our laws are protected from their own ignorance or the defection and fraud of others, especially one who might reasonably be assumed to be helping them, like a husband. I hope this case is drawn to the attention of those responsible for such matters'.

(Reasons, p.8)

[B.W.]

Overpayment: recovery

DUNCAN and SECRETARY TO DSS
(No. N87/1048)
Decided: 6 April 1988 by A.P. Renouf.

An overpayment of $20 358.90 occurred when Duncan received unemployment benefit while running a business. The AAT found that at the relevant times Duncan was not unemployed, but was 'a self-employed businessman who was forced to fall back upon unemployment benefit as a means of trying to make his business viable and to earn a living for himself and his family'. While the Tribunal accepted that Duncan had taken some steps to obtain suitable work his inability to do so 'was conditioned by his overriding (and natural) commitment to his business'.

Duncan's failure to advise the DSS of the existence of the business misled the respondent into paying benefit which should not have been paid. A debt to the Commonwealth was thereby created. The appellant argued that financial hardship existed and the DSS should write off the debt, or waive recovery by exercising the discretion in s.146(1) [now s.186(1)] of the *Social Security Act*.

The AAT accepted that the financial circumstances were bad but, because the appellant had misled the respondent to obtain money to which he was not entitled, the financial hardship imposed by recovery of the debt was not severe enough to warrant exercise of the discretion in the appellant's favour. The Tribunal did, however, recommend that the rate of recovery should be reduced until the applicant was able to improve his financial situation.

The AAT was unimpressed by an argument that the amount of the overpayment should be reduced by the amount of Family Income Supplement to which Duncan would have been entitled, had he known of its existence and claimed it. It found that, if a person misrepresents his situation, he has to accept that a consequence of the misrepresentation may be the denial of a benefit of a nature different to the one he is seeking.

[B.W.]

MALAJ AND SECRETARY TO DSS
(No. S86/142)
Decided: 20 April 1988 by J.A. Kiosoglous, J.T.B. Linn and D.B. Williams.

The appeal dealt with three separate periods during which the appellant had received unemployment benefit. In the first period the Tribunal accepted that Malaj was employed for part of the period during which he had received unemployment benefit so that part of the benefit was recoverable. The Tribunal decided that, during the other two periods, Malaj was conducting a subcontracting business and was not unemployed within the meaning of the *Social Security Act*. Malaj had earlier been prosecuted successfully but no reparation order was made. The overpayment was recoverable 'in the normal way'.

The AAT did not accept that this was a case in which it was appropriate to exercise the discretion in s.107(3) [now s.116(4)] to disregard the work. A considerable amount of work had been done and the appellant could not rely upon the fact that he did not receive much money for the work. The Tribunal repeated the words of the AAT in *Hine* (1981) 4 *SSR* 38, that unemployment benefit is not a support scheme for inadequately remunerated employment.

[B.W.]

Widow's pension: recovery of overpayment

BYRNE and SECRETARY TO DSS
(No. N87/82)
Decided: 28 March 1988 by Dr A.P. Renouf.

Margaret Byrne appealed to the AAT against a DSS decision to raise and recover an overpayment of widow's pension of $40,385.60 on the basis that throughout the period under review, she was living in a de facto relationship with MrIngo Golab.

Byrne had first moved to premises owned by Golab in October 1977 and in March, 1979 her third child, later acknowledged to be the child of Byrne and Golab, was born. In 1979 she had stated that she received board and lodging in return for services as a housekeeper. In 1980, Byrne had stated that she paid board and lodging to her mother. In 1983, she informed the department that board was paid to her brother, Ingo Golab.

Byrne had admitted to the DSS, when interviewed in February 1985, that she had been residing in a de facto relationship with Golab since 1977. Pension was cancelled and an overpayment, which she offered to repay over a period of time, was raised in October, 1985. Byrne signed an acknowledgement of debt and agreed to recovery being made from her family allowance.