time for Mrs Timmins to have this debt hanging over her': Reasons, para.54. The AAT concluded that the s.146(1) discretion should be exercised to waive half the debt:

> 'We believe that this is warranted because of the complexity of the legislative provisions with which Mrs Timmins failed to comply, the fact that we have found her failure was due to an honest mistake and our view that her error was no doubt contributed to by the fact that even when officers of the Department learned in 1978 that Mrs Timmins had not complied with her obligation under s.45(2) of the Act they took no steps to make sure she understood the nature of her obligation.'

(Reasons, para.54)

Formal decision

The AAT affirmed the decision to raise an overpayment but varied the amount of the overpayment to $1799.

The AAT set aside the decision to recover the whole of the overpayment and substituted a decision to waive half the overpayment and to recover the balance at the rate of $5 a fortnight.

BOUGHTON and SECRETARY TO DSS
(No.D85/1)
Decided: 21 April 1986 by R.A. Layton.

Robert Boughton was granted a supporting parent's benefit in August 1982. He continued to receive that benefit until June 1983, when the DSS cancelled the benefit because Boughton had commenced full-time employment. He told the DSS that he had been working 'on an off' over the past 6 months.

After checking with his employer, the DSS found that Boughton had earned $3413 between February and June 1983 and calculated that he had been overpaid. The amount of the overpayment was eventually calculated at $1072. Boughton asked the AAT to review that decision.

The legislation

The DSS based its recovery decision on s.140(1) of the *Social Security Act*, which provided that an amount paid by way of benefit in consequence of a failure or omission on the part of the payee to comply with the Act was recoverable from the payee as a debt due to the Commonwealth.

Failure to comply with the Act

It was not disputed that Boughton should have advised the DSS of his earnings, so that the level of his benefit could be calculated according to his 'annual rate of income': s.63(2).

The AAT found that Boughton had not notified the DSS of his earnings; he had merely inquired at a DSS office about the effect which increased income would have on his benefit.

Amount of overpayment

Boughton disputed the method used by the DSS in calculating his 'annual rate of income' and the amount of the overpayment. He pointed out that his income had fluctuated considerably throughout the 15 weeks in question. The DSS had averaged his receipts of income over that period.

The AAT referred to the High Court decision in *Harris* (1985) 24 *SSR* 294. The AAT said that the Court had declared that 'the circumstances of the case must determine what is a fair method of ascertaining the current rate of income at a particular time'. The AAT said that, in this case, these principles had been followed and, accordingly, the calculations should not be disturbed.

Discretion

Boughton then argued that the DSS had failed to extend to him the 'earnings concession'. Under DSS procedures at the time when the overpayment occurred, this concession had been available to pensioners and supporting parent beneficiaries with variable incomes. However, the DSS only extended the concession if a pensioner or beneficiary applied for it in writing. If Boughton had been granted the concession, the overpayment would have been calculated at $752.

However, Boughton had not applied for the earnings concession, because the DSS had not told him of its availability. The AAT said that, because Boughton had not attempted to conceal his earnings and because he could have received the benefit of the earnings concession, the discretion in s.140(1) should be exercised so that the amount recovered from Boughton 'should be no greater than the amount which would have been recoverable had the applicant been entitled to an earnings concession': Reasons, para.44

Formal decision

The AAT set aside the decision under review and directed that the amount recoverable from Boughton be no greater than $752.

Unemployment benefit: work test

MALIN and SECRETARY TO DSS
(No Q85/69)
Decided: 25 March 1986 by J.B.K. Williams.

Robert Malin, in partnership with his father and brother, owned a 400-acre and cattle farm. Malin worked full-time on the farm from June to December each year - the sugar cane season. But, during the balance of each year, when there was no work for him on the farm, he tried to find employment off the farm. In December 1984, Malin claimed unemployment benefit from the DSS and when his application was rejected he asked the AAT to review that decision.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person meets age and residence requirements and if the person satisfies the Secretary that he was 'unemployed' during the relevant period (and meets the other elements of the 'work test').

'Unemployed'?

Malin told the AAT that, when he had claimed unemployment benefit in December 1984, he had been uncertain about whether he would return to the farm in the following June because of the low prices then prevailing for sugar cane. He also told the AAT that in the year to June 1984, his taxable income from the farm had been $4,631. When the Tribunal asked Malin if he would have given up any job in order to return to the farm during the sugar cane season, Malin said that this was a hypothetical question which he would answer when it arose.

The AAT said that the central question was the same question as that asked in such cases as *Guse* (1981) 6 *SSR* 62 and *Vavaris* (1982) 11 *SSR* 110 - was Malin 'so seriously engaged in an economic enterprise, that is conduct of a business, as to lead to the conclusion that he is not unemployed':

> '[The] evidence indicates to me that despite serious problems presently facing those engaged in the sugar industry, the applicant has not abandoned the farm in preference to employment outside the farm. He is in my view still engaged in a serious business enterprise, notwithstanding the substantial diminution in income from that source.
>
> In all the circumstances, I think it true to say, as was observed in *Re Vavaris* that the applicant is underemployed rather than unemployed within the meaning of s.107(1)(c) . . . It appears to me that in colloquial or popular language the applicant is a cane farmer and not an unemployed person.'

(Reasons, pp.7-8)

Formal decision

The AAT affirmed the decision under review.