Administrative Appeals Tribunal decisions

Overpayment: discretion to waive recovery

BUHAGIAR and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. N81/1)
Decided: 23 October 1981 by A.N. Hall, L.G. Oxby, M.S. McLelland.

In September 1977, Michael Buhagiar was injured in the course of his employment. In May 1978 the DSS granted him an invalid pension. This was paid at the maximum rate, as Buhagiar had no income.

On 6 November 1978, Buhagiar advised the DSS that he had been granted weekly payments of workers compensation back-dated to September 1977, but that no payments had yet been made to him.

On 15 November 1978, Buhagiar was paid the arrears of compensation due to him, less the sum of $1554 paid direct to the DSS – the amount of sickness benefit which had been paid by the DSS to Buhagiar up to May 1978 (see s.115 of the *Social Services Act*).

From then on, Buhagiar received weekly payments of workers compensation (the smallest of these weekly payments being $80). However, the DSS continued to pay him an invalid pension at the full rate until 2 August 1979, by which time the DSS had established that Buhagiar was being paid $94 a week workers compensation. From 2 August 1979 DSS reduced Buhagiar's invalid pension from $58.20 per week to $16.20 a week, and cancelled his supplementary rent assistance.

In June 1980, the DSS advised Buhagiar that there had been an overpayment of invalid pension (between November 1978 and August 1979) of $1663.20, which would be recovered by reducing his invalid pension by $18 a fortnight. An SSAT recommended that all but $14 of the overpayment be written off because it was due to office error. However, a delegate of the Director-General affirmed the decision to proceed with recovery but reduced the claimed overpayment to $1360.40.

Buhagiar then applied to the AAT for review of that decision.

The facts

The AAT found the following facts:

(1) that Buhagiar had notified the DSS of the impending workers compensation payments on 6 November 1979;

(2) that the DSS had received notice of the commencement of those payments on or about 15 November 1979 when the sickness benefits were repaid to the Department by Buhagiar's employer;

(3) that Buhagiar had telephoned the DSS twice (around December 1978), queried the level of his invalid pension and been told that the amount was correct;

(4) the the DSS had telephoned Buhagiar on 22 May 1979 and Buhagiar had misled the DSS by saying he was receiving no workers compensation;

(5) that the DSS had sent Buhagiar a form in June 1979, which had been returned (by some unknown person) to the DSS with the information that he was receiving no workers compensation;

and

(6) that the DSS had been told by Buhagiar's former employer, in mid-July 1979, that Buhagiar was being paid workers compensation of $94 a week.

The legislation

Action to recover the overpayment was taken under s.140(2) of the *Social Services Act:*

> 140.(1) Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance, endowment or benefit which would not have been paid but for the false statement or representation, failure or omission, the amount so paid shall be recoverable in a court of competent jurisdiction from the person to whom, or on whose account, the amount was paid, or from the estate of that person, as a debt due to the Commonwealth.
>
> (2) Notwithstanding anything contained in this Act (other than sub-section (3) of this section), where, for any reason, an amount has been paid by way of pension, allowance, endowment or benefit which should not have been paid, and the person to whom that amount was paid is receiving, or entitled to receive, a pension, allowance or benefit under this Act (other than a funeral benefit under Part IVA), that amount may, if the Director-General in his discretion so determines, be deducted from that pension, allowance or benefit.
>
> (3) An amount referred to in sub-section (2) that has been paid otherwise than by way of child endowment under Part VI shall not be deducted from child endowment payable under Part VI.

Section 140(2) raised two issues: first, had there been an overpayment and, second, should the discretion be exercised to recover that overpayment by deduction from a current pension allowance or benefit.

Sub-section (2) allows recovery, the AAT said, in a wide variety of cases – recovery action by way of deduction from a current pension could

> be taken if for any reason the amount that has been paid should not have been paid. The breadth of these words is such as to preclude, in our view, any limitation of sub-section (2) to circumstances of fault on the part of the pensioner such as those envisaged by sub-section (1) of s.140 (cf. *Re Harris and Director-General of Social Services* (No.V80/14) as yet unreported decision brought down on 28 August 1981). Sub-section (2) is capable of applying whether the fault for the overpayment rests with the pensioner, with the Department, whether the fault is shared or, indeed, whether there is no fault on the part of anyone. It is capable of applying whether or not the overpayment would be recoverable at law. The sub-section requires no more in our view than that on a consideration of the circumstances of a particular case (which will necessarily be in retrospect) it should appear that for some reason an amount has been paid which ought not, if the Act had been correctly and properly administered, have been paid.
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> 31. However, whilst considerations of fault or recoverability at law are not relevant in determining whether or not an amount has been paid which 'should not have been paid', those considerations must in our view be included in the range of considerations relevant to a proper exercise of the discretion conferred by the sub-section. The breadth of the discretion whether to deduct or not to deduct the overpayment is confirmed by the language in which it is conferred. In deciding whether or not to exercise the discretion the Director-General must, we think, be guided by principles of consistency, fairness and administrative justice (see fairness and administrative justice (see *Drake (No. 2) and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634, 639; and *Nevistic and Minister for Immigration and Ethnic Affairs* (1978) 34 ALR 639, 647 per Deane J.

(Reasons for Decision, paras. 30–31)

15 November 1978 to 22 May 1979

The AAT was satisfied that the primary cause of the overpayment in this period 'was the failure to follow up effectively the information conveyed by the applicant on 6 November 1978 regarding his award of compensation', information which was supplemented when the DSS received the repayment of sickness benefits on or about 15 November 1979.

This overpayment was not caused by any false statement or failure to comply with the *Social Services Act* by Buhagiar and so was not a case to which s.140(1) applied.

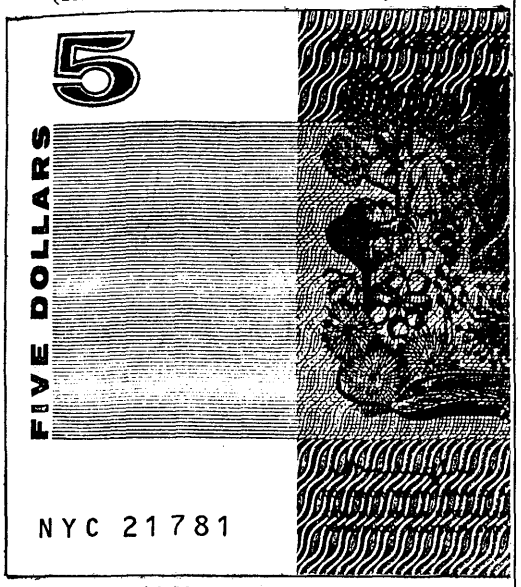
Nor was it an overpayment which could be recovered, as one not authorised by the Act, under the common law principles applied in, for example, the *Auckland Harbour Board* case [1924] AC 318 or *Commonwealth* v *Burns* [1971] VR 825. And it was, at least, doubtful whether the money was recoverable because it had been 'paid under a mistake of fact': on this point, see Reasons for Decision, para. 36.

Given these points, the AAT took the view that the discretion conferred by s.140(2) to recover by making deductions from a current pension should not be exercised:

> Despite the breadth of s.140(2), it cannot, we think, have been intended that, as a matter of course and without regard to the individual circumstances of each case, a pensioner who has an ongoing entitlement to a pension should be exposed to a greater liability for recovery of pension overpaid than a person who has ceased to be a

pensioner and against whom the only available remedy is an action at law. Having regard to the fact that, in our view, serious doubts exist as to the recoverability at law of the overpayment, that the prime cause of the overpayment was administrative error and that the applicant's circumstances are such as to make it inequitable that he should now be obliged to repay the overpayment consequent upon the failure of the Department to adjust the applicant's rate of pension in November 1978, we think that the discretion in s.140(2) should not be exercised.

(Reasons for Decision, para. 37)



22 May 1979 to 2 August 1979

The AAT concluded that the DSS had been misled by Buhagiar in the telephone conversation of 22 May 1979. If the DSS had been told (on that date) that Buhagiar was receiving workers compensation payments it could, after obtaining confirmation from his former employer, have adjusted the rate of pension from the pension pay day on or about 21 June 1979.

Accordingly, the overpayments made between 21 June 1979 and 2 August 1979 were 'moneys which should not have been paid and which would not have been paid but for the applicant's false statement': Reasons for Decision, para. 40.

Buhagiar's legal representative had submitted that the AAT should, in exercising the s.140(2) discretion, take into account the financial hardship which recovery of the overpayment would inflict. And he produced evidence that his weekly income of $27.65 was more than committed to basic living expenses. On this point, the AAT said:

> 42. In relation to a pensioner such as the applicant who is seriously disabled and obliged to live on a very low fixed income, it is virtually inevitable that there will be some hardship imposed if any part of that income is withdrawn. If hardship alone were a sufficient ground for relieving a pensioner from his liability to repay an amount which 'should not have been paid', the cases in which the discretion to make deductions could be exercised might well be severely limited. In the present case, having regard to the fact that there is an amount of pension which should not have been paid and which, in our view, it is proper to recover, we have concluded that considerations of hardship should only be taken into account in relation to the rate of deductions from Mr Buhagiar's ongoing pension. In this regard, as a result of our decision the recoverable overpayment will be considerably reduced and the level of deductions can be adjusted accordingly. Having regard to the applicant's financial commitments we consider that deductions at the rate of $6 per fortnight would be appropriate.

(Reasons for Decision, para. 42)

The AAT then set aside the decision under review and remitted the matter to the Director-General for reconsideration in line with the directions that the recoverable overpayment was to be restricted to the period after 21 June 1979 and that deductions from Buhagiar's current pension should be only $6 a fortnight.

[**Comment:** This is a very significant decision: it demonstrates the AAT's capacity to re-exercise the broad discretions given to the Director-General under the *Social Services Act;* it emphasizes the Tribunal's concern that these discretions be exercised consistently, fairly and in a way which will promote the general policy of the Act; and it indicates that any attempt by the DSS to recover an overpayment under s.140(2) should be carefully examined. That examination might reveal that the overpayment was due to the Department's oversight or error, in which case there is a strong argument for the s.140(2) discretion being exercised *against* recovery. Or it might show that recovery would impose financial hardship, in which case the discretion can (and should) be exercised to reduce the level of the deductions (and, consequently, increase the time over which the deductions will need to be made).]

McAULEY and DIRECTOR-GENERAL OF SOCIAL SERVICES
No. Q81/17

Decided: 20 July 1981 by J.B.K. Williams, I. Prowse, J.G. Billings.

Karen McAuley had been overpaid child endowment by the DSS. The overpayment, of $1288, was apparently due to Departmental oversight. The overpayment represented three years' payment of child endowment for two children who were not in McAuley's custody. The DSS decided to recover the overpayment by withholding the child endowment payable for McAuley's third child.

This decision was made under s.140(2) of the *Social Services Act* which allows the Director-General, 'in his discretion', to deduct an overpayment from any pension, allowance or benefit currently being paid. The Director-General had refused to exercise this discretion in favour of McAuley.

McAuley did not appear, nor was she represented, at the AAT hearing. Accordingly the Tribunal heard no evidence about the applicant's financial situation; nor did it hear any argument about the nature of the discretion in s.140(2). (See, for example *Buhagiar* in this issue of the *Reporter*.) The AAT simply said there was no evidence that withholding the child endowment would impose financial hardship on McAuley and there was no doubt that McAuley had received the payments over a long period in the knowledge that she was not entitled to them. The Tribunal exercised the discretion (in s.140(2)) 'in the same manner as was done by the Director-General' and affirmed the decision under review: Reasons for Decision, para.9.

Invalid pension: permanent incapacity

BRADLEY and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/29)

Decided: 19 August 1981 by Ewart Smith, M. Glick and W.B. Tickle.

Robert Bradley was injured while working in September 1978. He was then aged 33. He was awarded a lump sum settlement of his workers' compensation claim on 27 July 1980.

He claimed an invalid pension from the DSS on 26 June 1980 but, on 1 August 1980, the DSS rejected this claim on the ground that he was not permanently incapacitated for work. Following an unsuccessful appeal to an SSAT, the DSS decision came up for review by the AAT.

The qualifications for invalid pension are prescribed in ss. 23 and 24 of the *Social Services Act:*

> 23. For the purposes of this Division, a person shall be deemed to be permanently incapacitated for work if the degree of his permanent incapacity for work is not less than eighty-five per centum.
> 24. (1) Subject to this Act, a person above the age of sixteen years who is not receiving an age pension and—
> (a) is permanently incapacitated for work or is permanently blind; and
> (b) is residing in, and is physically present in, Australia on the date on which he lodges his claim for a pension,
> shall be qualified to receive an invalid pension.

A conflict of evidence

The dispute before the AAT was essentially one of opinion — that is, it involved a conflict between the assessments of Bradley's medical advisers and those of the specialists who examined him for the DSS.

A general surgeon, who had examined Bradley in March and July 1980 and compiled a detailed report, gave evidence on behalf of Bradley. He said that Bradley had suffered an acute low back strain superimposed on mild degenerative disc disease. He had continuing low back pain and restricted movement. He was permanently incapacitated for heavy work but, in the absence of psychiatric problems, would be fit for a suitable light job. But he did have severe psychiatric problems: 'taking the two problems together I doubt if this man would be capable of holding down any full-time job at the moment.' And the surgeon's opinion was that the mental depression was unlikely to improve and, unless it did, his back would not make any progress.

Bradley's psychiatrist, who had seen him