

of her UK pension) and 18 January 1979 (the date by which, in the normal course of its administration, the DSS would have acted on the information given to it on 16 November 1978 and adjusted Livesey's supplementary assistance). The amount of overpayment was calculated as \$1080, to be recovered by deduction of \$10 a fortnight from Livesey's age pension.

The DSS did not seek to recover the overpayment between January 1979 and March 1980, taking the view that this overpayment was due to its own failure to act on the information supplied by Livesey.

Following an unsuccessful appeal to an SSAT Livesey applied to the AAT for review of this decision. (Shortly before the AAT hearing, the rate of deductions was reduced by the Director-General to \$5 a fortnight.)

Overpayment: what was the 'effective cause'?

Section 140(2) of the *Social Services Act* gives a very wide power to recover overpayments made 'for any reason'. But the DSS had dealt with the recovery of the overpayment by calculating what amount could be recovered under s.140(1) of the Act. This sub-section authorizes recovery, 'in a court of competent jurisdiction', of any payment made 'in consequence of a false statement or representation, or . . . a failure or omission to comply with any provision of this Act', if the payment 'would not have been paid but for the false statement', omission etc.

The AAT agreed (as had the AAT in *Buhagiar*, 4 SSR 34) that this was the right approach:

In any event, I do not consider, as a matter of discretion, that any more should be recovered from the applicant than would be recoverable if the overpayment were determined in accordance with the provisions of s.140(1) of the Act (cf. *Re Buhagiar*).

(Reasons for Decision, para. 18)

Approaching the overpayment on that basis, the critical question was: 'what was the effective cause of the overpayment?' Was it Livesey's failure to notify the DSS before November 1978? Was it the Department's failure to conduct any review of Livesey's pension for five years? [Similar questions, arising out of the Department's abandonment of regular pension reviews between 1975 and 1978, were considered by the AAT in *Gee*, 5 SSR 48; *Woodward*, 5 SSR 49; *Forbes*, 5 SSR 50; and *Matteo*, 5 SSR 50.]

The AAT said there was every reason to believe that, if the pension had been reviewed annually, the DSS would have learnt of Livesey's UK pension earlier. But, said the AAT, it was Livesey's responsibility under s.30B(1) to notify the receipt of the UK pension:

The Department had no means of knowledge of the fact unless she told them (cf. *Re Harris*). She had no reason to assume that the Department was aware of the fact (cf. *Re Forbes*). It was not as if she had told the Department in 1974 and the Department had failed to act on the advice (cf. *Re Buhagiar*). I am satisfied therefore that the applicant's default was the effective cause of the overpayment and that there was an amount of

pension (namely an allowance by way of supplementary assistance) which should not have been paid to her and which is properly recoverable under s.140(2) of the Act.

(Reasons for Decision, para. 14)

The AAT decided that the overpayment 'ceased to be "in consequence of" the applicant's default when her notification of 16 November was received, by the Department (namely 22 November 1978)', rather than the date by which the DSS claimed it would normally have reacted to that notification (19 January 1979).

The AAT concluded by varying the decision under review and directing 'that the amount of overpayment be recalculated on the basis that a recoverable overpayment of supplementary assistance did not commence to accrue until 7 February 1974 and that it ceased to accrue on 22 November 1978': Reasons for Decision, para. 19.

PEAKE and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/8)

Decided: 23 February 1982 by G. D. Clarkson.

In this case Dorothy Peake, who had been granted a widow's pension in January 1973, sought a review of a decision that she had been overpaid by \$5505.10, which the DSS proposed to recover by deducting \$40 a fortnight from her pension.

Peake had worked as a part-time cook between 1973 and 1979. She had notified the DSS of her income from this job in January 1973 and February 1974 (when the income was \$36.91 a week). The DSS then suspended its regular pension reviews until 1979, when it sent Peake a review form. She completed and returned this, revealing a current weekly income of \$93.57.

[On this evidence, Peake could have argued that 'the effective cause' of the overpayments between 1974 and 1979 was the DSS's failure to review her pension (and income)—see *Forbes*, 5 SSR 50; and compare *Matteo*, 5 SSR 50; and she could have argued that, as recovery under s.140(1) would not be possible, because her failure or omission was not 'the effective cause', so the discretion to recover by deductions under s.140(2) should not be used—see *Buhagiar*, 4 SSR 34; and *Livesey*, in this issue of the *Reporter*. But these arguments were not raised before, or by, the AAT.]

The only issue raised before the AAT was whether the rate of repayment (fortnightly deductions of \$40 from Peake's pension) was too high; should the discretion in s.140(2) be used to fix a lower rate of deduction?

The Tribunal considered Peake's income and her expenses. The weekly income amounted to \$169.45 (from wages, pension and board paid by a son). She calculated her expenses at \$178 a week. The AAT thought that the estimate of expenses could not be completely accurate but admitted that a woman trying 'to provide a home for two sons would find any deduction from an income of about \$170 a hardship. The problem is to decide what degree of hardship should be imposed at the present time':

Reasons for Decision, p.4.

The decision about 'what degree of hardship' the AAT would impose should be made, the Tribunal said, by reference to existing facts. These facts included the fact, accepted by the AAT, that her income was 'fully committed in maintaining herself and her children and repaying the mortgage on the house'. The Tribunal arrived at the following result (by a process of reasoning which was not spelt out in its reasons, except for its reference to imposing some 'degree of hardship'):

Having regard to all the present circumstances and the fact that the department concedes that there was no misrepresentation by the applicant I think the amount of the fortnightly deductions should be reduced to \$20 per fortnight. The applicant should understand that just as she may apply to the department to accept smaller instalments if her circumstances worsen so the department may decide to increase the amount of the deductions if her circumstances change for the better.

(Reasons for Decision, p.5)

AAT appeals

The following statistics have been compiled from information supplied by the Department of Social Security:

	Nov. 1981	Dec. 1981	Jan. 1982	Feb. 1982
Applications for review lodged	68	49	42	54
Decided by AAT	9	10	5	7
Withdrawn by applicant	10	9	1	1
Conceded	7	6	2	14
No jurisdiction	1	0	1	1
Awaiting decision at end of month	480	504	537	568
Medical appeals	48	27	33	36
Other appeals	20	22	9	18
ACT	0	02	0	0
NSW	12	8	5	5
NT			0	1
Qld	28	11	13	26
SA	3	5	5	0
Tas.	3	5	1	1
Vic.	21	14	9	2
WA	1	4	0	1

contd. from p.64.

- Measey : 32
- 'willing to work' McKenna : 13
- Tacey : 54
- Thomson : 12
- Widow's pension
- cohabitation rule Ferguson : 55
- R.C. : 36
- Tang : 15
- Waterford : 1
- continuous residence in
- Australia Danilatos : 29
- overpayment Peake : 63
- Whyte : 37