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Administrative Appeals Tribunal decisions

Overpayment: what was the 'effective cause'?

HALES and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/245)

Decided: 23 April 1982 by J. O. Ballard.

In July 1973, Jeanette Hales (who supported an epileptic daughter and worked for the PMG's Department) was granted a reduced supporting mother's benefit of $13.80 a fortnight and told that she should notify the DSS of any increase in her income from her job. In January 1974, she wrote to the DSS stating that her income had increased and her pension was adjusted. In July 1974, she received and truthfully filled out a pension entitlement review form, and the DSS made enquiries of her employer as to her income. As a result of these checks her pension was again adjusted.

In May 1978 the applicant received a similar review form. She stated her then income and the DSS cancelled her supporting mother's benefit because of her income.

The letter informing her of the cancellation contained no suggestion that she would have to repay any amount. In March 1980, the DSS wrote to the applicant telling her that, because of increases in her income, she had been overpaid from 1974 to 1978 and asking for a refund of $3564.30.

Following an unsuccessful appeal to an SSAT, Hales applied to the AAT for review of this decision.

Basis for recovery

The DSS's right to recover the overpayment depended on s.140(1) 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.

The 'effective cause'—DSS responsible

Before the AAT, Hales conceded that she had been overpaid and that she had failed to comply with the notification requirements of s.74(2) of the *Social Services Act*. But she claimed that this failure had not caused the overpayment.

The Tribunal found the following facts:

(a) that the DSS knew from the start that the applicant was employed;

(b) the applicant was actually told that pensions were reviewed each year to ensure that the correct rate was paid;

(c) the DSS did not in fact rely on her statement of her income but made their own enquiries of her employer; and

(d) that it was the applicant's genuine belief that review would be instituted by the DSS.

The Tribunal continued:

> 14. Nevertheless on the facts of this matter the Department knew from the beginning that the applicant was employed. The applicant was actually informed that pensions were reviewed each year 'to ensure that the correct rate of pension is being paid'. It seems from the s.37 [*AAT Act*] statement that the Department did not in fact rely on the information supplied under s.74 but sought its own information as to the applicant's wages. I accept that it was the applicant's genuine belief that the manner of review would be instituted by the Department. On these facts the applicant was given to understand that there would be departmental review annually. In my view it is proper to regard the failure of the Department to perform its functions as the substantial or dominating cause of the overpayment. The applicant's failure can best be regarded as a contributory cause but not the effective cause.

In this issue:

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The Tribunal went on to say that, even if it was wrong on this point, any substantial recovery would cause extreme hardship to the applicant and her invalid pensioner daughter. (At the time of the hearing her daughter was 16 years old and in receipt of an invalid pension due to her epilepsy.)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General for reconsideration with the direction that recovery should be limited to any overpayment in first pension year after the 1974 review.

Invalid pension: permanent incapacity

KATSANTONIS and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/512)

Decided: 29 June 1982 by R. K. Todd.

Anotonios Katsantonis was born in Greece in 1936. He had 'quite minimal schooling' and migrated to Australia in 1962. He worked in factory labouring jobs until he qualified, through a course at RMIT, as a welder in 1975.

In May 1977 his back 'stuck' while pushing some heavy metal. He settled his workers' compensation claim for around $21 000 and was granted an invalid pension in 1979. In March 1981, the DSS cancelled his pension. He obtained another job (at Rocka Steel) as a welder but, after three days, his back 'stuck' again when he tried to lift some metal and he had not worked since then.

He applied to the AAT for review of the cancellation of his pension.

The evidence: conflict resolved in applicant's favour

The AAT found that Katsantonis suffered from spondylosis of his spine, soft tissue inflammation and chronic muscle spasm. The The Tribunal accepted Katsantonis' evidence that he suffered real and continuing pain despite the view of an orthopaedic surgeon (consulted by the DSS) that Katsantonis was not genuine. The Tribunal said:

> From the whole of the evidence and from the impression which I formed of the applicant, I believe that he would prefer to be a working man and I reject any assertion that he is making any attempt to mislead. He was previously a hard working man, and I do not believe that he would choose to manufacture symptoms for the purpose of obtaining the meagre financial benefits of the invalid pension as against the wages of the skilled tradesman that he is.

(Reasons for Decision, para. 16)

Competition for jobs

As to the suggestion that he might be fit for light duties, the Tribunal heard evidence that the Richmond (Victoria) CES office had received no vacancies for a watchman's position for the last eight months and that lift driving was not a readily available position. There were other reasons why Katsantonis was unlikely to obtain such work:

> While unemployment owing to economic conditions is not a relevant factor as such in the context of assessing incapacity for work for the purposes of ss.23 and 24 of the Act, it is I think appropriate to note that these circumstances do emphasise the ability of an employer to choose between a man who is fit and active and one who is not . . . Even if these economic circumstances be put on one side, I may still assume that the employer will be able to make such a choice.

(Reasons for Decision, para. 20)

In any event, the Tribunal thought that Katsantonis' medical condition prevented him from undertaking that type of work (Reasons for Decision, para. 12).

Workers' compensation risk

Finally, the AAT said it was relevant to consider that Katsantonis' condition and workers' compensation history would discourage any employer from hiring him, even for 'light duties':

> Even were he the only applicant . . . is it conceivable that an employer would accept him knowing of his history? I think not. And given that he has now a history of having tried again, and having failed, and of having added a second claim for compensation, the position is even more hopeless. It all adds up, as I find, to his being permanently incapacitated for work, the degree thereof being at least 85%, and probably 100%. [T]his has been the position at all times since the date of cancellation of pension, the job at Rocka Steel having been obtained only because the employer was ignorant of his history.

(Reasons for Decision, para. 22)

Formal decision

The AAT set aside the decision under review and remitted the matter for reconsideration in accordance with the direction that Katsantonis' invalid pension be restored as from the date of cancellation.

MIHAILOV and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/109)

Decided: 19 April 1982 by T. R. Morling J.

Mihail Mihailov was born in Bulgaria in 1925 and migrated to Australia in 1970. He worked as a labourer and machine operator until 1974 when he stopped working because of back pains, headaches and rheumatism.

An application (in 1980) for an invalid pension was rejected by the DSS. Mihailov applied to the AAT for review of this rejection.

The evidence

The AAT considered medical evidence from five doctors on Mihailov's physical and psychiatric condition. This evidence established that Mihailov had a moderate physical incapacity in his spine and left wrist, which left him able to perform light work. However, he also had a 'considerable obsession with his own physical disability' which was not likely to respond to psychiatric treatment and which prevented him from working.

An employment officer from the CES told the AAT that it would be 'extremely difficult' to find employment for Mihailov. This was due to several factors: his physical and psychiatric problems, his age and the deflated state of the labour market.

'Incapacity': are non-medical factors relevant?

The AAT endorsed the views expressed in *Panke*, (1981) 2 *SSR* 9, *Bowman* v *Repatriation Commission* (1981) 34 ALR 556, that 'incapacity for work' must be assessed by looking at the types of paid work available in the community which the applicant could reasonably perform.

This meant that the AAT must consider Mihailov's employment prospects. The DSS argued that these prospects were poor because of Mihailov's age (56), lack of education and skills and long absence from the work force. Because his poor prospects were partly based on these factors, so the DSS argument went, he did not have an 'incapacity for work' within s.24 of the *Social Services Act*. He was not qualified for invalid pension, the DSS argued, only for unemployment benefit.

The AAT did not resolve the critical issue raised by this argument (that is, the relevance of non-medical factors in determining incapacity). The Tribunal simply said that the DSS argument did not give 'full weight to the medical evidence in the case'. The Tribunal concluded:

> In my opinion that evidence demonstrates that the applicant's physical and psychiatric problems effectively and permanently deprive him of the capacity to find an employer who is prepared to employ him. They render him unable to earn a living by gaining employment in the only labour market which is open to him.

(Reasons for Decision, p.15)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Mihailov be granted an invalid pension.

MILOSALJEVIC and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/534)

Decided: 14 May 1982 by A. N. Hall.

Zarko Milosaljevic was born in Yugoslavia in 1933 and migrated to Australia in 1959. He was employed on construction work, boiler making, painting, casual restaurant work, security work and truck driving. In 1977 he fell and injured his back and in 1980 he aggravated this injury. His claim for an invalid pension was rejected by the DSS.

Conflicting evidence: applicant believed

There was some conflict in the medical evidence given to the AAT. The AAT accepted the views of Milosaljevic's doctors that his back injury disabled him from any work involving bending, lifting or maintaining a fixed position. They rejected the opinion of an orthopaedic surgeon called by the DSS, that Milosaljevic was not genuine and could undertake a variety of jobs. This rejection was largely based on the AAT's belief that Milosaljevic was a truthful and industrious person.