

Federal Court Decision

Overpayment: action to recover

DIRECTOR-GENERAL OF SOCIAL SERVICES v HALES

Federal Court of Australia

Decided: 5 May 1983 by McGregor, Lockhart and Sheppard JJ.

This was an appeal from the decision of the AAT in *Hales* (1982) 8 SSR 73, where the Tribunal had decided that the Director-General could not recover from Hales overpayments of supporting mother's benefit.

The recovery was based on s.140(1) of the *Social Security Act* which provides that a payment is 'recoverable . . . as a debt due to the Commonwealth' if that payment was made 'in consequence of a failure or omission to comply with any provision of this Act' and 'would not have been paid but for the . . . failure or omission'.

While it was agreed that Hales had failed to inform the DSS of increases in her income (as the Act obliged her to), the Tribunal found that the DSS's failure to review her benefit had been the 'dominating cause of the overpayment' and it was not, therefore recoverable.

The Director-General then appealed to the Federal Court, under s.44 of the *AAT Act*, 'on a question of law'. The appeal raised three questions of law.

1. Jurisdiction to review s.140(1) recovery
The Director-General argued that the raising of an overpayment under s.140(1) did not involve a 'decision' under the *Social Security Act* merely a 'step in the process of getting the money back'. Two of the three judges rejected this argument.

McGregor J. accepted the Director-General's argument: he assumed that, to be a 'decision' (and so reviewable by the AAT) the Director-General's action must have some legal consequences; but raising an overpayment under s.140(1) had no legal consequences because the Director-General would still have to sue and establish, in a court, that the money was owing. He distinguished (as involving 'significantly different' facts) the earlier decision in *Hangan* (1982) 11 SSR 115, where the Federal Court had decided that s.140(1) did involve a reviewable 'decision'.

However, Sheppard J, who might otherwise have agreed with McGregor, felt obliged to follow *Hangan* (which, he said, was indistinguishable from this case); and so he decided that there had been a 'decision' for the AAT to review.

The third judge, Lockhart J, also concluded that s.140(1) involved a reviewable decision: but he spelt out his own reasons in detail, rather than merely following *Hangan*:

The decision of the Director-General to recover the overpayments from Mrs Hales, although not directly affecting her legal

rights and obligations, plainly has a real practical effect on her. She becomes liable to be sued, she is required to defend or not defend the proceedings when commenced, to instruct solicitors and so on. For practical purposes the Director-General's decision sets in train a series of events which affect Mrs Hales and her financial position in a real way. (Reasons for Judgment, p.10.)

2. 'Effective cause' or 'contributing cause'
The Federal Court accepted the Director-General's second argument, that the AAT had been mistaken in saying that recovery under s.140(1) depended on showing that Hales' failure or omission was the 'effective cause' of the overpayment. The Tribunal should merely have asked whether her failure or omission to comply with the Act had been a 'contributing cause of the overpayment': see, e.g. Sheppard J, Reasons for Judgment, p.21.

(On this point, all members of the Court accepted what was said by the Federal Court in *Hangan*.)

3. Discretion not to pursue recovery
The AAT had said, in this case, that if the overpayment was legally recoverable, it should not be pursued in this case because of the hardship it would impose on Hales. The Director-General argued that this involved further errors of law on the part of the Tribunal. Again, this argument was rejected by two of the three judges.

McGregor J accepted the argument. Even if the Director-General had a discretion under s.140(1) which McGregor doubted, the discretion had not been properly exercised because it had been influenced by the 'failure' of the DSS to review Hales' benefit (but it was not obliged to review), and it had ignored the fact that public money, illegally paid, was involved.

On the other hand, Sheppard J said that the Director-General did have a discretion.

He must make the best judgment he can as to whether steps should be taken to pursue a person to whom an overpayment has been made.

If an overpayment is detected, the question will arise as to whether it is sensible to pursue the person to whom it has been made . . . The pursuit of such a claim may involve the throwing away of good money after bad. In other cases a compromise may be offered. Is it to be suggested that the Director-General has no power to accept half of what is owing if that seems a sensible course having regard to a pensioner's means? In other cases wisdom might indicate that action should await the day when a payee's financial circumstances may change.

All these considerations strongly suggest that the Director-General should have a wide discretion to determine whether he should take steps to recover an overpayment.

(Reasons for Judgment, pp. 23-5.)

Sheppard J concluded that the Director-General did have 'a discretion to proceed to recover an overpayment or to do nothing'. Ordinarily, his public duty required him to take steps for recovery: p.26. But he could take account of compassionate considerations as the AAT had done in this case. On the other hand, he should balance against them the fact that public moneys had been illegally paid, a fact to which the AAT had not referred to in its Reasons for Decision. On balance, Sheppard J said, he would assume that the AAT had considered the 'very important' factor which 'should always be taken into account': pp. 31-2.

Lockhart J also refused to accept the Director-General's argument: he was satisfied that the Tribunal's alternative finding of extreme hardship and scant chance of effective recovery was a proper exercise of its discretion in reviewing the Director-General's decision . . . (Reasons for Judgment, p. 15.)

Order

The Federal Court dismissed the Director-General's appeal, with costs.

Statistics

This table of applications lodged with and decided by the AAT, is compiled from information provided by the Department of Social Security.

	Jan. 83	Feb. 83	Mar. 83	April 83
Applications lodged*	92	124	70	90
Decided by AAT	11	5	3	19
Withdrawn	17	24	14	14
Conceded	15	17	6	8
No jurisdiction	3	4	1	2
Awaiting decision at end of month	967	1041	1085	1134

*Applications lodged: type of appeal-

Medical appeals	77	116	55	81
Other appeals	15	8	11	9
FOI	0	0	4	0

State where application lodged

ACT	0	1	2	0
NSW	52	82	40	60
NT	0	0	0	0
Qld	6	16	7	8
SA	4	6	5	3
Tas.	2	1	1	1
Vic.	23	16	14	13
WA	5	2	1	5