**COUSINS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S81/80)**

**Decided:** 19 November 1982 by R. K. Todd.

Lynnette Cousins had been overpaid $184.50 in family allowance between May and October 1979. This overpayment was solely a result of error by the DSS.

The DSS decided to recover the overpayment under s.140(2)—by deducting it from current instalments of family allowance payable to her. (See *Wright*, in this issue of the *Reporter*, for the text of s.140(2)).

On review of this decision, the Tribunal referred to *Forbes*, (1981) 5 *SSR* 50, and said:

> It is fair to say that as a general rule the discretion conferred by the terms of the sub-section to recover overpayments from current pension etc has not been applied where there would have been hardship to the recipient of the overpayment and where in addition there are no factors present in the conduct of the recipient that would fix on him or her some blame for the occurrence of the overpayment.

(Reasons for Decision, para. 6)

While the overpayment was due to an error on the part of the DSS, the Tribunal could not 'find that there would be undue hardship in requiring the repayment of the amount in dispute': Reasons for Decision, para. 7.

**Formal decision**

The AAT affirmed the decision under review.

[**Comment:** The Tribunal's reference to *Forbes* suggests that it was confused: that was a case of recovery under s.140(1), not s.140(2); and the Tribunal in *Forbes* put forward Departmental error and hardship as *alternative* grounds for preventing recovery. See also the comment on *Wright* in this issue of the *Reporter*.]

# Overpayment: 'effective cause'

**AUSTIN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/537)**

**Decided:** 2 December 1982 by R. K. Todd.

Rhonda Austin was receiving child endowment for her two children. In April 1977, she and her children left Australia for the United States. It was clear that their absence from Australia was not temporary.

It was not disputed that, once Austin and her children left Australia, endowment ceased to be payable and she should have informed the DSS (*Social Security Act*, s.104(1), s.104A(b)). She did not inform the DSS and, consequently, continued to be paid endowment until her absence was discovered.

The DSS then cancelled the endowment and decided to recover the overpayment of child endowment under s.140(1)—see *Wright* in this issue of the *Reporter*.

On review of the decision to recover the overpayment, the AAT said it was plain enough that Austin's failure to inform the DSS of her children's departure had caused an overpayment. The DSS decision to recover under s.140(1) was therefore correct.

Wright had argued that she regarded 'the money as being recoverable from her ex-husband'; but this was not something which the AAT could take into account:

> It was the applicant who applied for child endowment in the first place and who received it and in those circumstances any dispute between the applicant and her ex-husband as to the disposal of the money after it was paid is not a matter that the Tribunal can do anything about. Further, of course, the applicant's queries as to what she can do to obtain support from her ex-husband relate to matters which are a long way beyond the reach of the Tribunal.

(Reasons for Decision, para. 8)

**Formal decision**

The AAT affirmed the decision under review.

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**VLAHADAMES and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/449)**

**Decided:** 20 December 1982 by R. K. Todd.

The DSS had decided that James Vlahadames had been overpaid $434 representing two unemployment benefit cheques sent to him on 3 October and 17 October 1977. The DSS claimed that Vlahadames was not qualified to receive these payments because he was, at the time, employed.

The DSS had decided to recover the overpayment under s.140(1) of the *Social Security Act*, the terms of which are set out in *Costello* (in this issue of the *Reporter*).

Vlahadames applied to the AAT for review of this decision, denying that he had received the two cheques and denying that, at the relevant time, he had been employed.

**Would the available evidence prove an overpayment?**

The Tribunal confirmed 'that it had jurisdiction to review an administrative decision to seek recovery in a court and the administrative determination of the amount sought to be recovered'. It was for the Tribunal to consider whether, on the available evidence, the Department could prove to a court that there had been an overpayment: Reasons for Decision, para. 2.

Looking only at the question whether Vlahadames had received the cheques, the Tribunal said that his bank records showed no trace of the two cheques, and there was no evidence that the cheques had been cleared by the DSS's bank.

Therefore, it was 'unlikely that the [Department] will be able to discharge the onus of proof in respect of the first allegation, namely that the applicant received the two cheques': Reasons for Decision, para. 4.

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the AAT with a recommendation that the recovery 'be not proceeded with'.

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**COSTELLO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/103)**

**Decided:** 20 September 1982 by A.N. Hall.

This was an appeal against a DSS decision to recover under s.140(1) of the *Social Security Act*, an overpayment of $3598.90. The DSS alleged this had been overpaid because of Norma Costello's failure to notify increases in her income between 17 October 1974 and 30 August 1979.

Costello applied for a wife's pension in August 1971, when her husband was in receipt of an invalid pension. In February 1977, when Costello turned 60, she was transferred to an age pension. At all material times she had been employed as a cleaner at the Inverell Court of Petty Sessions, till she retired in 1982.

The fact of her employment had been disclosed to the DSS on her husband's application for an invalid pension and on her own application for a wife's pension. The Costellos had received DSS review forms regularly until March 1974 and on each occasion disclosed correctly Mrs Costello's wage. Her pension had been adjusted accordingly prospectively not retrospectively.

The DSS suspended its practice of sending review forms during 1974 and Costello did not receive another until August 1979. The Department concluded that there had been an overpayment, commencing on 5 October 1974, when the applicant should have notified the DSS of her increase in salary as required by s.45. This $3598.90, the DSS said, was recoverable under s.140(1) but would be deducted from her pension under s.140(2). Costello appealed to the AAT.

**Legislation**

The present s.45(2) of the *Social Security Act* requires a pensioner to notify the DSS if, in any period of eight consecutive weeks, her average weekly private income exceeds $34.50 or exceeds her average weekly income last notified to the DSS. Such notification is to be made within 14 days of the expiry of the eight week period.

In other words the applicant had ten weeks to notify the DSS of an increase in wages, first occurring on 20 September 1974, and there would have been a series of occasions between October 1974 and August 1979 when a similar obligation arose.

Section 140(1) provides:

> Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any pro-

vision 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.

**Was the DSS notified? A dispute over the facts**

The DSS alleged that Costello had not notified the Department of increases in her income from 5 October 1974 till 26 August 1979.

Costello, on the other hand, called the Clerk of Petty Sessions at Inverell. He stated that, while he occupied the position from July 1976 until 1979, he had frequent communication (probably every three or four months) with the DSS in Armidale on the question of Costello's current salary. The preceding Clerk of Petty Sessions also stated in a statutory declaration that he was contacted by the DSS in Armidale on one occasion. The Tribunal concluded that this was before July 1976.

The DSS had no record of these 'phone conversations and suggested they may have been made by someone posing as a DSS officer. The Tribunal found the conflicting evidence somewhat puzzling but was persuaded that the telephone conversations did occur and found as fact that the DSS was notified of Mrs Costello's wages once prior to July 1976 and a number of times between July 1976 and August 1979.

The Tribunal said that, given that the dates of these 'phone conversations were unknown, it was impossible to say if they constituted compliance by Costello with the notification provisions in s.45 of the Act, although it was possible they coincided with her quarterly wage adjustments.

The Tribunal, referring to *Babler* (1982) 7 *SSR* 71, noted that *mens rea* was not a necessary element of an offence under s.45 and, although Mrs Costello was probably never clearly aware of her obligation, it found that she did fail to notify the DSS of increases in her income on or around 5 October 1974, and 'on the probabilities', there were subsequent omissions between 5 October 1974 and August 1979, when other increases in her wage occurred.

**The 'effective cause' of overpayment**

The question remained, was this failure the effective cause. (see *Re Matteo* (1982) 5 *SSR* 50). The Tribunal found that the DSS failure to undertake annual reviews was a contributing factor to the overpayment. Secondly, the Tribunal found that, despite abandoning annual reviews and knowing that Costello was in regular employment, 'no attention appears to have been given, at the time when increases in the basic rate of pension occurred, to the question of whether Mrs Costello's wages had also increased ... These factors, in my view, indicate that the overpayment ... would probably not have occurred (or at least, would not have been as great) if annual reviews had occurred': Reasons for Decision, para.24.

The Tribunal referred to a series of previous decisions on the question of how much of the overpayment should be attributed to the applicant's failure to comply with s.45 (see *Gee* (1981) 2 *SSR* 11, *Matteo* (1982) 5 *SSR* 50, *Babler* (1982) 7 *SSR* 71, *Parr* (1982) 9 *SSR* 90). It concluded 'that the applicant's failure to notify increases in her income from time to time as they occurred was the effective cause of overpayment of pension until the date when information was first provided on her behalf to the Department by [the Clerk of Petty Sessions] prior to July 1976': Reasons for Decision, para.26. The date when this happened was taken to be 31 July 1976:

> [A]ny overpayment which occurred after that was due to Departmental error in not following up the information ... Any technical failure on the part of the applicant thereafter to comply with the requirements of s.45 was not, in my view, the effective cause of the overpayment to her.
>
> (Reasons for Decision, para.26).

Thus the demand for recovery should be limited to that overpayment which occurred between 5 October 1974 and 31 July 1976. The Tribunal stated that the actual amount should be calculated in accordance with the Federal Court decision in *Harris* (see this issue of the *Reporter*).

**Financial hardship**

The applicant argued she should be relieved from repaying any overpayment on the grounds of financial hardship. She pointed to the length of time it took the DSS to notify her of the overpayment, her husband's recent death and consequent funeral expenses, and her own and her husband's medical expenses. The Tribunal, in turn, noted that her home was not subject to mortgage, that she was entitled to a lump sum retirement benefit of between $12 000 and $15 000 and that she was eligible for the age pension. Consequently, it decided not to vary its original decision.

**Formal decision**

The AAT set aside the decision under review and remitted the matter for reconsideration with the direction that recovery be limited to the overpayment which occurred between 5 October 1974 and 31 July 1976.

# Age pension: residence

**CIARDULLO and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. V82/239)**

**Decided**: 17 December 1982 by A.N. Hall

Iolanda Ciardullo migrated from Italy to Australia in 1968 (when she was 52) to join her husband, who had been here since 1952.

In 1973, when he reached 65 years of age, Mr Ciardullo was granted an age pension and Mrs Ciardullo was granted a wife's pension. They then returned to Italy, where they continued to recieve their pensions (under the portability provision of the *Social Services Act*).

In 1976, Mrs Ciardullo was granted an age pension in her own right when she reached 60 years of age. In 1979 Mr Ciardullo died; and Mrs Ciardullo continued to receive an age pension until 1981 when the DSS told her that she had been granted an age pension in error, that she had been overpaid $5637.40 (which the DSS did not seek to recover) and that her pension was cancelled.

Mrs Ciardullo applied to the AAT for review of this decision.

The AAT pointed out that, in order to qualify for an age pension, a person must meet the age requirements in s.21(1)(a) and the residence requirements in s.21(1)(b) of the *Social Security Act*; that is, pension is only payable to a woman who has reached 60 years of age and who:

> is residing in, and is physically present in, Australia on the date on which he lodges his claim for a pension and has at any time been continuously resident in Australia for a period of not less than ten years ...

At no stage had Mrs Ciardullo met these requirements: she had not been continuously resident in Australia for ten