**PARADISSIS and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. N83/687)**

**Decided**: 5 July 1984 by B.J. McMahon.

Sarandis Paradissis had been born in Greece in 1930 and, after migrating to Australia in 1956, he had worked as a labourer until he injured his back in June 1979. As a consequence of that injury, he was granted worker's compensation which was still being paid (at the rate of $318 a fortnight) at the time of the hearing of this application. In August 1982, Paradissis lodged a claim for invalid pension and the DSS rejected that claim in December 1982. He then sought review of that rejection by the AAT.

**Permanent incapacity**

The Tribunal concluded that, although Paradissis exaggerated his symptoms, his back condition had left him quite unfit for work involving heavy lifting, bending and stooping and that there was only a very remote prospect of him returning to the full-time workforce. In addition, he had suffered a loss of hearing which would add to his difficulties in attracting an employer.

There was evidence that some of his back problem could be alleviated through an operation but Paradissis had refused to undergo the operation because success could not be guaranteed. On this point, the AAT said:

> Since *Dragojlovic* v *Director-General of Social Security* (1984) 52 ALR 157 [18 *SSR* 187], it is clear that this could not be held against him, provided his refusal is objectively regarded as reasonable. In the circumstances of this application, one would have to regard that refusal in that light.

(Reasons, p. 5)

The Tribunal concluded that Paradissis was permanently incapacitated for work and, therefore, entitled to an invalid pension.

**Deprivation of income**

Paradissis had owned a block of 4 flats since 1959. In 1982, these flats were returning gross annual rents of $5454. One month before he applied for an invalid pension (that is in July 1982) he gave this property to his children.

Paradissis explained that he had given the building to his children because he was unable to maintain it himself. He also said that, because the property market was depressed, he had not wanted to sell the property but preferred to give it to his children.

The Tribunal said that neither of these reasons was a convincing explanation and that it was 'inconceivable that he could not have been influenced by his approaching application for the invalid pension, in deciding to give away this income producing asset': Reasons, p. 10.

Section 47(1) of the *Social Security Act* provides that the Director-General may treat, as income of a pensioner, any income of which the pensioner has deprived himself in order to obtain the pension at a higher rate than that for which he would otherwise have been eligible.

The Tribunal noted that, according to the earlier decision in *Ridley* (1983) 13 *SSR* 127, s.47(1) could only be invoked where deprivation of the income had been undertaken for the purpose of obtaining pension at a higher rate; it was not sufficient to prove only that the deprivation of income resulted in a higher rate of pension.

In the present case, the Tribunal concluded that Paradissis had –

> deliberately, purposely and intentionally (albeit with a belief in the permissiveness and possibly cleverness of his actions) deprived himself of an income bearing asset, without consideration, for the purpose of obtaining a pension at a higher rate than that for which he would otherwise have been eligible.
>
> In assessing the amount of the pension to be paid to the applicant, therefore, the respondent should take into account the amount of the deprived income.

(Reasons, p. 14)

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that the invalid pension be granted to Paradissis, and that in assessing the amount of that pension account should be taken of the worker's compensation payments being paid to Paradissis and of the income of which Paradissis had deprived himself.

# Overpayment: discretion to waive recovery

**POURSANIDIS and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. V83/256)**

**Decided**: 15 June 1984 by I.R. Thompson.

Anastasia Poursanidis had been receiving a family allowance for one of her daughters, K. Shortly after K left school in November 1979, the DSS asked Poursanidis to complete an entitlement review form.

Another of Poursanidis' daughters, S (who usually acted for her parents in any matters where they needed to read or write English), completed this form but it was not received by the DSS. Nevertheless, the DSS cancelled payment of the family allowance for K in December 1979.

In April 1980, the DSS asked Poursanidis to complete another review form for her daughter K. This form was also completed by S and it was returned to the DSS. The form showed that K had ceased to be a full-time student at the end of 1979.

Despite the fact that the DSS received this form on 6 May 1980, the DSS wrote to Poursanidis on 20 May 1980 informing her that, as K was a full-time student, the family allowance would still be paid to K.

S then contacted the DSS and repeated that K had ceased to be a full-time student. An officer of the DSS made a note to cancel the family allowance for K but no action was taken to do this. Family allowance for two of Poursanidis' daughters, K and D, continued to be paid into the family's bank account.

In December 1980, the DSS forwarded another review form to Poursanidis. K completed this form and returned it promptly to the DSS, showing that K had ceased to be a full-time student in November 1979. The DSS then cancelled the family allowance for K.

Early in 1981, the DSS discovered that there had been an overpayment (of $260.40) of family allowance for K and decided to recover that overpayment by withholding family allowance payable to Poursanidis' other daughter, D.

Poursanidis appealed to an SSAT which recommended that her appeal be allowed. When the DSS affirmed its earlier decision, Poursanidis applied to the AAT for review.

Throughout the period of the SSAT appeal and while the AAT review was awaiting hearing, the DSS continued to withhold the payment of family allowance for D, making a full recovery of the overpayment.

**The legislation**

Section 140(2) gives the Director-General a discretion to recover an overpayment made 'for any reason' by deducting the overpayment from any current pension, allowance or benefit.

Section 140(3) provides as follows:

> (3) An amount referred to in sub-section (2) that has been paid otherwise than by way of family allowance under Part IV shall not be deducted from family allowance payable under Part IV.

Section 105 of the Act requires that a family allowance 'shall be applied, by the person . . . to whom it is payable, to the maintenance, training and advancement of the child in respect of whom it is granted'.

**The discretion to recover**

The AAT accepted that, throughout her dealings with the DSS, Poursanidis had acted honestly and with complete good faith. The AAT was satisfied that the overpayment was entirely due to error by the DSS, for which Poursanidis was not responsible, and that Poursanidis had not realised, throughout 1980, that the DSS was paying her family allowance for K.

However, the AAT said, the overpayment was recoverable under s.140(2) of the Act. The central question in this re-

view was whether the discretion to make that recovery should be exercised. The Tribunal said that, in deciding to make recovery under s.140(2), there were several factors to be taken into account:

- Poursanidis had received public moneys to which she was not entitled;
- Poursanidis would not suffer undue financial hardship as a result of the recovery;
- the overpayment was entirely due to DSS error;
- Poursanidis was entirely without fault and had acted in complete good faith; and
- the family allowance, from which the DSS had recovered the overpayment, was payable to Poursanidis for her daughter D: in the light of s.105, that recovery was 'inconsistent with the purpose of s.140(3)'.

The AAT decided that, in the circumstances of this case, the factors against recovery outweighed the factors in favour of recovery.

**Could recovery be 'reversed'?**

The AAT said that, if the present review had come up for decision before the DSS had made recovery of the overpayment, the Tribunal would have had no hesitation in setting aside the decision to recover. However, the DSS had made full recovery of the overpayment and it was, at least, doubtful whether the power to make a refund of money legally received by the Director-General. (The AAT noted that this question had also arisen in *Castronuovo*, also noted in this *Reporter*.) However, the AAT said, that problem did not directly arise here: the DSS had an obligation to pay family allowance to Poursanidis for her daughter, D; and the AAT had the power to direct that the DSS discharge that obligation – that is, pay to Poursanidis the family allowance for D which had been withheld.

The AAT then discussed the question whether it should exercise its power to make that direction:

> The money which was withheld was required to be provided to [Poursanidis] for her to spend on D. If it is paid now, she will be obliged to apply it to the maintenance, training and advancement of D; whatever obligation she may ever have had to repay the amount which was overpaid to her in respect of K will remain. As the withholding was commenced after the applicant appealed against the initial decision, was continued after the SSAT had recommended that there should be no recovery and was persisted with after the applicant had applied to the AAT for review of the affirming decision, and as the applicant was never informed that she might apply for a stay of the implementation of the decision to make the recovery, it would, I consider, be entirely appropriate for the Tribunal now to direct that the money withheld be paid to the applicant.
>
> (Reasons, para. 27)

**Criticism of DSS action**

The Tribunal said that the decision by the DSS to implement recovery while its decision was being reviewed by the SSAT and the AAT 'was entirely contrary to the spirit in which social welfare legislation is intended to be administered'.

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction not to recover the overpayment; and a direction to pay to Poursanidis the full amount of the withheld family allowance for D.

### CRAIG and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W84/4)

**Decided:** 21 June 1984 by G.D. Clarkson.

The AAT *affirmed* a DSS decision to recover an overpayment of sickness benefit. Craig had been paid sickness benefit between May and July 1981. In that period, his bank account had been credited with payment for consultancy work done before his illness; but Craig did not discover these payments until July 1981 when he immediately advised the DSS. The DSS at first considered waiving recovery but in August 1983 decided to pursue recovery.

The AAT said that Craig had failed to notify the DSS 'immediately on receipt of income' and this had caused overpayment of sickness benefits. The overpayment was accordingly, recoverable under s.140(1) of the *Social Security Act*.

Neither the 'inordinate' delay on the part of the DSS (in pursuing recovery), the good faith of Craig, the fact that he notified the DSS as soon as practicable nor his claim of financial hardship was sufficient ground for the exercise of a discretion to waive recovery: 'The fact remains, however,' the AAT said, 'that the applicant has been paid public moneys that he should not have received.'

# Sickness benefit: total and temporary incapacity

### SHEARIM and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q83/91)

**Decided:** 22 June 1984 by R.K. Todd.

Victor Shearim had been granted sickness benefit in November 1980 after injuring his back. He was then aged 32.

In April 1982, the DSS cancelled Shearim's sickness benefit and granted him an unemployment benefit. Shearim asked the AAT to review that decision.

**Sickness benefit: temporary and total incapacity**

Sickness benefit is payable to a person who satisfies the Director-General that he or she is temporarily 'incapacitated for work by reason of sickness or accident . . . and that he has thereby suffered a loss of salary, wages or other income': s.108 of the *Social Security Act*.

Evidence given by medical specialists and by an occupational therapist established that Shearim was permanently incapacitated for work. The occupational therapist, upon whose evidence the AAT relied, said that Shearim 'would not be capable of going back to any type of employment, either on a full-time or even a part-time basis.'

The AAT said that Shearim's eligibility for sickness benefit should be looked at in the light of his situation in April 1982. (The AAT distinguished this approach from the approach involved in review of invalid pension decisions, where 'the criterion of permanent incapacity would make it most undesirable for the Tribunal not to have regard to the progress of the applicant's medical condition and employment prospects up to the date of hearing.')

The Tribunal said that it was doubtful whether, in April 1982, Shearim was qualified for sickness benefit: his incapacity for work had not been total, as s.108 required. Moreover, it was likely that, at that time, Shearim's incapacity had not been temporary but permanent.

The AAT said that, in assessing eligibility for sickness benefit, the real question was 'a global one' rather than a series of questions (dealing with 'incapacity', 'sickness or accident', and the 'temporary' character of the incapacity):

> Was the applicant for any period prior to the date of cancellation temporarily incapacitated for work by sickness or accident? So stated, concentration is focused on whether he fell within the total parameters of entitlement to sickness benefit , a benefit intended for those suffering short-term loss of income because they are too sick or injured to work but who can be expected to recover: See the citation from *Re Alchin* paragraph 13 above. As far as the present applicant is concerned, he was no doubt an appropriate beneficiary of sickness benefit in these terms for some time after his initial accident. But at some later stage a situation must on the evidence have been reached in which his condition was static and the extent of his incapacity crucial. At this point, whenever it was, the appropriateness of sickness benefit was exhausted, and the options were unemployment benefit or invalid pension. This point of exhaustion had in my view plainly been reached by April 1982, and probably much earlier. Cancellation of sickness benefit was thus a proper course and the decision so to cancel must be affirmed, but on the footing that it should probably have been made some time earlier. But the real difficulties flow from there. When it was cancelled the assumption was made that reversion to unemployment benefit was appropriate, but it would in my opinion have been preferable to inform the applicant that while it was intended to return him to unemployment