Overpayment: is criminal conviction conclusive proof?

RIMMER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. A83/122)

Decided: 11 July 1984 by J.O. Ballard.

Michael Rimmer was being paid sickness benefit by the DSS in May 1981. On 15 May 1981, Rimmer told the DSS that he had not received the most recent cheque (for $135.48) and the DSS gave him a duplicate cheque.

Rimmer cashed the duplicate cheque. When the DSS discovered that the first cheque had also been cashed, the matter was investigated by the Australian Federal Police, who interviewed Rimmer in September 1982. He signed a statement which stated that he had cashed both cheques because he had 'got mixed up with cheques'.

Rimmer was then charged with the offence of imposition on the Commonwealth, to which he pleaded not guilty. He was convicted by a Court of Petty Sessions (in the ACT) and fined $200.

The DSS then decided that Rimmer had been overpaid and that this overpayment should be recovered by making deductions from his current sickness benefit. Rimmer asked the AAT to review that decision.

The conviction – conclusive evidence?

The DSS argued that Rimmer's conviction was conclusive evidence of the fact that Rimmer had been paid twice for the same period – that there had been an overpayment.

The AAT noted that in *Minister for Immigration* v *Gungor* 42 ALR 209, the Federal Court had decided that, when reviewing the Minister's decision to deport an immigrant convicted of a criminal offence, the AAT must accept, as conclusive, the fact of the immigrant's conviction. However, the AAT said, the Court's decision had arisen from the fact that such a conviction was 'the genesis of the power to deport' – it was not authority for the general proposition that a criminal conviction is conclusive evidence in later civil proceedings.

The AAT also referred to a House of Lords decision in *Hunter* v *Chief Constable of West Midlands* [1981] 3 All ER 722, where particular statutory provisions had been discussed in detail. There were similar provisions in the *Evidence Ordinance* 1971 of the Act:

- Section 78 of the Ordinance made conviction of a criminal offence conclusive evidence for the purpose of defamation proceedings.
- But, s.77(2) made conviction of a criminal offence only *prima facie* evidence (that is 'unless the contrary is proved') in other civil proceedings.

While the AAT was not bound by the rules of evidence (s.33(1)(c) of the *AAT Act*). it thought that it should adopt the approach suggested by the *Evidence Ordinance* and treat Rimmer's conviction as evidence that he had committed the offence of imposition, but not as conclusive evidence.

The other evidence

The Tribunal noted that, during the criminal proceedings, Rimmer had expressed some doubt as to whether he had signed or cashed the original cheque: he said that he had been persuaded that it was his signature by the police at the time when he signed the statement. He told the AAT that he had been on methadone for 7 years and that this had affected his short term memory.

The AAT examined a copy of the original cheque and noted that there were significant differences between the signature on that cheque and Rimmer's signature. That cheque had not been produced (in its original form) to the AAT, nor had any handwriting expert been called to give evidence.

Formal decision

The AAT decided that Rimmer's conviction was admissible but not conclusive evidence that he had commited the offence of imposition. It directed that the original of the first cheque be produced to the AAT by the DSS and gave the parties liberty to make further submissions or call further evidence.

Sickness benefit: late application

CLOHESSY and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. Q83/154)

Decided: 3 May 1984 by J.B.K. Williams.

Kevin Clohessy had broken his leg on 29 December 1981 and was temporarily incapacitated for work for several months. He claimed a sickness benefit on 1 September 1982 which was, eventually, granted to him from 24 August 1982. However, the DSS refused to pay the benefit from the date of his incapacity, i.e. 29 December 1981.

Clohessy asked the AAT to review that decision.

The legislation

Section 119(2) provides that sickness benefit is payable from seven days after the date of a person's incapacity if the claim is lodged within 13 weeks of the incapacity occurring. Otherwise, according to s.119(3), the benefit is payable from the date when the claim is lodged. But the Director-General has the power to backdate payment if the failure to lodge the claim within time 'was due to the cause of the incapacity or to some other sufficient cause'.

Ignorance not a 'sufficient cause'

Clohessy said that he had not claimed benefit earlier because he did not know that he was entitled to make a claim.

The Tribunal said that Clohessy's claimed ignorance was not a 'sufficient cause' within s.119(3). He had lived in Australia all his life (62 years) and had worked as a bookmaker's clerk (which would bring him into contact with a broad cross-section of the community). There were none of the special features, such as illiteracy or recent arrival in Australia, which were mentioned in *Wheeler* (1981) 1 *SSR* 3 as providing a 'sufficient cause' for a late claim.

Formal decision

The AAT affirmed the decision under review.

Federal Court Decision

LYNAM v DIRECTOR-GENERAL OF SOCIAL SECURITY
Federal Court of Australia

Decided: 10 October 1983 by Fitzgerald J.

This was an appeal from the decision of the AAT in *Lynam* (1983) 14 *SSR* 140, where the Tribunal had decided that Lynam's benefit should be cancelled because of the income of a woman who was 'living with [Lynam] as his wife on a *bona fide* domestic basis although not legally married to him'.

The Tribunal had taken the view that the question whether a *de facto* relationship existed between Lynam and the woman depended upon the financial relationship between the two. The Tribunal distinguished the Federal Court decision in *Lambe* (1981) 4 *SSR* 43 on the basis that the issue in that case had been *eligibility* for a benefit whereas the issue in this case was the calculation of