Deprivation of income: intention necessary

The AAT considered that for s.47(1) 'to operate it is necessary to show that the applicant has deprived himself or herself of income and that he or she has done so with the intention to qualify for a pension or for a higher rate of pension': Reasons, para.24.

The transfer of assets to the trust was clearly a deprivation of income. As to their intention the Tribunal commented:

> Having regard to the fact that he and his wife were the Trustees of the Trust and that it was within their discretion to distribute the whole of the income to themselves, we are unable to accept that their decision to set up the Trust was divorced from the notion to apply for pensions, particularly in the light of their awareness of the means test.
> The closeness in time of the two events, namely the transfer of the assets to the Trust and their applications for pension, raises in our minds a strong possibility that each of the applicants was aware such transfer would have an impact upon or affect their eligibility for a pension . . .

(Reasons, para. 23)

The AAT concluded that it was the intention of the applicants to deprive themselves of income to qualify for a pension at a higher rate and that the trust income was correctly taken into account by the DSS.

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: wife's income

KARRASCH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W81/39)

Decided: 21 December 1983 by R.K. Todd

Winifried Karrasch asked the AAT to review a DSS decision that he had been overpaid $4044 in unemployment benefit between July 1979 and January 1981.

The benefits were paid on the basis that neither Karrasch nor his wife had any income. (Indeed, Karrasch regularly informed the DSS that his wife was not working and had no income.) However, his wife was in full-time employment throughout this period, and the DSS claimed that her income should have been taken into account so as to reduce the level of Karrasch's benefit.

The legislation

Section 114(3) of the *Social Security Act* provides that, for the purposes of the income test for unemployment benefit,

> the income of a person shall include the income of that person's spouse, unless that person and his spouse are living apart –
> (a) in pursuance of a separation agreement in writing or of a decree, judgment or order of a Court; or
> (b) in such circumstances that the Director-General is satisfied that the separation is likely to be permanent.

Separation under one roof

Karrasch claimed that, throughout the whole period in question, he and his wife were living separate lives, although residing in the same house, and had formally separated in January 1981, reunited and separated again in March 1983.

The Tribunal accepted that Karrasch and his wife were living apart under the same roof, but doubted whether s.114(3) of the Act contemplated that type of 'living apart':

> It seems more likely that a strict separation is required. In the first place, paragraph (a) clearly contemplates full separation. The only alternative separation envisaged is that provided for in paragraph (b) wherein it is requisite that the Department be satisfied that the separation is likely to be permanent. I find it hard to conceive that the legislation requires the Director-General to assess whether a separation under the one roof is likely to be permanent.

(Reasons, para. 8)

Even if the Tribunal were wrong on this point and s.114(3)(b) was applicable, there was not sufficient evidence in this case that the 'separation' of Karrasch and his wife was, between 1979 and 1981, likely to be permanent. It followed that her income should have been taken into account and there had been overpayment.

Amount of overpayment

The Tribunal observed that, during the hearing, the DSS had checked the calculation of the overpayment and discovered that it amounted to $3707 rather than $4044. The Tribunal said it was 'disturbed at the number of times on which calculations appear to require alteration'.

Formal decision

The AAT varied the decision under review by fixing the amount of overpayment at $3707.37.

[**Comment**: The Tribunal's doubt about the relevance of Karrasch and his wife 'living separately under the one roof' might be contrasted with earlier AAT decisions. In *'A'* (1982) 8 *SSR* 79, the Tribunal decided that 'separation under the one roof' was a sufficient 'special reason' for disregarding a spouse's income. (See also *McQuilty* (1982) 6 *SSR* 61 and *Reid* (1981) 3 *SSR* 31.) **PH**]

COSTELLO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/210)

Decided: 8 December 1983 by J.B.K. Williams.

Ronald Costello applied to the AAT for review of a DSS decision to recover an overpayment of $2289 in unemployment benefit.

Costello had been paid unemployment benefit between March 1979 and May 1982. Throughout this period his wife was being paid invalid pension (first granted in 1967). The DSS claimed that Costello failed to reveal his wife's invalid pension when he first applied for unemployment benefit and that he failed to inform the DSS of his wife's income from that source on each of the fortnightly income statements lodged between 1979 and 1982.

The DSS argued that this was a failure to comply with the requirements of the *Social Security Act*, which required a beneficiary to notify the Department of changes in circumstances which could affect the beneficiary's entitlements. The DSS claimed that it could recover the overpayment directly from Costello under s.140(1) of the Act or by deductions from his wife's invalid pension under s.140(2).

No recovery from wife's pension under s.140(2)

Section 140(2) gives the Director-General a discretion to recover any overpayment (whatever its cause) from any pension, allowance, or benefit being paid to the person who had received the overpayment.

The AAT pointed out that, if any overpayments had been made in this case, they were received by Costello, not by his wife. The Department's claim to reduce her invalid pension could not be sustained.

No recovery from Costello under s.140(1)

The DSS based its decision to recover the money from Costello on s.140(1) of the *Social Security Act*. This provision allows the Director-General to recover any overpayment caused by a beneficiary's false statement or representation: see *Kaiser* in this issue of the *Reporter*.

According to the DSS, there were two distinct omissions by Costello which had led to him being overpaid.

- First, the DSS claimed that he had told the Department, when applying for unemployment benefit, that his wife was not receiving invalid pension. (Section 112(2) of the *Social Security Act* provides that the rate of unemployment benefit paid to a married person shall take account of any pension being paid to the beneficiary's spouse, if the beneficiary is dependent on the spouse.)

The original application form completed by Costello had asked whether his wife was receiving invalid pension and the answer 'no' had been written on the form. But Costello claimed that he had not written this answer and the AAT found that there was no evidence that Costello was responsible for this answer.

- **Second**, the DSS claimed that Costello had failed to reveal his wife's income from her invalid pension when completing his fortnightly income statements. (Section 114 of the *Social Security Act* provides for the rate of unemployment benefit to be reduced according to any income of the beneficiary or the beneficiary's spouse.)

Costello agreed that he had not disclosed his wife's invalid pension payments when completing his income statements; but he argued that he had not been asked for this information. The form had asked: 'Did you or your wife or husband receive any other income or payments during the period . . .?'

'Income' is defined in s.106 of the Act, for the purposes of unemployment benefit, in terms which expressly exclude any payment of invalid pension. The income statement forms, prepared by the DSS, defined 'income' by offering a long list of examples. The only one of these which could possibly include invalid pension payments was

> (h) any Government assistance or allowance; example
> (i) Tertiary Education Assistance Scheme
> (ii) National Employment and Training Scheme
> (iii) State Welfare payments.

These examples, the AAT said, did 'not suggest to me that invalid pension might be regarded as "Government Assistance or Allowance" for the purposes of the definition'. Accordingly, it could not be said that Costello had made a false statement or representation when he denied that his wife was receiving income:

> As has been said, the statutory definition of 'income' expressly excluded payments of the kind here in question. Reliance has been placed by the respondent upon the reference in the definition on the back of the forms of 'Government Assistance' or 'Government Assistance or Allowance' as indicating that invalid pension was income which a beneficiary was required to notify. If the draftsman of the form so intended then I think that the words are too vague and indefinite to convey this. I am left in substantial doubt whether the answers of the applicant to the questions posed of him were in fact false and misleading. Rather in context they may have been accurate. In consequence I am not satisfied that overpayment has occurred in consequence of false statements by the applicant. Any overpayment that has occurred is not, in my view, recoverable pursuant to s.140(1).

(Reasons, p.9)

Possible recovery from Costello under s.140(2)

However, Costello had been overpaid: s.112 required his wife's invalid pension to be taken into account when fixing the rate of his unemployment benefit and this had not been done.

The AAT said that this overpayment could be recovered under s.140(2) from any pension, allowance or benefit granted to Costello in the future. (Recovery under that sub-section is permitted no matter what the cause of the overpayment.) However, the question of hardship would need to be considered if the DSS were to attempt recovery under that provision.

Formal decision

The AAT set aside the decision under review and substituted the following decisions:

(1) Any overpayment was not caused by Costello's false or misleading statements.

(2) Such overpayment was not recoverable under s.140(1).

(3) Such overpayment was not recoverable under s.140(2) from Costello's wife.

(4) Such overpayment might be recoverable under s.140(2) from any pension or benefit granted to Costello in the future.

[**Comment**: The facts, as outlined by the AAT, revealing a disturbing attitude and practice on the part of the Department of Social Security. How frequently, one might ask, has the Department acted in clear breach of the *Social Security Act* by deducting overpayments from a spouse's pension? According to the Tribunal, the Department not only decided to make those illegal deductions from Mrs Costello's pension but actually made some of those deductions (see Reasons, pp.9-10). How could the Department have made such a decision in the first instance, confirmed it after review by an SSAT and sought to support it before the AAT? And how many other pensioners have suffered these deductions without appreciating their illegality? **PH**]

Overpayment: discretion to waive recovery

KAISER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S82/101)

Decided: 14 September 1983 by R. Balmford.

Henry Kaiser applied for sickness benefit in July 1980 and March 1981. On each occasion he disclosed, on the application form, the fact that his wife was being paid an invalid pension. He did not disclose on the application form that he and his wife had some investment income. That information was available on his wife's invalid pension file kept by the DSS; it was also clear from Kaiser's duplicate income tax return, which he produced to the DSS within two days of application for sickness benefit.

However, the DSS calculated Kaiser's sickness benefit without reference to the investment income. When Kaiser disclosed that income during a periodic review by the DSS in August 1981, the DSS decided that he had been overpaid $513 and requested a cash refund of this amount.

Following an unsuccessful appeal to an SSAT, Kaiser sought review of the decision by the AAT.

Basis of recovery

The decision to recover the overpayment had been made under s.140(1) of the *Social Security Act* 1947:

> 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 Tribunal adopted the analysis of s.140(1) made by Lockhart J in the Federal Court in *Hales* (1983) 13 *SSR* 136, to the effect that a s.140(1) decision had five components:

(1) That a benefit which had been paid was not payable: this component was established – Kaiser's sickness benefit had been paid at a rate above the appropriate rate.

(2) That the payment was made in consequence of the beneficiary's failure to comply with the *Social Security Act*: Kaiser's failure to report the investment income on his application form was a failure to comply with s.116(a) of the Act, requiring a claim for sickness benefit to be made in writing on an approved form.

(3) That the payment would not otherwise have been made. The Tribunal said that this component was also established but emphasized that all the necessary information to enable accurate calculation of Kaiser's benefit was available to the DSS from his income tax return and his wife's invalid pension file – to which the DSS needed to refer in order to calculate the level of Kaiser's benefit, as his wife's pension was taken into account in fixing that benefit.

(4) That the amount of overpayment is recoverable: this, too was satisfied in Kaiser's case.

Discretion to recover

(5) That the amount of the overpayment should be recovered: this component, the Tribunal said, was not satisfied. It accepted evidence given by Kaiser and by a DSS officer that, at the time of lodging the claims for sickness benefit, Kaiser had been ill, that he had been asked by the DSS to complete the application form quickly and to bring supporting documents to the DSS later and that this was normal DSS procedure. The AAT said:

> 37.Given the realities of social welfare administration, I would be prepared to assume . . . that many claim forms are accepted and processed by the department with similar omissions . . . In this case what was done followed a normal practice, adopted with a view to expediting the payment of benefits to an applicant in need, of accepting an admittedly incomplete form and permitting the submission of supporting evidence at a later date. As a matter of the practical administration of social welfare legislation, this practice would seem to be both necessary and desirable. However, also as a matter of the practical administration of social welfare legislation, it seems unfor-

tunate and undesirable that that incomplete form should now be relied on as the basis of a claim for the recovery of an overpayment in a case where it is conceded that there was no attempt on the part of the applicant to mislead the department, and where the necessary information was in fact made available.

Hardship

The Tribunal found that recovery of the money would not have imposed hardship on Kaiser. But that was not conclusive. Other matters, including 'principles of consistency, fairness and administrative justice' (*Buhagiar* (1981) 4 *SSR* 34) were relevant to the decision to seek recovery under s.140(1).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that no further action be taken to recover the overpayment of sickness benefit.

DOBROWOLSKI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/63)

Decided: 29 August 1983 by G.D. Clarkson

Ruby Dobrowolski suffered a stroke, which severely disabled her, in 1972. In May 1973 she applied for and was granted an age pension. In her application (completed by her son because of her disabilities) she revealed her husband's income from employment.

Over the next five years, the DSS did not review Dobrowolski's pension, nor did she notify the DSS of increases in her husband's income, as required by the *Social Security Act*. (It was accepted that, over this period, she was severely disabled and that the household's business affairs were handled by her husband who did not understand the English language well.)

In May 1978 the DSS reviewed the level of Dobrowolski's pension, found that her husband's income had increased and decided that there had been an overpayment of $4639, which it eventually proceeded to recover by deducting $30 a fortnight from her pension.

In May 1982, Dobrowolski suffered another stroke which paralyzed her completely. She entered a nursing home, whose fees exceeded the level of her pension by $50 a fortnight: the excess was paid by her husband. She then appealed to an SSAT against the decision to continue to deduct $30 a fortnight from her pension. Following the failure of this appeal, she sought review by the AAT.

Discretion to deduct from a current pension

The Tribunal said that the application for review was limited to seeking 'the exercise of the discretionary power [in s.140(2)] to waive the deduction of any further money from the appliant's pension': p.6. (Section 140(2) gives the Director-General a discretion to deduct, from a current pension, an amount of pension which should not have been paid, whatever the reason for the overpayment.)

This, the Tribunal said, was an appropriate case for exercising the discretion in favour of Dobrowolski. In coming to this conclusion, the AAT took account of the following factors:

(1) The fact that, from 1973 onwards, Dobrowolski had been physically incapable of fulfilling the statutory obligation to keep the DSS informed of changes in her husband's income. (The Tribunal rejected a DSS argument that those handling her affairs were under any obligation to supply the information: 'the intentions and circumstances of the applicant must be important considerations': Reasons, p. 9.)

(2) The significant effect which flowed from the DSS's failure between 1973 and 1978, to continue its annual reviews of age pensions: this failure 'contributed as much, if not more, to the building up of the overpayment as did the applicant's inability to give notice' of her husband's increased income: Reasons, p.11.

(3) The fact that Dobrowolski had savings of only $1400, the only reserves available to meet her living expenses if her husband's support was no longer available. Her husband's assets and income were irrelevant as he was not liable to repay the overpayment.

(4) The fact that nearly two-thirds of the overpayment had already been recovered before deductions were suspended pending the appeal and review process.

(5) The fact that continued deductions would disadvantage Dobrowolski's husband rather than her because he paid the difference between her pension and her living costs in the nursing home.

Formal decision

The AAT set aside the decision under review.

FLORIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/431)

Decided: 5 December 1983

Argiro Floris applied to the AAT for review of a DSS decision to recover from her (under s.140(1) of the *Social Security Act*) an overpayment of $1103 in invalid pension.

The legislation

Section 140(1) authorises the Director-General to recover an overpayment caused by a pensioner's failure to comply with the requirements of the Act: see *Kaiser*, in this issue of the *Reporter*.

Section 45(2) obliges a pensioner to report to the DSS, at regular intervals, any increases in income.

The overpayments

Floris had been granted an invalid pension in February 1979. She told the DSS that her husband was employed and stated the amount of his wages. The DSS checked with the husband's employer and used that information to calculate the level of Floris' pension.

Over the next two years, Mr Floris' wages varied considerably. When requested by the DSS, Mrs Floris informed them of the current level of her husband's income, and the DSS also obtained this information from the employer.

However, Mrs Floris did not report any of the increases in her husband's income (as required by s.45(2)), except when requested by the DSS. On the other hand, she did approach the DSS on two occasions to report reductions in that income. These approaches followed specific advice given to her by a social worker.

Neither Mrs nor Mr Floris could read English. Each of them had believed that the DSS was checking the husband's wages with his employer. In fact, the DSS had adjusted Mrs Floris' pension from time to time until October 1980 when it cancelled her pension because of a substantial increase in her husband's income.

The Tribunal found that the DSS based all its calculations of Mrs Floris' pension on information supplied by the employer. (The overpayments resulted from the Department's reliance on that information, which was later shown to be inadequate.) It was reasonable for Mrs Floris to assume that the DSS was following this course: both the correspondence from the DSS (which neither Mr or Mrs Floris could read) and the facts known to them would have led to this conclusion.

Recovery by the DSS – a matter of discretion

The Tribunal said that the overpayment would not have occurred if Mrs Floris had complied with s.45(2) of the Act and reported increases in her husband's income. Accordingly, the Director-General had a discretion to decide whether to recover the overpayment (as confirmed by the Federal Court in *Hales* (1983) 13 *SSR* 136).

The AAT referred to two factors which were relevant to the exercise of this discretion:

(a) the Department's reliance on inadequate information from the employer; and

(b) the lack of means of Mrs Floris which would mean that the Director-General could not enforce payment of any judgment debt.

Taking those factors into account, the AAT said that recovery of the overpayment should not be pursued under s.140(1).

Possible recovery by deductions

The Tribunal also considered whether the DSS might recover the overpayment under s.140(2), in the event of her invalid pension being restored. (That sub-section authorises recovery of an overpayment by deduction from current payments of pension or benefit.) Given that her pension could only be restored if her husband's income fell, the Tribunal