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

the amount of benefit payable through the application of the income test in s.114 of the *Social Security Act*.

The Federal Court allowed the appeal, holding that the Tribunal had made an error in law because it had failed to follow the decision in *Lambe*. In deciding whether a man and a woman were living together as husband and wife on a *bona fide* domestic basis, all facets of their interpersonal relationship should be taken into account – their financial relationship, although important, was only one of a number of relevant matters. That approach had been established in *Lambe* and there was no basis for departing from that approach in the present case. The Court made the following observations:

> It is easy to see that an absence of financial support may, in some circumstances, afford evidence that the relationship in question does not exist, although, of course, even in institutional marriage, there have always been a wide variety of financial arrangements and it seems a reasonable inference that increased flexibility has resulted from the greater financial independence now enjoyed by many women and the less structured roles which the sexes play in current society in this country.
>
> Financial arrangements cannot be taken in isolation and considered of particular importance in determining the nature of a relationship . . . Each element of a relationship draws its colour and its significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration.
>
> It seems futile to deny that subjective views as to what are involved as basic attributes of the marriage relationship will intrude into the assessment called for. However it is in my view important that the departmental officers or tribunals charged with the task at least take into account what is the norm for the peer group of the applicant. Only in this way can the legislation be fairly and justly accommodated to a multi-racial and otherwise diverse society.

(Reasons for Judgement, pp. 6-8)

Order

The Federal Court allowed the appeal and returned the matter to the AAT for reconsideration.

[**Editorial note**: We apologise for the delay in noting this Federal Court decision, of which we became aware only recently. We thank the Department of Social Security for providing us with a copy of the Court's judgment.]

Background

Social Security Appeals Tribunals: a new structure?

The Administrative Review Council has completed its report on *The Structure and Form of Social Security Appeals* (Report No. 20). It follows closely the draft report reviewed in the February 1984 issue of the *Reporter* (1984) 17 *SSR* 180.

A 'two tier' system

In particular, the report proposes that the present 'two-tier' system of appeals should be retained, but with substantial modifications: Social Security Appeals Tribunals would continue to operate as the first tier, dealing with the great bulk of appeals; but it would be given complete independence from the DSS, its members would have security of tenure, its procedures would be up-graded to improve the quality of justice offered to appellants and (perhaps most importantly), its decision would be substituted for those of the DSS – that is, the DSS would no longer have the power to veto SSAT decisions.

The second tier would be the Administrative Appeals Tribunal, which would hear appeals from decisions of SSATs, rather than from decisions of the Director-General after review by an SSAT as it does now. Appeals to the AAT could be brought by either a claimant or the DSS – at present, only claimants can seek review of social security decisions in the AAT (an inevitable restriction, given that at present the only 'decisions' that can be made are decisions of the Director-General of Social Security); but once the SSATs are given power to make effective decisions, the arguments for allowing the DSS to seek review by the AAT are very strong.

A dissent on 2 points

The Council's final report carries dissenting views by two members on two matters relating to the future operations of SSATs: M. Kirby and A. Rose dissented from the majority's recommendation that the Tribunal should continue to include one Public Service member (amongst their three members); and from the majority's recommendation that, in general, SSAT hearings should be in private. These dissents were based on the need to maintain, and to give to appellants the appearance of, an independent Tribunal; and on the need to open the administration of the law to public scrutiny.

The basic issue – unanimity within the Council, but not outside

However, none of the Council's members dissented from the basic thrust of the Report, which is to retain and improve the current 'two-tier' structure for social security appeals. This unanimity is a little surprising in the light of the fact that, in 1980, the Council had recommended that social security appeals should be dealt with by a 'single-tier' system, consisting of the AAT. Its change of mind is supported in the Report by several arguments: the Council has had the opportunity to compare the current 'two-tier' system with other review systems which also handle a large volume of decisions; it believes that a 'single tier' system would not permit the AAT to give to DSS decisions the careful and critical scrutiny that is necessary to correct unlawful or inconsistent practices; and it makes the point that a 'single tier' system would not be able to provide an accessible, speedy, informal and economical form of review in such a high volume jurisdiction and, at the same time, achieve an adequate standard of justice in all cases: Report, para. 104.

This is not a view which is shared by some organizations whose activities identify them with claimants: ACOSS, the Welfare Rights Centre (Canberra) and the Sydney Welfare Rights Centre argued for the abolition of SSATs, the improvement of internal review mechanisms (now handled by DSS 'review officers') and the establishment of the AAT as the only external review body. A primary objective of this re-structuring would be to improve initial decision-making and to provide an accessible system for correcting DSS errors almost immediately they are made. Behind these proposals there is (I think we can assume) real scepticism as to the impact of the current 'two tier' review system on the day-to-day activities of the DSS: that is, there is considerable doubt that the DSS is capable of reacting, or willing to react, to individual AAT decisions which demonstrate that, for example, its refusal to pay special benefit to a migrant, covered by a maintenance guarantee, is inconsistent with s.124 of the *Social Security Act*. (That scepticism can only be reinforced if we look at the AAT decision in *Sakaci*, noted in this isue of the *Reporter*: the AAT described as without legal foundation DSS practices which had been condemned by the AAT some 30 months earlier in *Blackburn* (1982) 5 *SSR* 53.)

The Administrative Review Council began an 'impact study', focusing on the DSS and a few other departments, about 18 months ago: that study (for which, I understand, the investigations have been completed) should give us some insights into the reality of the effect of the current review systems on DSS practices and procedures. It is a pity that the Council has not been able to give the 'impact study' the same level of priority as that given to the current Report, which was completed within 6 months of a reference from the Attorney-General.