

## Overpayment

### McSHANE and SECRETARY TO DSS (No. W84/104)

Decided: 23 January 1985 by R.K. Todd.

The AAT *affirmed* a DSS decision to recover an overpayment of unemployment benefit, amounting to \$245.

McShane had denied receiving payments of unemployment benefit which had led to the overpayment. In particular, he denied that the endorsement on 3 DSS cheques made out to him was his signature.

The AAT said that it did not need to decide whether McShane had endorsed the cheques because the evidence showed that each of the cheques had been credited to McShane's savings bank account. It followed, the AAT said, that McShane had received payments of unemployment benefit and, because he was not entitled to those payments, the overpayment was recoverable.

### WARD and SECRETARY TO DSS (No. V84/174)

Decided: 31 January 1985 by J.R. Dwyer.

The AAT *affirmed* a DSS decision to recover an overpayment of \$4522 paid to Deborah Ward by way of widow's pension.

The AAT decided, that during a period of some 10 months, Ward had been 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him' and, accordingly, was disqualified by s.59(1) from receiving her widow's pension.

The AAT said that Ward had continued to receive her widow's pension during that 10 month period because she had failed to notify the DSS (as required by s.74(5)) of her *de facto* relationship. It followed that the overpayment was recoverable as a debt due to the Commonwealth under s.140(1).

However, the AAT said, it might be appropriate for the Secretary to exercise his discretion in s.140(1) so as to recover only half the total overpayment:

[I]n my view, Mrs Ward could make the payments of \$10 to \$15 a week without suffering extreme hardship. If such payments were regularly made it would require at least 6 years to repay the full amount of the overpayment. Even though the overpayment represents public moneys obtained by dishonesty, the Secretary may conclude that there would be sufficient benefit to the public purse and less conflict with social welfare principles if a compromise were reached that so long as regular payments were made, an amount less than the total amount would be accepted in full satisfaction. I would suggest that in all the circumstances the figure of half the total of overpayment would be acceptable. Of course, if the applicant's circumstances should materially change for the better or the worse, it would be appropriate for the Secretary to again place all considerations in the scales before deciding to pursue recovery or what recovery to require.

(Reasons, para.40)

## Sickness benefit: recovery from compensation

### MITREVSKI and SECRETARY TO DSS (No. N84/418)

Decided: 18 January 1985 by A.P. Renouf.

Tanas Mitrevski was injured at work in February 1977. His weekly workers' compensation payments ended in November 1979 and the DSS then granted him sickness benefit. Mitrevski continued to receive sickness benefit until August 1982, when the NSW Workers' Compensation Commission awarded him \$55 000 against his former employer.

Before that award, the DSS had notified Mitrevski, his solicitors and his employer's insurers that it intended to recover the sickness benefit paid to Mitrevski from the award of compensation. Following the compensation award, the DSS decided that the sum of \$10 081 should be recovered and the insurers paid this amount direct to the DSS (the DSS later varied this decision by reducing the recoverable amount to \$8382).

Mitrevski asked the AAT to review the DSS decision.

#### The legislation

Section 115B(3) of the *Social Security Act* authorises the Secretary to recover, from a person to whom sickness benefit and workers' compensation had been paid for the same incapacity, the sickness benefit received by that person for that incapacity.

Section 115C allows the Secretary to recover the sickness benefit direct from any person liable to pay the compensation.

Section 115E gives the Secretary the discretion to waive recovery of all or part of the sickness benefit in 'special circumstances'.

#### Identity of incapacity

Mitrevski claimed that the sickness benefit had been paid to him because of a back injury but that the workers' compensation award had been made for a psychiatric illness. However, medical certificates lodged with the DSS and various documents dealing with his workers' compensation claim established that both the benefit and the award had been paid because of Mitrevski's back injury and psychiatric problems. Accordingly, the 'identity of incapacity for which the compensation and the sickness benefit were paid' required by s.115B(3) had been established, the AAT said.

#### 'Special circumstances'

Mitrevski argued that the Secretary should waive recovery of sickness benefit from him because Mitrevski had settled his compensation claim for approximately half the sum which he might have expected to receive if the matter had gone to a full hearing.

However, the AAT said, this should not be treated as a 'special circumstance' because:

- there was nothing unusual or special in an injured person compromising her or his claim for damages or compensation;
- to treat the making of a compromise settlement as a 'special circumstance' would substantially undermine the

provision of the Act dealing with recovery of sickness benefit; and

- Mitrevski had accepted the compromise settlement, knowing that he would be expected to repay to the DSS the sickness benefit received by him.

#### Formal decision

The AAT affirmed the decision under review.

### FULCOMER and SECRETARY TO DSS (No. V84/58)

Decided: 15 February 1985 by J.R. Dwyer.

Elizabeth Fulcomer was injured in a motor vehicle accident in March 1978 and paid sickness benefit (totalling \$1071) for the period between 19 March and 1 August 1978. She then began a common law action against the driver of the vehicle responsible for her injuries.

In January 1982, Fulcomer's solicitors asked the DSS whether it intended to claim a refund of the sickness benefit: but they received no response to this request. In March 1982, The DSS wrote to Fulcomer, her solicitors and the defendant's insurer, indicating that the DSS might claim a refund of the sickness benefit from any damages awarded to Fulcomer.

In November 1982, Fulcomer's solicitors advised the DSS that the damages action had been settled for \$35 000 and again asked if the DSS intended to seek