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 Feburary 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

repayment of the sickness benefit. The DSS then asked Fulcomer's solicitors and the defendant's insurer's solicitor for details of the basis of the damages settlement. Before these details were provided and before the DSS had decided whether the sickness benefit was repayable, the defendant's insurer paid the full amount of the sickness benefit ($1071) to the DSS in February 1983.

Eventually, in June 1983, after being told that the settlement had included about $15 000 for loss of past and future earning capacity, the DSS decided that all the sickness benefit was recoverable and that none of the $1071 received from the insurer would be refunded to Fulcomer. She then sought review of that decision.

The legislation

This case raised a complex series of legislative provisions: s.115 of the *Social Security Act* (which had been repealed from 1 August 1982) authorised the recovery by the DSS of sickness benefit out of certain compensation and damages awards; from 1 August 1982, that section was replaced by Division 3A; and s.39 of the *Social Security Legislation Amendment Act* 1982 dealt with the transition from the old s.115 to the new Division 3A.

Adequate 'notice' of the DSS claim?

The AAT first examined the notice given by the DSS to the insurer in March 1982. Because that notice had not specified the amount of sickness benefit which the DSS had decided to recover, it was (at best) a notice of intended claim under the old s.115(5). It was not a notice of demand under the old s.115(6) and could not provide legal authority for the insurer's payment to the DSS, even if that notice were preserved by the transitional provisions.

Again, even if that notice had been preserved by the transitional provisions, it had not been followed up by a notice under the new s.115C(2) or the new s.115D(2), either of which might have provided legal authority for the insurer's payment to the DSS.

However, the AAT said, the notice given by the DSS to the insurer in March 1982 had not even qualified as a notice of intended claim under the old s.115(5), because that sub-section was limited to permitting the DSS to recover sickness benefit from an insurer liable to pay weekly compensation: the DSS could not, under the old s.115(5), give notice to an insurer liable to pay lump sum damages.

$1071 illegally retained

It followed, the AAT said, that the DSS had unlawfully received and retained the money paid to it by the defendant's insurer. The 'irregularity' surrounding the receipt of the payment could not be regarded as 'waived' by the insurer:.

> It is difficult to see why the insurer should be able to waive any irregularity when it is the plaintiff or recipient of sickness benefit who is affected by the procedures outlined by the Act. Those procedures are to protect the interests of recipients of sickness benefit who recover damages awards as much as to protect the interest of the Commonwealth in receiving reimbursement.

(Reasons, para. 32)

DSS power of direct recovery

The AAT then turned to the question whether the DSS could recover the sickness benefit direct from Fulcomer. The Tribunal said that, as she had received her damages settlement after 1 August 1982, the DSS recovery power was controlled by the new Division 3A, which imposed no time limits on the recovery of sickness benefit. Accordingly, it was still open to the DSS to serve a notice on Fulcomer under the new s.115B(3) so as to require her to refund some or all of the sickness benefit.

Was all the sickness benefit recoverable?

Recovery of the whole of the sickness benefit depended, according to s.115B(3), on the Secretary being satisfied that the damages settlement had been paid for the same incapacity as the sickness benefit, and that the settlement had included a sum of money at least equal to the amount of sickness benefit paid.

The AAT pointed out that to decide this question was 'almost impossibly difficult . . . without evidence from the parties and their legal advisers as to the basis of any agreed figure of compensation': Reasons, para. 54; and adopted the observation in *Edwards* (1981) 3 *SSR* 26 that 'certainty is necessarily elusive': Reasons, para. 60.

The AAT decided that all the $1071 of sickness benefit was recoverable from Fulcomer because the damages award had included at least $1420 to cover Fulcomer's incapacity for work (because of her injuries) between 19 March and 1 August 1978 – the incapacity for which the sickness benefit had been paid. The AAT arrived at that figure by noting that about $15 000 had been included in the settlement to cover loss of earning capacity (past and future), that Fulcomer had probably lost $3556 in salary during that period, and that the settlement had involved some compromise, leading to her claim being discounted by about 60%, because of her contributory negligence.

Accordingly, the AAT said, the DSS could recover the whole of the sickness benefit from Fulcomer.

The discretion

Section 115E gives the Secretary a discretion to waive recovery of whole or part of sickness benefit in 'special circumstances'. The AAT said that this discretion should be exercised here so as to recover only $871 of the sickness benefit (so that the DSS would refund $200 to her), if she agreed not to insist upon a full refund of the $1071. The AAT listed the following factors as relevant to the exercise of the discretion:

- that Fulcomer had received public moneys (a 'paramount consideration') and compensation for the same period;
- that the DSS had unlawfully received and retained for 2 years Fulcomer's money;
- that it would be 'unjust oppressive and inappropriate' if the result of the hearing was that Fulcomer succeeded in showing the illegality of the DSS retaining her money and then being obliged to pay the Commonwealth all that money;
- that such a result would not encourage the DSS to ensure that its procedures conformed to the Act; and
- that, if Fulcomer were to cooperate by not demanding the refund of her money illegally retained by the DSS (and leaving the DSS to recover that money from her under s.115B(3)), there would be a substantial saving in expense for the DSS.

Formal decision

The AAT remitted the matter to the Secretary for reconsideration in the light of a series of directions:

(1) that $1071 had been wrongly paid to the DSS and she was entitled to a refund of that money;

(2) that the Secretary was entitled to recover from Fulcomer all the sickness benefit paid to her; and

(3) that, in exercising the discretion to waive recovery of part of the sickness benefit, the Secretary should take account of the factors listed above.