Sickness benefit

The AAT noted that Hurrell had been temporarily incapacitated for work because of sickness between 6 October and 24 December 1983. During that period, the AAT said, Hurrell had been qualified for sickness benefit under s.108(1)(c)(ii) of the *Social Security Act*.

Although Hurrell had not lodged a claim for sickness benefit, this was an appropriate case in which the Director-General could exercise the discretion in s.145 of the *Social Security Act* and treat Hurrell's original claim for unemployment benefit as a claim for sickness benefit, so as to permit payment of that sickness benefit, along the lines adopted in *Dixon* (1984) 20 *SSR* 213.

Section 117(1) of the *Social Security Act* provided that a claim for sickness benefit should be supported by medical certificate; but gave the Director-General a discretion, 'in special circumstances', to dispense with that requirement. Here, the AAT said, there were sufficient special circumstances to dispense with the medical certificate. Those circumstances included Hurrell's financial inability to consult a doctor and the possibility that his illness was caused or aggravated by stress, contributed to by the DSS when it stopped payment of his unemployment benefit.

Special benefit

The Tribunal concluded by saying that, if Hurrell had not qualified for unemployment benefit or sickness benefit at any time during the period under review, he would have qualified for special benefit under s.124(1) of the *Social Security Act*, as a person 'unable to earn a sufficient livelihood'. Moreover, That special benefit could have been paid retrospectively, as had been decided in, eg. *Sakaci* (1984) 20 *SSR* 221 and *Ezekiel* (1984) 21 *SSR* 237.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with directions that Hurrell was qualified for unemployment benefit at the married rate from 22 September to 6 October 1983, and from 20 December 1983 until the date of this decision; and that Hurrell should be paid sickness benefit at the married rate from 6 October to 20 December 1983. (These directions were made subject to Hurrell lodging a claim for sickness benefit and subject to the Director-General being satisfied that Mrs Hurrell was not herself being paid benefit or pension or receiving disqualifying income.)

Overpayment: discretion to recover

NASMAN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N84/323)

Decided: 20 November 1984 by B.J. McMahon.

Leila Nasman was a 34-year-old invalid pensioner (suffering from epilepsy) at the beginning of 1982. She was renting a private flat and receiving supplementary assistance under s.30A of the *Social Security Act*.

On 15 March, Nasman moved to a Housing Commission flat and began paying rent to the NSW Housing Commission. (The *Social Security Act* had been amended from 1 February 1982 so that supplementary assistance was no longer payable to a pensioner paying rent to a public housing authority such as the Housing Commission. However, a circular detailing this change, sent by the DSS to Nasman, had not been received by her.)

On the day that she moved to the Housing Commission flat, Nasman telephoned the DSS and informed an officer of her move. She subsequently visited a DSS office and completed a change of address form. However, she continued to be paid supplementary assistance until 30 June 1983, when a DSS review revealed that she had been overpaid. The DSS decided to recover this overpayment under s.140(1) of the *Social Security Act* and Nasman sought review of that decision from the AAT.

The legislation

Section 30B(1A) of the *Social Security Act* provides that a person receiving a supplementary allowance must notify the DSS after he or she begins to pay 'Government rent' – that is, rent to a Government authority such as the Housing Commission of NSW.

Section 140(1) provides that any overpayment of supplementary allowance, which would not have been paid but for a failure to comply with the Act, is recoverable in a court of competent jurisdiction from the person to whom the allowance was paid.

Section 140(2) gives the Director-General a discretion to deduct from a person's pension any overpayment of supplementary allowance, regardless of the reason for that overpayment.

No basis for s.140(1) recovery

The AAT said that, technically, Nasman's telephone call to the DSS (on 15 March 1982) had not been a strict compliance with s.30B(1A), because it was made *prior* to her first payment of Government rent. However, the AAT said, such a technical breach could not be treated as a failure on the part of Nasman to comply with the *Social Security Act* and, therefore, any overpayment of supplementary allowance made to Nasman could not be recovered under s.140(1).

The discretion to recover under s.140(2)

The AAT noted that the DSS could recover an overpayment under s.140(2) regardless of the cause of the overpayment.

However, s.140(2) gave the Director-General a discretion and, the AAT said, because of the 'extraordinary width' of the recovery power under that provision, 'the respondent should be even more hesitant to exercise his discretion adversely to an applicant in sub-section (2) situations':

> It goes almost without saying that any discretion must be reasonably exercised. It is subject even to judicial review if it is not. (See eg de Smith's *Judicial Review of Administrative Action*, 4th ed. at p. 346 et seq and Whitmore and Aronson's *Review of Administrative Action* at p. 223 et seq.)
>
> There must be a correlation between reasonableness and width. The greater the absolute power the higher the duty to take account of all reasons why it should not be used. In the administration of social security legislation compassion is the better part of discretion. It follows that sub-section (2) must call for the application of more than usual [care].

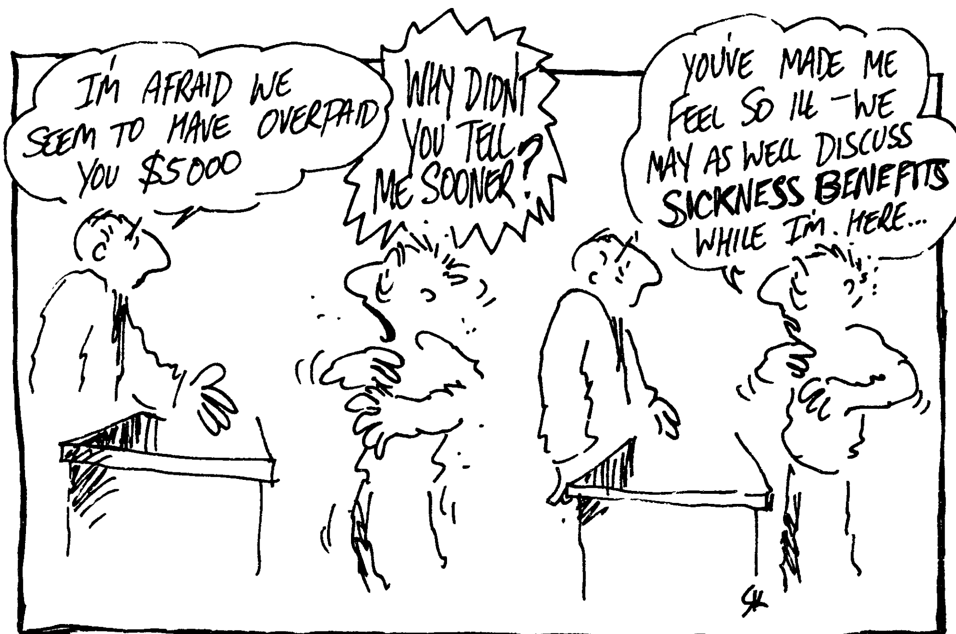
(Reasons, p. 7)

The AAT noted that Nasman had received public moneys to which she was not lawfully entitled. While this was an important consideration, it was only a starting point, rather than the only consideration. Other factors supported an exercise of the discretion in favour of Nasman:

- There had been several administrative errors or delays on the part of the DSS, some of which had caused stress and worry to Nasman;
- Nasman's personal circumstances had not equipped her to understand the niceties of social welfare legislation and had left her without personal, financial or emotional support; and
- withholding any amount from Nasman's invalid pension would cause her financial hardship.

On the issue of financial hardship, the AAT examined Nasman's budget and noted that the whole of her pension was required for her living expenses. The DSS had argued that, if Nasman were to curtail her social activity (10-pin bowling), she could afford to repay about $2.50 a week. The AAT dealt with this argument as follows:

> The inference was that it was unreasonable for the applicant to pursue this frivolous interest while she owned money. It is hard to see how, looked at from the opposite point of view, such an argument could justify the respondent exercising his discretion adversely to the applicant.
>
> It do not consider it appropriate that the respondent (or this Tribunal) should make a value judgment on the way in which a pensioner spends her pension. If she is able to save in one area to spend in another area then that is entirely her own private affair. One is no more entitled to criticise a person for playing 10 pin bowling than one is for spending large amounts, for example, on



cigarettes. Whether one approves or disapproves of the cigarette habit is not to the point. The fact is that the applicant manages her money in such a way as to sustain herself and to leave something over for a perfectly legitimate pursuit which she chooses to undertake.

(Reasons, pp. 12-3)

Formal decision

The AAT set aside the decision under review.

NEM and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/809)

Decided: 3 December 1984 by B.J. McMahon, D.J. Howell and M.S. McLelland.

Chhim Nem came to Australia as a refugee from Cambodia in 1980. She was a widow with 3 young children, having lost her husband and 2 children in Cambodia; and she spoke no English. Shortly after her arrival, she was granted a special benefit.

In April 1982, after some training in the English language, Nem took up casual employment as a teacher's aide. She notified the DSS of this employment (and of several later changes in her employment status); but, when she told the DSS of her earnings from this source, she used her net, rather than her gross, wages. At that time, Nem was unaware of the distinction; and the DSS officers with whom she dealt made no attempt to explain the distinction.

Although the DSS checked with her employer, on several occasions, the fact of Nem's employment, it did not check the amount of her wages until October 1982.

Towards the end of 1982, Nem learned of the distinction between net and gross wages and notified the DSS that she had understated her income. However, the DSS took no action until February 1983 when it decided that Nem had been overpaid $1042 – later reduced to $913. By this time, Nem had taken up full-time employment; but the DSS decided that the overpayment should be recovered by withholding part of her family income supplement and family allowance. Nem asked the AAT to review that decision.

The legislation

There was no dispute that Nem had been overpaid. The central question before the AAT was whether it was appropriate in this case for the Director-General to pursue recovery.

Section 140(2) of the *Social Security Act* gives the Director-General a discretion to recover an overpayment of benefit made to a person (whatever the cause of the overpyament) by deducting the overpayment from any current pension, benefit or allowance payable to that person.

A wide discretion

The AAT repeated the point made in *Nasman* (see this issue of the *Reporter*) that the Director-General should be careful to pursue recovery under s.140(2) because of the width of that provision:

> The greater the absolute power the higher the duty to take account of all reasons why it should not be used. In the administration of social security legislation compassion is the better part of discretion.

In the present case, the conduct of the DSS, factors personal to Nem and her financial hardship combined to support an exercise of the discretion in her favour.

DSS conduct

The AAT said that the failure of the DSS to check Nem's income when it had the opportunity was a relevant factor, as was its delay (for some 4 months) in raising an overpayment. Also relevant was the failure of the DSS to explain the concept of gross and net income to Nem during her dealings with the Department.

Factors personal to Nem

The AAT said that Nem was a refugee, to whom Australia had 'clear legal obligations . . . under the Convention and Protocol Relating to the Status of Refugees [which obliged] the contracting states (including Australia) to accord certain minimum treatment to refugees lawfully staying in their territory in specified fields including social security'.

But beyond that, the Australian community and the Director-General had 'a moral duty to do everything in our power to assist the transition of the refugee from her shattered world to a settled place in our society'; and it was, therefore, 'certainly legitimate to take into account . . . "compassionate considerations" ': Reasons, p. 7. The AAT recounted Nem's experiences in Cambodia and her flight to Australia:

> A widow at 34 . . . with no husband or family near her, she lacks any personal, financial or emotional support except what she can derive from her young children. It is not too much to expect that in the exercise of discretion and in looking at the total circumstances of the case, the respondent should pay some attention to these matters.

(Reasons, p. 8)

Moreover, the AAT said, Nem had been scrupulously honest in disclosing her employment and income to the DSS, and this was a factor to be taken into account.

Financial hardship

The AAT looked at Nem's income and expenditure and noted that Nem and her children lived in a very cramped flat, which she was about to be forced to leave. She would then have to pay a higher rent and 'the delicate balance of income and outgoings [established by the evidence] is therefore soon likely to be upset . . . Clearly there would be little hope of recovering $913.25 from the applicant, even by instalments, without creating serious financial hardship': Reasons, p. 11.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that the overpayment not be recovered.

GRASSO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N84/145)

Decided: 14 December 1984 by J.A. Kiosoglous, G.D. Grant and J.H. McClintock.

Mauro Grasso was retrenched from his job with General Motors Holden in September 1980 when he was aged 61. He was granted unemployment benefits for 3 weeks, then undertook a course in English for 10 weeks and, in December 1980, was again granted unemployment benefit which was paid to him at the full married rate until August 1983.

In his December 1980 application for unemployment benefit and in various applications for continuation for that benefit, Grasso had declared that his only pri-

vate income consisted of rent (for a property let to his son) of $6 a week. However, throughout most of this period, Grasso had approximately $5000 invested on interest-bearing depsosit which was producing regular income for Grasso.

When the DSS discovered the existence of this income, it concluded that there had been an overpayment (initially calculated at $4650 but later calculated at $915); and the DSS decided to recover this overpayment by withholding $5 a week from Grasso's unemployment benefit. Grasso asked the AAT to review that decision.

The legislation

Section 114 of the *Social Security Act* provides that the rate of unemployment benefit payable to a person is to be adjusted by reference to the person's income.

Section 130(1) obliges a beneficiary to notify the DSS whenever the beneficiary's weekly income increases.

Section 140(1) provides that, where there has been an overpayment of unemployment benefit because of a failure to comply with any provision of the Act, the overpayment is recoverable in a court of competent jurisdiction from the person to whom the overpayment was made.

Section 140(2) gives to the Director-General a discretion to deduct from any current benefit an amount which has been overpaid by way of benefit, whatever the reason for that overpayment.

The cause of the overpayment

On behalf of Grasso, it was argued that the overpayment had resulted because of inactivity and error on the part of the DSS, combined with Grasso's cultural isolation – that is, his ignorance of the social security system and his poor English.

Grasso claimed that, when he had first been granted unemployment benefit in September 1980, he had told the DSS that he had received a redundancy payment of $5000 from GMH. Although Grasso had not repeated this disclosure when he applied for unemployment benefit in December 1980 and although he had consistently failed to reveal the income earned from the investment of that $5000, Grasso's counsel argued that the DSS should have realised that the redundancy payment was likely to be invested and should have followed up that matter.

However, the AAT pointed out that Grasso had neither revealed the existence of the $5000 to the DSS in December 1980 nor disclosed the income earned on that money. He had, therefore, failed to comply with s.130(1) of the Act and there was a basis for recovery of the overpayment under s.140(1).

So far as Grasso's cultural isolation was concerned, the AAT noted that he had answered many questions during the Tribunal hearing without the use of an interpreter; and that the rental income received by him from his son ($6 a week in 1980, $10 a week in 1984) corresponded to the maximum allowable income under s.114 of the *Social Security Act*. This may have been 'just purely a coincidence' or it may have indicated Grasso's understanding of the social security system.

Direct recovery

Although the original DSS decision had been to recover the overpayment by deductions from Grasso's current benefit, the AAT decided that, in the circumstances of this case, Grasso should be directed to make immediate repayment – that is, the recovery decision should be based on s.140(1) rather than s.140(2).

In coming to that conclusion, the AAT took account of the facts that Grasso had received public money to which he was not entitled, that he would not suffer financial hardship by being obliged to refund the overpayment, given that he had some $6000 in his bank accounts, that deductions from current benefit or pension was an uncertain means of recovering an overpayment and that the overpayment was contributing to Grasso's current income from investments:

> The overpayment has resulted, even if to a limited extent, in his receiving an income from derived interest. This being the case, it would not accord with 'principles of consistency, fairness and administrative justice' should he not repay to the Department the entire overpayment forthwith. This would disallow the applicant receiving further interest (and thereby 'income') from public moneys that he has invested. In effect it would prevent the applicant receiving further interest on money that he should never have had.

(Reasons, para. 59)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Grasso repay to the Director-General the total amount overpaid forthwith.

Overpayment: evidence

LETTS and SECRETARY TO THE DEPARTMENT OF SOCIAL SECURITY (No. W84/41)

Decided: 20 December 1984 by J.D. Davies J.

Arthur Letts was granted an age pension sometime before 20 June 1977. On that date, the DSS granted an age pension to one 'Allan Ryan' who had given his address as 'C/- Midland PO' on his claim form.

In August 1981, Letts was convicted of an offence under s.29B of the *Crimes Act* 1914, of imposing upon the Commonwealth by an 'untrue representation . . . with a view to obtaining money'. Evidence was given at Letts' trial that the claim form in the name of 'Allan Ryan' and pension cheques endorsed by 'Allan Ryan' were in the handwriting of Letts. Evidence was also given at the trial by a clerk at the Midland Post Office that, over several months, a person known as Ryan had collected pension cheques; but this witness was unable to identify Letts as the person he knew as Ryan.

Following this conviction, the DSS decided that Letts had been overpaid $7008 (apparently the amount of age pension paid to 'Allan Ryan') and decided to recover this overpayment from Letts by withholding $8 a fortnight from his age pension. Letts asked the AAT to review that decision.

The legislation

Section 140(2) of the *Social Security Act* now gives to the Secretary a discretion to recover any overpayment of pension, whatever the reason from the overpayment, by deducting the amount of that overpayment from the payee's current pension.

Evidence of overpayment

The AAT said that Letts' conviction was 'evidence of the matters which must necessarily have been accepted by the jury in reaching its verdict.' In order for the jury to have found him guilty of imposition upon the Commonwealth, it must have accepted the testimony of the handwriting expert; and, accordingly, the verdict was evidence that Letts was the person who had filled in the application form seeking an age pension for Allan Ryan.

In addition, the AAT said, s.33 of the *AAT Act* 1975 provided that the Tribunal was not bound by the ordinary rules of evidence; and it could take into account as evidence in this review the transcript of the evidence given at Letts' trial. While that transcript showed that the postal clerk was unable to identify Letts as the person whom he knew as Ryan, the evidence of the handwriting expert positively identified the signatures on 'Allan Ryan's' pension cheques as in the handwriting of Letts. The AAT concluded:

> I am therefore satisfied that the applicant both sought an age pension in the name of Allan Ryan and received the pension cheques addressed to Mr Allan Ryan. What use the applicant made of those moneys is not disclosed by the evidence before me. However, I am satisfied that he received those moneys. For the purpose of s.140(2), it is sufficient that my satisfaction is satisfaction on the balance of probabilities, though taking into account the serious nature of the allegation made against the applicant . . . Taking into account the nature of the allegation, I am satisfied that the applicant claimed and received payments by way of age pension totalling in all, $7007.90 to which he was not entitled.

(Reasons, pp.4-5)