Overpayment: not recoverable

GABLIKIS and SECRETARY TO DSS
(No. W84/122)
Decided: 25 June 1985 by G. D. Clarkson, A. H. Marsh and I. A. Wilkins.

Alberta Gablikis had been granted an invalid pension in November 1979. The rate of that pension was calculated on the basis of income received by Gablikis' husband. Over the period between January 1981 and December 1982, his income varied but the rate of Gablikis' pension was not adjusted by the DSS to take account of those variations. When the DSS discovered this discrepancy it calculated that there had been an overpayment of $1989 and decided to recover that overpayment from Gablikis. She asked the AAT to review that decision.

The legislation
Section 140(1) of the *Social Security Act* provides that an overpayment of pension, made in consequence of a failure or omission to comply with any provision of the Act, is recoverable from the person to whom the overpayment was made. At the time of the decision under review, s.45(2)(b) obliged a pensioner to notify the DSS of increases in the income of the pensioner's spouse.

The evidence
Gablikis told the Tribunal that on several occasions (probably 3) she had notified a regional office of the DSS of increases in her husband's wages; and that on at least one occasion she had called personally at the DSS office for this purpose. She was able to identify accurately the officer to whom she had spoken when reporting these increases in her husband's wages.

The DSS did not dispute this evidence and did not call the identified officer to give evidence. However the DSS produced its files which contained no record of these notifications.

Overpayment not caused by pensioner's failure or omission
The AAT decided that the DSS had not established that the overpayments of invalid pension made to Gablikis had been in consequence of her failure or omission to comply with a provision of the *Social Security Act*. Given that the DSS was able to identify the officer described by Gablikis and given that the DSS had not sought to call evidence from that officer, it should be taken as not contesting the substance of her evidence. This meant that she had notified the DSS of increases in her husband's wages and that the overpayments made by the DSS were not recoverable under s.140(1).

Discretion
The AAT concluded by saying that, even if it was wrong in its conclusion as to the operation of s.140(1),

> we think this would be a proper case for the exercise of the Secretary's discretion against recovery, which would cause hardship and anxiety to a woman in poor health whose conduct in relation to the relevant issues we regard as blameless.

Formal decision
The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that no action to recover the alleged overpayments be taken.

Claim for 'inappropriate' pension etc.

WIEBENGA and SECRETARY TO DSS
(No. V84/248)
Decided: 25 September 1985 by H.E.Hallowes.

Graeme Wiebenga visited the CES and enquired about unemployment benefit on 21 October 1983 soon after his employment was terminated. He was given a 'Registration of Job Seekers' form to fill in (which he lodged with the CES) and other forms to take away. These appeared to concern sickness benefit so he discarded them.

Wiebenga found employment on 28 November 1983. He made further enquiries about his unemployment benefit and lodged a statutory declaration with the DSS on 6 January 1984 detailing his attempts to apply for unemployment benefit. He was told by the DSS on 23 January 1984 that he was ineligible for the relevant period because of his failure to complete a claim 'in writing in accordance with a form approved by the Director-General' (s.116(a) of the *Social Security Act*; see now s.135TB).

'Approved' form not lodged
The AAT agreed with the DSS that Wiebenga had not complied with the Act. The form lodged with the CES was not one 'approved' by the Director-General nor did it conform with it: the DSS form required much more information than that given to the CES - for example, a statement that the applicant was capable of undertaking and willing to undertake work and had taken all reasonable steps to obtain employment. The fact that the CES had given Wiebenga a sickness benefit application rather than one for unemployment benefit was irrelevant. Similarly, his statutory declaration did not comply with the Act.

The s.145 discretion
Wiebenga also argued that his oral request to the CES, the form he filled in at that office and his subsequent statutory declaration made to the DSS constituted a relevant claim within s.145 of the Act. (This section allows a claim for an inappropriate benefit to be treated as a claim for the appropriate benefit, for determining the date of eligibility, once 'a claim in accordance with the appropriate form' has been lodged.) The AAT said that, presuming that the combination of forms and declarations that had been provided did amount to a 'claim', it could not exercise any discretion to backdate the payment until an appropriate form had been lodged.

Formal decision
The Tribunal affirmed the decision under review.

LAMBERT and SECRETARY TO DSS
(No. V84/415)
Decided: 17 October 1985 by H.E.Hallowes.

Oswald Lambert was granted an invalid pension from 19 April 1984. He appealed against a refusal of the DSS to backdate his pension to March 1977.

Lambert had made a telephone inquiry of the DSS about his eligiblity for an invalid pension in 1977 or 1978 and had been told his income was too high. The AAT followed *Boak* (1982) 9 *SSR* 90 and decided that his failure to lodge an appropriate claim form meant that he was not entititled to payment from that earlier date.

Lambert had also made an application to the Repatriation Department for a war pension in 1961. He argued that this claim should be treated as one that could, under s.145 of the *Social Security Act*, be treated as a claim for an invalid pension. Section 145 gives the Secretary to the DSS a discretion to treat a claim for an inappropriate benefit as a claim for the appropriate benefit, for determining the date of eligibility, once 'a claim in accordance with the appropriate form' has been lodged.

The Tribunal adopted the reasoning in *Dixon* (1984) 20 *SSR* 213 that 'the power to backdate becomes desirable in order to enable the claimant to receive something to which he would have been entitled had he claimed it originally.' Given that the Tribunal was not satisfied that Lambert would have been entitled to an invalid pension in 1961, they held s.145 did not apply.

Formal decision
The Tribunal affirmed the decision under review.

GIURGIS and SECRETARY TO DSS
(No. N83/318)
Decided: 8 July 1985 by B. J. McMahon.

Kamel Giurgis had been granted sickness benefit in November 1979, on the basis of a psychiatric condition. At that time, he was enrolled for a tertiary course and receiving a TEAS allowance from the Federal Department of Education. Although Giurgis told the Education Department that he was receiving sickness benefit, and although the DSS learned in July 1980 that Giurgis was receiving a TEAS allowance, the DSS did not reduce the level of Giurgis' sickness benefit. However, in 1982 (at about the time when Giurgis was granted an invalid pension), the DSS calculated that there had been an overpayment of sickness benefit to Giurgis and decided to recover that overpayment by making deductions from his current invalid pension. Giurgis asked the AAT to review that decision.

Before the AAT, it was conceded that the TEAS allowance was 'income' which, according to s.114 of the *Social Security Act*, should have reduced the amount of sickness