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

benefit. It was also conceded that the DSS had the power, under s.140(2), to make deductions from Giurgis' invalid pension in order to recover the overpayment (which stood at $5532 in February 1985).

Giurgis' appeal to the Tribunal was based on two separate arguments: first, that he should have been granted an invalid pension (which has a more generous income test) rather than sickness benefit in 1979; and, secondly, that the DSS should exercise its discretion in s.140(2) against recovery.

Invalid pension?

Section 145 of the *Social Security Act* gives the Secretary to the DSS a discretion to treat an application for a pension, benefit or allowance as an application for another and more appropriate pension benefit or allowance.

There was a statement in one of the medical reports made on Giurgis that, with the benefit of hindsight, it would have been better for Giurgis to have applied for invalid pension rather than sickness benefit.

However, the AAT said that the only basis of its jurisdiction to review decisions by the Secretary was s.15A of the *Social Security Act*. That section conferred—

> jurisdiction only where the decision of the Secretary has been previously reviewed by a Social Security Appeals Tribunal. Jurisdiction is defined in those terms and, in my view, such an intermediate review is mandatory to the exercise of that jurisdiction. Without it, the matter cannot be dealt with by this Tribunal.

(Reasons, p.11)

Accordingly, even if there had been a basis for exercising the discretion in s.145, the fact that there had been no SSAT appeal on the question of that discretion meant that the AAT had no jurisdiction to deal with that discretion.

The AAT said that, even if it were wrong on the jurisdictional point, there was another difficulty. Section 27 of the *Social Security Act* requires an applicant for invalid pension to be examined by a medical practitioner, who is to certify whether the applicant is permanently incapacitated for work. There was, the AAT said, 'simply insufficient evidence before this Tribunal in the present proceedings to allow such conclusion to be reached'. The only evidence was some speculation by a medical practitioner several years after Giurgis had applied for sickness benefit. Accordingly, even if the Tribunal could treat Giurgis' earlier application for sickness benefit as an application for invalid pension, it would have to conclude that Giurgis had not demonstrated his entitlement.

The discretion

After noting that the discretion in s.140(2) was 'explicit and extraordinarily wide', the AAT said that it was necessary to take into account all the circumstances of the case. In the present case, there were factors which reflected upon the DSS. The first of these was the Department's two year delay in adjusting the level of Giurgis' sickness benefit after learning that he was being paid a TEAS allowance. The second factor was the wording of a pamphlet prepared by the DSS which said that people undertaking rehabilitation programmes were 'offered assistance which appears to be best suited to their needs and abilities . . . through further education . . .' It was clear that Giurgis had understood this information as referring to his tertiary course and to the TEAS allowance. The AAT commented:

> I accept that there was no fraud or dishonesty on the part of the applicant. I also accept that the form would not be misleading to one who had more than a passing knowledge of social security structures. However, given Mr Giurgis' state of mind and his other personal circumstances, I believe it reasonable to infer that he was honestly misled by that part of the Department's brochure.

(Reasons, p.16)

The AAT said that it had no evidence as to Giurgis' current financial position (he was receiving an invalid pension and living in Egypt). But, in the light of the two factors described above, the AAT thought that it would be 'appropriate and fair' if the amount to be recovered from Giurgis were reduced by the amount of the overpayment made between July 1980 and August 1982 (the period during which the DSS had known of Giurgis' TEAS allowance).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that half of the amount outstanding at February 1985 should not be recovered from Giurgis.

'Income': gross or net?

CONWAY and SECRETARY TO DSS (No. V84/370)

Decided: 22 February 1985 by I. R. Thompson.

William Conway was granted an age pension in May 1984. The pension was paid to him at a reduced rate on account of income which, the DSS decided, Conway was receiving. Conway asked the AAT to review the decision to reduce the level of his pension.

The legislation

At the time of the decision under review, s.18 of the *Social Security Act* defined 'income' as meaning—

> any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever . . .

Can losses be deducted from profits?

Conway had 3 sources of income: a bookmaking business which he had carried on for 30 years; farming; and rent from 2 shops. According to his records, he had, in the tax year ended 30 June 1982, made a net profit of $3423 from bookmaking, a net profit of $5124 from farming and net loss of $3466 from the rents. In the next tax year (ended 30 June 1983) he had made a net loss of $7150 on bookmaking, a net profit of $6351 on farming and a net loss of $2112 on property. Each of these net figures had been calculated by deducting various business expenses from his gross income on each of the various activities.

The DSS argued that Conway should be treated as carrying on 3 separate activities—bookmaking, farming and letting the shops; and that losses for one of those businesses could not be deducted from the profits of another business. On the other hand, Conway argued that he was carrying on only one business and that his income should be regarded as the aggregate of profits and losses under the 3 heads. In his evidence to the AAT, Conway explained that he had reduced his involvement in the farming business over the past 5 or 6 years and had now let the land to a tenant. He also said that his bookmaking business was now much smaller than it had been previously; and was operating at a loss for two reasons: first, because he was a gambler by inclination and, second, because he did not want 'just to sit down'.

The AAT noted that in *Szuts* (1983) 13 *SSR* 128, it had been decided that losses on an investment business could not be deducted from money received as superannuation payments, so that only the net sum might be regarded as 'income' for the purpose of the income test under the *Social Security Act*. On the other hand, the Tribunal had decided in *Schafter* (1983) 16 *SSR* 159 and *Sheppard* (1983) 13 *SSR* 127 that expenses properly incurred in various business activities could be offset against the moneys received in each of those activities. The DSS had generally adopted that practice and the profits or losses from each of Conway's activities had been calculated in this way. The AAT continued:

> What is in issue in these proceedings is whether losses, which quite clearly have been incurred by the applicant mainly in carrying on the bookmaking activities, can be regarded as reasonably incurred in the operation of a multi-faceted business. If there were any sound prospect of the bookmaking activities becoming profitable in the near future (in view of the applicant's age it is not appropriate to look further ahead), that might be possible. But that is not the situation; because of the applicant's age and his semi-retirement, there is no real possibility of his bookmaking activities becoming profitable. They have become more of a hobby than a business and are likely to remain so for as long as he chooses to continue with them. They cannot properly be regarded as part of a multi-faceted business operation. The profits derived by the applicant from his farming activities since February 1984 and the moneys he has received since then as rent for the farm and the shops must be regarded as 'income' for the purpose of section 28(2) of the Act.

Formal decision

The AAT affirmed the decision under review.