

to cancel a benefit where a person has failed to comply with a provision of the Act.

Full-time study

The Tribunal referred to the decision in *Long (1986) 29 SSR 360* which summarised the factors to be considered when assessing the eligibility of an applicant engaged in study. Those factors include the applicant's intentions at the relevant time, the

nature of the course, the amount of time required in attending the course, the applicant's commitment to the course and the applicant's willingness to obtain work. Applying those factors to this case the AAT concluded that the applicant was not eligible for unemployment benefit when engaged in the course of study.

As for the period between the end of his period of study and the new application for benefit, the AAT

concluded the matter on the basis of the applicant's own statement that he did not actually begin to look for work until the 1985-1986 summer holidays. This would have been at the time of the new application. The Tribunal therefore found that he was not eligible for unemployment benefit until the date of his new claim.

Formal decision

The Tribunal affirmed the decision under review.

Recovery of overpayment

SADDINGTON and SECRETARY to DSS

(No. V86/91)

Decided: 27 August 1986 by J.R. Dwyer, G. Brewer and L.S. Rodopoulos. Cynthia Saddington asked the AAT to review a decision by the DSS to recover an overpayment of \$3000 in widow's pension. (The actual overpayment calculated was \$6100.70 but the DSS had decided to waive recovery, under s.146 of the *Social Security Act*, of all but \$3000). The DSS alleged that the overpayment was in consequence of the applicant's failure to advise the DSS of maintenance payments she received as well as income she derived from part-time employment over a period of several years.

Recovery was apparently under s.140(2) as the DSS had decided to recover the amount by withholding \$5 per week from the applicant's pension. However, by the date of the hearing the applicant was earning an income which precluded her from receiving the pension. Thus at that date recovery was sought under s.140(1) which provides that the overpayment is a debt due to the Commonwealth.

Cause of overpayment

It was contended for the applicant that Departmental error contributed to the overpayment. The DSS had not acted on a copy of a custody and maintenance order obtained by the Department in 1980 to ascertain whether she was still in receipt of maintenance. The DSS also did not act on a letter written by the applicant in August 1981 which advised that she was accepting more part-time work. No attempt was made at that stage to ascertain her earnings.

However, the Tribunal found that administrative error played only a small part in the overpayment. The majority of the overpayment arose because of the failure of the applicant to advise the DSS of her increase in income. She was frequently advised by the DSS of this statutory obligation.

The discretion

The AAT considered that the decision to waive recovery of over \$3000 was generous in the circumstances. The DSS

had substantially overlooked the applicant's breaches of the Act over periods when they had been the major or contributory cause of the overpayment.

The applicant submitted that she would suffer hardship if the \$3000 that had not been waived was recovered. The AAT did not agree. There were no compassionate circumstances in this case which would suggest hardship if the applicant was required to repay the overpayment at the rate of \$5 or \$10 per week (see *Ward (1985) 24 SSR 289*). She was now working as a Secretary earning \$350 per week and had no unusual major expenses. The AAT compared her to those who relied solely on social security benefits, noting that the maximum weekly rate of widow's pension for an adult with one dependent child was in the vicinity of \$130.

The Tribunal referred to *Reynolds (1986) 32 SSR 404* where in relation to the test of 'severe financial hardship' in relation to the operation of the assets test the AAT observed that that form of hardship was 'more likely to be demonstrated by a person whose income is materially less than the current maximum pension'. The Tribunal noted:

Although it is not necessary for the exercise of the discretion to waive an overpayment [under s.146] that 'severe financial hardship' be demonstrated, we do suggest that it is unlikely that a finding of hardship relevant to the administration of the Act will be made where a person's income is substantially more than the current maximum pension unless there are unusual features to the case.

(Reasons, para. 35)

The AAT considered that the factors that arose from the decision of the Federal Court in *Hales (1983) 13 SSR 136* which should be considered were:

- (1) the fact that the applicant has received public moneys to which she was not entitled;
- (2) the way in which the overpayment arose whether as a result of innocent mistake or fraud;
- (3) the financial circumstances of the prospective defendant;
- (4) the prospect of recovery;
- (5) whether a compromise is offered;
- (6) whether recovery should be delayed if there is a prospect that the proposed

defendant's circumstances may improve or that the person may again become a beneficiary so that section 140(2) would be come applicable;

(7) compassionate considerations and the fact that the Act is social welfare legislation and the Secretary should have regard, inter alia, to any financial hardship which may result from an action for recovery.

(Reasons, para.37)

The AAT, having considered these factors, concluded that the amount not waived should be recovered.

Discount for period pension not paid?

The AAT was told that the applicant had requested that her pension be cancelled in July 1985. She reapplied for, and was granted, the pension in October 1985. There was no evidence as to her earnings during that period. The AAT considered whether some allowance should be made for this period.

However, after considering the generous exercise of the discretion to waive recovery of a substantial part of the overpayment, the AAT decided that there should be no further reduction of the amount to be recovered.

Formal decision

The AAT affirmed the decision to raise the overpayment of \$6110.70, to waive recovery of \$3110.70, to recover the balance of \$3000 and recommended that so long as regular instalments are made, recovery at the rate of \$5 per week be accepted.

THICK and SECRETARY TO DSS

(No. W85/209)

Decided: 19 August 1986 by R.D. Nicholson, J.G. Billings and N. Marinovich.

Mr Thick applied to the AAT to review a decision to recover \$2,957.34 overpayment in unemployment benefit. The applicant had understated the income of his wife on his continuation of benefit form over an eight month period. The actual overpayment was not contested by the applicant but he argued that the

discretion of the DSS should be exercised so as not to seek recovery of the overpayment (apart from one portion which occurred when the applicant himself undertook work while receiving unemployment benefit).

The legislation

Section 140(1) provides that where a benefit, pension or allowance has been paid to a person as a consequence of a false statement or representation or failure or omission to comply with the provisions of the Act then the amount paid is recoverable as a debt due to the Commonwealth.

Section 140(2) provides that where an amount has been paid by way of pension, benefit or allowance that should not have been for any reason and the person who received the payment is in receipt of a pension, benefit or allowance then the amount shall be deducted from that pension, benefit or allowance.

Section 146 gives the Secretary a discretion to waive recovery of an overpayment, to write off debts arising under the Act and to allow an amount that is to be recovered as an overpayment to be paid in instalments.

Exercise of discretion

The applicant said that he had not been told by his wife how much she earned. He also claimed that he had made a genuine error in the completion of the forms. Finally he claimed that the Department had been inefficient in that they had not questioned a discrepancy in the amount stated by the applicant as representing his wife's wages on his initial claim form and the later income statements.

The Tribunal referred to the decisions in Taylor (1984) 21 SSR 238 and Ward (1985) 24 SSR 289 where the Tribunal had set out seven matters for consideration for the exercise of the discretion not to recover (those factors are listed in *Saddington*, this issue).

The Tribunal then considered each of those matters in turn. The receipt of public moneys to which he was not entitled was acknowledged by the applicant. Although he did not deliberately seek to defraud the DSS a guilty mind is not necessary under the legislation. The AAT acknowledged that the applicant's wife was responsible for the financial affairs of the marriage and so may not have accounted fully to Mr Thick in relation to her income. However, the AAT observed

While he would not have known in detail the hours of his wife's part-time work, he would have known the importance of impressing upon her an accurate answer to enable him to complete the form. Even accepting the Applicant's evidence that he regularly asked his wife for evidence of her earnings, we do not think that in the circumstances he properly discharged the obligation to ensure disclosure of Mrs Thick's true income. It was always open to him to advise the

Department that he could not guarantee the information in relation to his wife's income and the Department would then have been upon notice that it should make enquiries to substantiate her earnings.

(Reasons, pp.12-13)

As to the claim that he had made an error the AAT thought that this was of very light weight given that the error was perpetuated and that it was in his interests not to correct it.

It was also not a case of administrative delay. The Department had not failed over a period of years to clarify apparent discrepancies. However, if the Department had compared the initial claim with the later income statements then the applicant could not have continued to make the misstatements that he did.

The prospects of the applicant to repay were not high. He had recently divorced and there was some prospect of money flowing from the sale of his jointly held property. There was no evidence of his prospects improving. He had applied for a pension since the date of the hearing.

Formal decision

Having taken all the circumstances into consideration the Tribunal decided that the correct and preferable decision was to set aside the decision under review, require the applicant to repay the amount that relates to the period during which he was working, to waive \$500 of the debt and to remit the matter to the DSS to determine whether the balance should be paid in instalments or deducted from any pension, benefit or allowance received by the applicant.

circumstances were such that he often had to resort to charity for support.

The DSS pointed to the six year recovery period allowed in the Act and also made reference to the history of the applicant in causing duplicate payments to be made. It was proposed that recovery be by way of small deductions from sickness benefit paid to the applicant which would not impose hardship on him.

Affirming the decision under review, the AAT noted the need to encourage the applicant to be more careful in the future and to ensure that public moneys are properly expended. The Tribunal did not consider that hardship would be suffered by the applicant as his needs were limited to maintaining himself. Deductions of \$10 per fortnight from his sickness benefit were appropriate in the present circumstances.

Formal decision

The AAT affirmed the decision under review.

BAUMANN and SECRETARY TO DSS

(No. N86/200)

Decided: 24 October 1986 by A.P. Renouf, H.D. Browne and M.S. McLelland.

Theo Baumann applied to the AAT for review of a decision to recover an overpayment of \$212.40 in unemployment benefit. In respect of two fortnightly payments of benefit in March 1982 the applicant had told the DSS that he had not received his benefit at the usual time. As a result the DSS issued substitute payments. It was later discovered that payment had been made into his bank account. It was accepted that there was no fraud on the part of the applicant. His confusion had led to the circumstances giving rise to the overpayment.

It was argued for the applicant that recovery of the overpayment should be waived under s.146 of the *Social Security Act* having regard to the length of time since the overpayment occurred and the hardship that the applicant would incur. The applicant had recently completed a repayment to the DSS and his