Recovery of sickness benefit: temporary write-off?

SECRETARY TO DSS and GLOSSOP
(No. 5010)
Decided: 11 April 1989
by B.J. McMahon.

Gregory Glossop was injured in a motor accident in May 1985, in circumstances which gave him a possible claim for worker's compensation against his employer and common law damages against the Nominal Defendant.

Glossop was paid sickness benefits, totalling $11 915, between July 1986 and May 1988, when an award of worker's compensation was made in his favour, in the sum of $17 722.

The DSS recovered the $11 915 in sickness benefits paid to Glossop from that compensation award, under ss. 153(3) and 155(1) of the *Social Security Act*.

Glossop appealed to the SSAT, asking that the recovered sickness benefits be refunded to him, pending the outcome of his common law action for damages against the Nominal Defendant, which was due for hearing in 1990. He explained that he needed the money to pay off several debts and that he would repay the sickness benefits out of his common law damages.

The SSAT decided to exercise the Secretary's power under s.251(1) of the *Social Security Act* to 'write off' the debt owed by Glossop to the DSS. The effect of this decision was that the existence of the debt was not disturbed, but that its recovery would not be pursued for the time being.

The Secretary to the DSS then appealed to the AAT, exercising the right of appeal granted by s.207 of the *Social Security Act*.

Power to write off not available

The AAT said that the determination by the Secretary, under s.153(3) of the *Social Security Act*, that Glossop was liable to repay the sickness benefits out of his compensation award created a debt due to the Secretary. This debt could have been waived or written off under s.251(1) in appropriate circumstances.

The Tribunal pointed out that the waiver of a debt expunged that debt whereas writing it off was

> 'simply an acknowledgment of the reality that while, legally, the debt is recoverable, in practice it is not. It does not affect the rights and obligations as between the debtor and the creditor. The debt is still payable. Writing off is a procedure adopted only so that the creditor's accounts can present a true picture of the value of his assets'.

(Reasons, para. 14).

However, in the circumstances of this case, the power to write off the debt was not available to the Secretary or the SSAT:

> 'Here, there was an available fund, there was a charge upon that fund, there was an undisputed debt, and, in the event, the debt was paid from that fund. In my view, the applicant would not have had the power to write off the debt in such circumstances. To do so would have been a misuse of statutory power. . . . In circumstances where the debt is readily repaid, such an exercise would not, in my view, be a *bona fide* exercise of a statutory power. The purpose for which the power was given was to ensure that the accounts of the applicant gave a true view of the value of its assets.
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> . . .
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> Where there is no practical reason for writing off a debt the power should not be exercised. To use it for the disguised purpose of making a capital loan to the respondent would be wrong. As in the exercise of all administrative powers, the purpose of the grant should be respected.'

(Reasons paras 16, 17).

The AAT also said that, if the power to write off had been available, the circumstances of the present case did not justify an exercise of that power. Glossop was not in special hardship and had no pressing capital commitments. It was by no means certain that Glossop would be successful in his action against the Nominal Defendant. Glossop had increased his indebtedness while negotiating with the Department about the return of the recovered sickness benefits and, finally, he did not seem to have exhausted other remedies to alleviate his financial position — such as applying for an expedited hearing of his action against the Nominal Defendant or borrowing money to finance that action.:

> 'Mr Glossop in effect asks that public moneys be expended so that the need for these courses of action could be obviated. In my view, this would not be an appropriate course.'

(Reasons, para. 24).

Formal decision

The AAT set aside the decision of the SSAT and affirmed the Secretary's primary decision to recover the sickness benefits out of Glossop's compensation award.

[P.H.]

Overpayment: jurisdiction to waive recovery

DAUGALIS and SECRETARY TO DSS
(No. 4977)
Decided: 20 March 1989
by R.A. Layton.

Daugalis was paid unemployment benefit between July and September 1987. The DSS subsequently decided that Daugalis had not been eligible for these benefits because he had not been 'unemployed', as required by s.116(1)(c) of the *Social Security Act*.

The DSS decided that there had been an overpayment to Daugalis of $1190 and that this overpayment had been a consequence of Daugalis' failure to notify the DSS of his activities. This, the DSS decided, constituted an overpayment under the former s.181(1) [now s.246(1)] of the *Social Security Act* and the overpayment was recoverable from him as a debt due to the Commonwealth.

That decision was reviewed by an SSAT and affirmed by a delegate of the Secretary. Daugalis then asked the AAT to review that decision.

Jurisdiction to waive overpayment

After reviewing the evidence, the AAT decided that Daugalis had not been unemployed during the period when he had received unemployment benefits, and that he had been overpaid as a consequence of his failure to notify the DSS of this fact. It followed that there was an overpayment within s.181(1) [now s.246(1)] of the *Social Security Act*.

Daugalis then asked the AAT to exercise the discretion in s.186(1) [now s.251(1)] of the Act, to waive recovery of the overpayment or to allow repayment in instalments.

The AAT noted that, at the hearing of the review, both parties had regarded the exercise of this discretion 'as an integral part of the overpayment process' and therefore within the AAT's review jurisdiction, despite the fact that the discretion had not been separately considered by either the SSAT or the delegate.

However, the AAT was not prepared to accept this point of view. It said that it did not have jurisdiction to consider the exercise of the s.186 discretion

because the exercise of that discretion had not been considered by the SSAT nor by the delegate.

The Tribunal referred to a decision in *Cranswick and Repatriation Commission* (1988) 15 ALD 459, where the AAT had concluded —

> 'that the Tribunal did not have jurisdiction to review decisions made under completely separate sections of an Act which required different criteria and considerations when those matters were not considered by previous decision-makers, nor was it statutorily required that such sections be considered, nor was a request made by a party for such issues to be considered.'

(Reasons, para. 27).

It might well be, the AAT said, 'a preferable practice' for the s.186 discretion to be considered whenever an overpayment was raised —

> 'but where this has not been done, I cannot see how this Tribunal has jurisdiction to review what has never been decided. A different conclusion may have been reached if there had been an application made for the exercise of that discretion, and the relevant decision-makers had neglected or failed to consider such application. For these reasons, I find it is not within the jurisdiction of this Tribunal to consider the provisions of s.186 of the Act.'

(Reasons, para. 28).

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Compensation award: recovery of sickness benefit

SUTERS and SECRETARY TO DSS (No. 4999)

Decided: 7 February 1989

by E.T. Perignon.

Graham Suters suffered an industrial injury in September 1986. Between May and December 1987 he received sickness and unemployment benefits, totalling $7677.

In December 1987 Suters settled a worker's compensation claim for $36 290. The DSS then recovered the full amount of the sickness and unemployment benefits $7677, direct from the insurer of Suters' employer. When the DSS refused to waive full recovery of the sickness and unemployment benefits, Suters applied to the AAT for review.

The legislation

Section 155(1) of the *Social Security Act* authorises the DSS to recover amounts of sickness and unemployment benefit (and other payments) made to a person direct from any insurer who is liable to pay compensation to that person, where the compensation has been paid for an incapacity for work.

Section 156 gives the Secretary to the DSS a discretion to treat all or part of the compensation payment received by a person as not having been received if the Secretary considers it appropriate 'in the special circumstances of the case'.

'Special circumstances'

Suters argued that he had settled his compensation claim for $36 290 because the DSS had led him to believe that it proposed to recover only $3844 from him.

In August 1987 the DSS had advised Suters that, if he received a compensation award, 'some or all of the sickness benefit paid to you might have to be paid to this Department'.

In response to enquiries from Suters' solicitors, the DSS had told those solicitors, on 2 November 1987, that the sum of $3844 had been paid to Suters between June and September 1987, but that the amount to be repaid to the DSS could only be calculated when the full details of any settlement were known. The compensation recovery section of the DSS had written this letter in the belief that Suters' compensation claim had been settled in September. However, Suters had told the relevant regional office of the DSS that his claim was scheduled for hearing in late November.

Suters claimed that the two letters from the DSS (one warning him that he would have to repay sickness benefits, and the other indicating that he had received $3844 from the Department) had led him to believe that this was the total amount which the Department would seek to recover from his compensation award.

The AAT decided that Suters and his solicitors had been misled by the correspondence from the DSS; and that Suters would not have settled his worker's compensation claim for $36 290 if he had known that the DSS would insist on repayment of $7677.

However, the AAT thought that there had been some neglect on the part of Suters or his solicitors in not making an up-to-date enquiry of the DSS as to the amount which it proposed to recover immediately before settling the matter in December 1987.

Because of these considerations, the Tribunal decided that the discretion in s.156 should be exercised so as to allow for a refund to Suters, from the recovered sickness and unemployment benefits, of $2000, thereby permitting the DSS to recover $5677.

Formal decision

The AAT set aside the decision under review and substituted a decision that so much of the compensation payment should be treated as not having been made as would result in the repayment to Suters of $2000.

[P.H.]

Compensation award: discretion to disregard

MINDA and SECRETARY TO DSS (No. 4969)

Decided: 10 March 1989

by B.M. Forrest.

The AAT *affirmed* a DSS decision that the applicant, Aurel Minda, was precluded from receiving pension from September 1987 to January 1989 because of a lump sum award of compensation made in his favour in September 1987.

On that date, Minda had settled his common law and accident compensation claims for $47 500, of which $27 500 had been paid as 'future compensation' for Minda's work-caused injuries. The DSS had calculated the preclusion on the basis that only $27 500 was a payment in respect of incapacity for work within s.152(2) of the *Social Security Act*.

'Special circumstances'

This application for review focused on s.156 which allowed the Secretary to treat all or part of a compensation payment as not having been made if the Secretary thought this was appropriate 'in the special circumstances of the case'.