Overpayment: deduction from current pension

HOLT & HOLT and DIRECTOR-GENERAL OF SOCIAL SECURITY (Nos Q82/73 and Q82/74)

Decided: 23 February 1983 by J. B. K. Williams, M. Glick and M. McLelland.

Ellen Holt and her husband were granted Australian age pensions in April and July 1981, having notified the DSS that they were also applying for United Kingdom retirement pensions.

Late in July 1981 the Holts were advised that they had been granted UK pensions from 2 July 1981. On 4 August 1981, Mr Holt told the DSS that he and his wife had been granted UK pensions and asked that their age pensions be adjusted.

The DSS adjusted the Holt's pensions on 28 August 1981 and then claimed that they had been overpaid (a total of $651) between 2 July and 22 August. The Holts applied to the AAT for review of this decision.

The Tribunal assumed that recovery of the overpayments was based on s.140(2) of the *Social Security Act*, which gives to the Director-General a discretion to deduct, from a current pension, an amount of pension, paid for any reason, which should not have been paid.

The Holts argued that the discretion in s.140(2) should be exercised in their favour because the overpayments were not their fault and because they would suffer severe hardship if the overpayments were recovered.

The AAT dismissed the first of these arguments: even though the Holts 'were not at fault nevertheless, they have received monies [*sic*] to which they were not entitled under the *Social Security Act*'. Therefore, they 'should be called upon to re-pay the amounts of the overpayments from future entitlements': Reasons for Decision, p.5.

[Earlier, the AAT had contrasted s.140(2) recovery with s.140(1), where recovery was only possible if the overpayment was a consequence of the individual's failure to comply with the Act. The AAT did not mention the argument adopted by an earlier Tribunal in *Buhagiar* (1981) 4 *SSR* 34, to the effect that the s.140(2) discretion should be exercised so as to ensure that it had the same practical operation as s.140(1).]

After looking at the financial circumstances of the Holts, the AAT recommended that recovery of the overpayments should not exceed $5 a week.

Formal decision

The AAT affirmed the decision under review and recommended that the rate of deductions under s.140(2) should not exceed $5 per week from the combined pension.

Invalid pension: permanent incapacity

BORG and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/447)

Decided: 27 January 1983 by E. Smith.

Joseph Borg was born in Malta in 1931 and migrated to Australia in 1973 where he worked as a labourer. He suffered a hernia in 1977 and, following three operations, he was dismissed on medical grounds in 1978.

In February 1981 he applied for an invalid pension but the DSS rejected his application.

Permanent incapacity: non-medical factors

On review, the AAT found that Borg was still suffering from a medical disability—a recurrent incisional hernia, which would not improve and could deteriorate.

He was still physically capable of light work: the extent of his 'medical incapacity' was estimated (by various doctors) at between 30% and 60%. But the Tribunal accepted the opinion of Borg's surgeon that he was '85% incapacitated, taking into account factors other than purely medical factors in arriving at this conclusion': Reasons for Decision, para. 44.

In one of his reports, this surgeon had said that the hernia rendered Borg 50% incapacitated but, 'as he is an unskilled labourer and is unfit for heavy work, his English being very limited and with the current recession, I would consider him unemployable'.

The AAT observed that Borg had 'little or no marketable capacity to engage in remunerative employment, when viewed as a realistic and not merely a theoretical manner' and continued:

> He has, to adopt the words used by Mr A. N. Hall in *Re McGeary* [(1982) 11 *SSR* 113], 'effectively lost his ability to undertake suitable paid employment by reason of his physical and mental impairments'. Any doubts there may have been on this aspect were, in my view dispelled by [the Department of Employment counsellor's] evidence, which was positive and to the point. He did not think the applicant was employable. He did not think the Rehabilitation service was suitable for the applicant or that he would be accepted for rehabilitation.

(Reasons for Decision, para. 47)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Borg be granted an invalid pension from the date of his application.

TRIANDAFYLLAKOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/365)

Decided: 14 February 1983 by E. Smith.

The Tribunal *affirmed* a DSS refusal of invalid pension to a 45-year-old former factory worker who had injured his back in 1977.

Faced with conflicting medical opinion, and with claims by Triandafyllakos of pains all over his body, the Tribunal accepted the evidence called by the DSS and found that Triandafyllakos was only 20% permanently incapacitated for work.

Given the degree of his incapacity, his grasp of English and good education, he could not be regarded as having virtually no residual capacity for work that could be exploited in the market place'. Nor had Triandafyllakos 'tested his ability to find work sufficiently over the years to justify a finding that he [had] lost that ability'.

His basic problem, said the Tribunal, was 'unwillingness to make the necessary efforts to get himself back into useful employment, compounded, to some extent, by too ready acceptance by his medical advisers of his complaints'.

CARFANTAN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/35)

Decided: 14 January 1983 by J. B. K. Williams.

The Tribunal *set aside* a DSS refusal to grant invalid pension to a 52-year-old former plumber with very poor command of English, whose spine had been injured and now severely restricted his range of movement.

Given Carfantan's age and background, the Tribunal dismissed the prospect of rehabilitation and observed that his limited English 'would preclude him from engaging in sedentary occupations, e.g. clerical work'. The Tribunal found that 'his prospects of again being enlisted in the work force are remote'.

ARMANASCO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/147)

Decided: 14 January 1983 by J. B. K. Williams.

The Tribunal *affirmed* a DSS cancellation of an invalid pension held by 55-year-old woman who had worked as a clerk and a shop assistant, after accepting medical evidence that she had only 'minimal work restrictions' because of spinal degeneration.

Given her work experience, the Tribunal said, there was 'a range of employment for which she has the necessary skills and which are within her physical capacity to perform'.

LEGAKIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/600)

Decided: 19 November 1982 by E. Smith.

The Tribunal *set aside* a DSS refusal to grant invalid pension to this 47-year-old man who suffered from a back disability and a post traumatic neurosis which made him 'unemployable'.

TURNER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/208)

Decided: 23 November 1982 by J. B. K. Williams.

The Tribunal *affirmed* a DSS refusal of invalid pension to this 52-year-old former station hand. His back injury prevented him from working in that occupation but, as a single man, he should 'be free to move to areas where work within his capacity might be available'.

RAUCCI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/177)

Decided: 13 December by G. D. Clarkson, R. A. Sinclair and M. Glick.

The Tribunal *set aside* a DSS cancellation of invalid pension held by a 33-year-old former labourer, whose back condition (complicated by unconscious exaggeration) prevented him doing manual work, and whose limited skills and education excluded him from any other type of work.

GRAHAM and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/109)

Decided: 23 November 1979 by J. B. K. Williams.

The Tribunal *set aside* a DSS cancellation of this 52-year-old former painter's invalid pension, accepting his medical advisers' evidence that his back injury incapacitated him from physical work.

McBAY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/204)

Decided: 28 January 1983 by W. Prentice.

The Tribunal *affirmed* a DSS refusal of invalid pension to 52-year-old former mechanic who had injured his back in an industrial accident.

The Tribunal accepted medical opinions produced by the DSS that McBay was capable of work which did not involve heavy lifting.

Having observed that finding and holding jobs was difficult in the 'present socio-economic climate', the Tribunal said that McBay's work experience and qualifications would place him 'ahead of others in the scramble for jobs at the present'.

McCANN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/199)

Decided: 26 November 1982 by A. N. Hall.

The Tribunal *affirmed* a DSS refusal of invalid pension to a 34-year-old former carpenter suffering a back condition and a psychiatric disorder, after finding that he had not exhausted employment prospects.

PETRINOVIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/264)

Decided: 17 February 1983 by W. Prentice.

The Tribunal *affirmed* a DSS refusal of pension to a 42-year-old former labourer, who was illiterate in English, and who had suffered a back injury and serious leg injury.

The Tribunal accepted medical evidence, produced by the DSS, that Petrinovic could perform a wide range of relatively light unskilled work. No doubt, the Tribunal said, he would have considerable difficulty in finding work of any kind—but this was because, the Tribunal implied, 'manual work is currently unavailable, as a practical matter, for *anyone*'.

YOUSSEFF and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/111)

Decided: 7 January 1983 by W. Prentice.

The Tribunal *affirmed* a DSS cancellation of an invalid pension held by a 42-year-old former process worker, with no understanding of English, who had suffered a back injury which he claimed rendered him incapable of working.

The Tribunal found no significant organic disability and accepted medical opinion that he had no psychiatric disorder 'but his behaviour is promoted by attitudes in the community and by social influences and institutions that make it possible to gain reward from simulation of illness'.

LAUGHTON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/68)

Decided: 26 January 1983 by J. B. K. Williams.

The Tribunal *affirmed* a DSS cancellation of invalid pension held by a 58-year-old man, with substantial clerical work experience.

Although Laughton had a long history of osteo-arthritis and a peptic ulcer and claimed to be suffering a psychiatric disorder, the Tribunal accepted medical evidence produced by the DSS that he was still capable of performing clerical or light physical work. The Tribunal observed that, in assessing his incapacity, 'it must . . . be kept in mind that this is not a case [where] the work skills of the person concerned lie only in the labouring field involving strenuous physical activity'.

PAGEL and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/33)

Decided: 2 February 1983 by J. B. K. Williams.

The Tribunal *affirmed* a DSS refusal of invalid pension to a 51-year-old woman, who had worked as a shop assistant, clerk and domestic, who was suffering osteo-arthritis.

The Tribunal accepted several medical opinions that this problem did not prevent Pagel from working in her former occupations, 'none of [which] appear to me to be particularly physically demanding'.

LEE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V364/81)

Decided: 17 January 1983 by G. D. Clarkson.

The Tribunal *set aside* a DSS refusal to grant invalid pension to a 49-year-old man who had lost all hearing in one ear, and had severely restricted hearing in the other ear (with periods of total deafness).

The Tribunal accepted medical opinion that the relatively sudden and late onset of hearing loss was 'catastrophic' because of the difficulty in adapting to other communication methods. And the Tribunal concluded that Lee was 'very substantially incapacitated from obtaining remunerative work'.

HARRISON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/201)

Decided: 11 January 1983 by J. O. Ballard.

The Tribunal *set aside* a DSS cancellation of an invalid pension granted to a 52-year-old farm labourer (who had also worked at heavy factory labouring).

The Tribunal accepted medical evidence that Harrison had a painful spinal condition which prevented him working as a labourer. His employment prospects in Mildura (where he had lived for 12 years) 'were extremely grim indeed' because of his limited qualifications and the narrow range of job opportunities.

The Tribunal rejected a DSS argument that Harrison's employment prospects should not be limited to Mildura—'a man cannot be expected to change his habitat in search of work', the Tribunal said.

ZOCCOLI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/595)

Decided: 17 January 1983 by J. O. Ballard.

The Tribunal *set aside* a DSS refusal to grant invalid pension to a 43-year-old former labourer who had suffered a series of back injuries which, in combination with 'a genuine functional overlay', made him at least 85% permanently incapacitated for work—an assessment supported by a report from a DSS rehabilitation centre.

QUTAMI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/112)

Decided: 1 February 1983 by A. N. Hall.

Ruda Qutami was born in Jordan in 1941 and migrated to Australia in 1971. He then worked in a series of factory jobs until he injured his right wrist in 1974. After attempting to return to work, Qutami was dismissed at the end of 1974. He had not worked since then. He was paid worker's compensation and, in late 1979, settled a claim for damages against his former employer.

In March 1980, he applied for an invalid pension, which was refused by the DSS. He then sought review of that refusal by the AAT.

The medical evidence

The AAT found that Qutami had permanent restriction of movement in his right wrist, and that he suffered constaht pain in this wrist. He also suffered pains in his back and neck, probably caused by 'postural imbalance', although there was probably a functional element in that pain.

Given that Qutami was 'extremely right-handed', the Tribunal found that he could not work in any heavy manual occupation, or in an occupation which required two-handed manual skills. His grasp of written English was inadequate for clerical work; but he did have 'the physical and mental capacity to undertake light work such as a car park attendant . . .'

Capacity to obtain employment

If the evidence had rested there, the Tribunal said, Qutami would not have qualified for an invalid pension. However the evidence went 'much further insofar as it indicates an inability on the part of the applicant to obtain work due to his medical condition': Reasons for Decision, para. 35.

The Tribunal had been told of applications for at least ten jobs, and of fruitless attendance at the local CES office over two years. In addition, he had not been able, during a rehabilitation course, to adjust to the demands of full-time employment.

The AAT accepted the opinion of Davies J in *Panke* (1981) 2 *SSR* 9, that incapacity could not be considered 'in a meaningful way without having regard to his employment prospects". So the question was whether Qutami had 'lost his ability to attract an employer who is prepared to engage and remunerate him': Reasons for Decision, para. 37. In answer to this question, the AAT said:

> Having regard to the obvious impairment to his right wrist and hand, to his history of a worker's compensation and damages claim against his former employer, to the fact that he has been out of the workforce for over eight years and that his performance during the recent rehabilitation program indicates an inability on his part to cope with the realities of what a regular job would entail, I have concluded that the applicant has lost the ability to attract an employer who would be prepared to engage and remunerate him.

(Reasons for Decision, para. 39)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Qutami be granted an invalid pension from the date of his claim.

BLASNIK and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/104)

Decided: 23 February 1983 by J. B. K. Williams, M. Glick and M. McLelland.

The Tribunal *affirmed* a DSS cancellation of invalid pension held by a 59-year-old tradesman, after concluding that his back disability (a result of a work injury and degeneration) did not prevent him from doing light work, and that he had no psychiatric illness.

The Tribunal observed that Blasnik's unwillingness to work was 'influenced by a desire not to leave his [sick] wife at home unattended'; but that was 'not a factor that can be taken into account when assessing the applicant's physical capacity for work'.

Widow's pension: misleading advice

VALLANCE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/38)

Decided 18 January 1983 by G. D. Clarkson.

Margaret Vallance had been granted a class A widow's pension in 1975 (she then had three dependent children).

By November 1981, her two older children had ceased to be in her 'custody, care and control' and her youngest child was about to leave school. She called at the Perth office of the DSS and asked if her pension would continue if that child took employment from 1 December.

An officer of the DSS advised her that her entitlement would continue. Her youngest child then entered into full-time employment on 1 December.

On 3 December 1981, Vallance again went to the Perth office of the DSS and told the office that her youngest child had commenced work. She was again told that her entitlement to a pension would continue.

This advice was wrong: Vallance was due to turn 45 on 14 December 1981 and her entitlement to a widow's pension could only have continued if her youngest child had delayed taking up employment until then—a matter of two weeks. And, in fact, the DSS quickly became aware of this and cancelled her pension within a few days of 3 December 1981.

Vallance then applied to the AAT, claiming that she should be paid a class B widow's pension.

(For the purpose of establishing jurisdiction, the AAT treated the DSS cancellation as a refusal to grant a class B widow's pension to Vallance.)

The legislation

The AAT pointed out that a class A widow's pension was payable to 'a widow who has the custody, care and control of one or more children': s.60(1)(a).

A class B widow's pension was payable to a widow, without the custody etc. of any child, who was 50 years of age and to a widow who had ceased to have the custody etc. of any child after reaching the age of 45 years: s.60(1)(b). The Tribunal said that the effect of Vallance's youngest child taking employment two weeks before Vallance turned 45 was that she ceased to be qualified for a class A widow's pension and could not qualify for a class B widow's pension until she turned 50.

No 'estoppel'

Vallance had argued 'that because of the bad advice given by the departmental officer on 18 November 1981, on which the applicant acted to her prejudice, the Director-General [was] estopped from saying that her entitlement to a pension under s.60(1)(a) or (b) ceased before she attained 45 years of age on 14 December 1981'. The Tribunal rejected this argument in the following passage:

> In general terms, the powers of the Director-General are those given to him by statute, and although he ostensibly has a wide discretion to determine a rate of pension which is reasonable and sufficient (e.g. s.63) I am unable to find any power vested in him to grant a pension to a person who is not qualified to receive one. Such a grant may occur by mistake or error and certain decisions of the Director-General are subject to appeal or to judicial review, but in my view if the Director-General rightly concludes that a person does not qualify for a pension, he has no power then to grant one.

(Reasons for Decision, p.10)

Formal decision

The AAT affirmed the decision under review.