



Secretary of State for Work and Pensions v Payne and Cooper [2010] EWCA Civ 1431
A case note (judgment received 14/12/2010)

Summary

The High Court rules that the DWP cannot reclaim benefit overpayment where a DRO (Debt Relief Order) has been granted.

This is an important case for those who successfully apply for a Debt Relief Order (DRO) and who, having previously failed to repay overpayments of benefit or Social Fund loans, owe money to the DWP and/or local authorities. The issue for the Court of Appeal was whether the DWP has the power to recover such debts (referred to below as “overpayment debts”) by making deductions from the debtor’s benefit after a DRO is made.

What are DROs?

DROs are a form of insolvency instrument introduced by the Tribunal Courts and Enforcement Act 2007, whose purpose is to allow very poor debtors (with property of not more than £300 and surplus income of not more than £50 per month over the course of a year), to be relieved of their debts. The procedure is similar to bankruptcy, but can only be used where there is essentially no money in the debtor’s estate (unlike bankruptcy, where the procedure allows what money the debtor has to be divided fairly amongst creditors).

To obtain a DRO, a debtor applies to the Official Receiver, who makes a DRO if certain criteria (including the criteria as to the debtor’s means described above) appear to be met. Following the making of a DRO, there is a moratorium period (usually of one year), during which debts listed in a schedule to the DRO are frozen, while creditors have an opportunity to have the DRO revoked or amended. At the end of the moratorium period, the DRO is discharged and the scheduled debts extinguished (unless they were incurred through fraud). During the moratorium period, a creditor cannot sue for overpayment debts listed in the schedule to a DRO.

The facts

Ms Cooper and Ms Payne (the claimants), owed money to the DWP in respect of an overpayment of benefit (Cooper), and the repayment of a Social Fund loan (Payne). Both had DROs made in their favour by the Official Receiver. The DWP started making deductions from their benefits to recover the overpayment debts. The claimants challenged the deductions by bringing claims for judicial review.

The arguments in the case

The claimants argued that following the making of a DRO, all scheduled debts are frozen by virtue of s251G(2)(a) of the Insolvency Act 1986. This states that “during the moratorium [period after the making of a DRO], the creditor to whom a specified qualifying debt is owed... has no remedy in respect of the debt”. The claimants argued that deductions from their benefits are a “remedy” in respect of their overpayment debts, and therefore prohibited by s251G(2)(a).

The DWP accepted that, because of section 251G(2)(a), they did not have the power, following the making of a DRO, to recover the overpayment debts by normal recovery methods, such as suing for them. But they *did* argue that they could exercise their statutory power (which is not available to any other creditor) to deduct money from the claimants’ benefits, since, they argued, deductions from benefit are not a “remedy”. This argument was based on a comparison between bankruptcy and DROs. Like for DROs, under the bankruptcy procedure, there is an initial order following which a bankrupt’s estate is protected against actions by section 285 of the Insolvency Act 1986 (a provision similar to section 251G(2)(a), but worded differently), until the bankruptcy order is discharged. Case law in relation to bankruptcy established that where a bankrupt had failed to repay an overpayment debt, the DWP could make deductions from benefit between the making of the bankruptcy order and its discharge. The DWP argued that this is what should happen with DROs too.

The Court of Appeal’s decision and its consequences

The DWP’s argument was accepted by one of the panel of the Court of Appeal, Mummery LJ. However the majority (Smith and Toulson LJJ) disagreed, and held that the approach taken by the courts to deductions from benefit in bankruptcy cases following the making of a bankruptcy order is not applicable to DROs. This is because:

- (1) the ordinary meaning of s251G(2)(a) was clear – deductions from benefits are “a remedy” in respect of a debt, and (unless there was a good reason not to apply the natural meaning of the provision) were prohibited.
- (2) bankruptcy and DROs have different purposes: bankruptcy orders are partly made for the benefit of creditors, who can try to recover some of what is owed them. By contrast, DROs are solely made for the benefit of the debtors, because they have no money to pay off even part of their debts. So the case law relating to bankruptcy did not apply, and s251G(2)(a) should be given its natural meaning.

The DWP have applied for permission to appeal to the Supreme Court. No decision has yet been made on the application. Until the Supreme Court says otherwise, or the law is changed, the Court of Appeal’s judgment means that it is unlawful for deductions to be made in respect of overpayment debts during the moratorium period following the making of a DRO. This will alleviate the financial hardship of thousands of the poorest people in our society who owe money in respect of overpayments, and have the benefit of DROs, as it means that deductions from benefit must cease when a DRO is made.

The case of Cooper was referred to PLP by the CAB Specialist Support Money Advice team, who continued to support it throughout. The legal teams in the cases were as follows:

- Richard Drabble QC and Desmond Rutledge instructed by Edwards Duthie Solicitors for Ms Payne; and
- Richard Drabble QC and Paul Stagg instructed by PLP for Ms Cooper.

You can read the Court of Appeal's judgment here:

<http://www.bailii.org/ew/cases/EWCA/Civ/2010/1431.html>

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