

The AAT found that, even though the payments made by Haddon's husband were spasmodic, by the final pre-amendment period, they were being enforced by the Child Support Agency. Therefore a payment was made in the final pre-amendment period and Haddon 'had maintenance income' at that time.

Haddon had received a general letter from her local office under s.163 of the Act, which informed her that she was required to notify the DSS of any income received, including maintenance. The AAT found that the notice referred to income 'received', whereas the savings provision depended on whether she 'had maintenance income'; and so the AAT was unable to find that she had failed to notify the DSS in accordance with the s.163 notice.

However, with regard to the sole parent review form, the Tribunal held that she had failed to notify of maintenance income for the relevant period until 4 August, even though the form was due to be returned by 18 July. Accordingly, her notification was outside the period specified in s.163(2).

Because she had not notified her income as required, the AAT held that s.21 did not apply to her.

#### **No jurisdiction to review**

Moreover, after considering this matter in detail, the AAT went on to note that the SSAT did not have jurisdiction to review this decision.

This was because the SSAT's jurisdiction is limited to review of decisions made by an officer under the *Social Security Act* (s.177) and the transitional provisions in s.21 of the 1988 Amendment Act do not form part of the *Social Security Act*.

However, relying on *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, the AAT held that it had power to review a decision made in the purported exercise of powers conferred by an enactment.

#### **Decision**

Although the AAT reached the same decision in substance as had the SSAT, the formal decision of the AAT was to set the decision aside and remit the matter to the Secretary for reconsideration in accordance with the direction that the SSAT did not have power to review the decision of the delegate.

[R.G.]

## **Overpayment: recovery**

**SMITH and SECRETARY TO DSS (No. 6668)**

**Decided:** 14 February 1991 by P.W. Johnston.

James Smith asked the AAT to review a DSS decision to recover an overpayment of \$9999.08 in unemployment benefit.

#### **The facts**

Smith lodged a claim for unemployment benefit in November 1988. He continued to receive this benefit during 3 periods of employment which were not disclosed to the DSS. In December 1988 he separated from his wife. Although she did not apply for sole parent's pension, he continued to receive his payment at the married rate. His wife had access to the account into which it was paid.

During the periods of employment, Smith was involved as a union representative in industrial disputes related to risks from asbestos fibres. He claimed to be depressed at times because he thought he might die from a asbestos related disease. He also claimed that this depression was aggravated because of his marital problems and health problems experienced by his wife. He also entered a relationship with another woman who became pregnant. All these circumstances were advanced as reasons why he did not disclose his employment while receiving benefits.

The AAT noted that Smith's employment prospects were good. He was at present in work and looked likely to remain employed. His financial circumstances were not good. He had maintenance commitments of \$50 per week and debts relating to credit cards and a car loan. He owned a car and some land, although he owed some money on the land to his father.

#### **Exercise of discretion to vary or waive recovery**

The only matter to be determined by the Tribunal was whether the discretion to vary or waive recovery of the overpayment contained in s.251 of the *Social Security Act* should be exercised in Smith's favour. The AAT concluded that the stress suffered by Smith during the relevant period was not a satisfactory explanation for failing to notify the DSS of his employment.

Smith put to the Tribunal that there should be some discount of the over-

payment because, if he had disclosed his circumstances to the DSS, then his wife would have been entitled to sole parent's pension. Thus the amount saved by the DSS in not paying Smith's unemployment benefit would have been offset by payments of sole parent's pension to his wife.

The AAT referred to the criteria set out in *Hales* (1983) 13 SSR 136 with respect to the exercise of the discretion to waive recovery in s.251 of the *Social Security Act*. The AAT said that the criteria worked against Smith:

'He has received a large amount of public moneys through his own deception and whilst on a day-to-day basis his financial situation is precarious, he has substantial assets at his disposal in the form of the block of land and a motor vehicle. It is true that he has been subject to a degree of stress and remorse but this is not of such magnitude to cut much ice with this Tribunal.'

(Reasons, p.4)

As far as the 'discount' was concerned, the AAT decided that it should not consider a hypothetical situation. The applicant continued to receive unemployment benefit at the full married rate. The fact that his wife received the full benefit paid and Smith did not directly benefit during his periods of employment did not affect this conclusion. The applicant did benefit in the sense that during those periods his wife was no direct burden on him.

#### **Formal decision**

The AAT affirmed the decision under review.

[B.S.]

## **Assets test: financial hardship**

**GATES and SECRETARY TO DSS (No. S89/218)**

**Decided:** 12 March 1991 by B.H. Burns.

Mr and Mrs Gates sought review of a decision of the SSAT not to apply the hardship provisions of s.7 of the *Social Security Act* for their benefit.

#### **The facts**

The Gates owned a farm which had been their primary source of income and which had been in the family for 3 generations. They also conducted a small scale tractor repair business. Their son