the DSS to review her financial circumstances after two years. If they had not materially improved in the meantime, the AAT recommended that the balance of the debt then outstanding be waived.

[R.G.]

Overpayment: jurisdiction

SECRETARY TO DSS and IBBOTSON

(No. 7814)

Decided: 11 March 1992 by T.E. Barnett

Background

The DSS asked the AAT to review a decision of the SSAT, setting aside a DSS decision that the applicant had been overpaid $18 671.20.

The DSS claimed that Ibbotson had received single unemployment benefit while living with RF as his *de facto* spouse for a period between 1984 and 1987. During that time, it was alleged that she had used the name 'F' for various purposes, but had used her own name (Ibbotson) when she applied for unemployment benefit on 20 September 1984. It was also alleged that she had used her brother's address for some of the time and that she had deliberately provided false information to the DSS.

It was argued that, as a 'dependent female' and later as a de facto spouse, Ibbotson had had no entitlement to benefit as F was in receipt of unemployment benefit (including an additional component for Ibbotson as a dependent spouse) throughout the period. As the payments she received were made in consequence of her having made a false statement or representation, the debt was recoverable under s.246(1) of the Act.

Ibbotson maintained that by the time she claimed benefit in September 1984, she and F were separated and she had notified the DSS that she had just left a *de facto* relationship where the father of her daughter was claiming for her as a dependent spouse.

Even though F followed her and they shared accommodation again for a time, Ibbotson argued that throughout the period she remained a single person as the relationship never resumed. She continued to share accommodation with F only because he refused to leave and because she had insufficient finance to move into separate rented accommodation. Her explanation for having made damaging admissions to a DSS officer was that F was present throughout the interview and she was frightened that he would be violent towards her if she told the officer she was no longer a *de facto* spouse.

Ibbotson's second submission was that, even if the AAT found that she was living in a *de facto* marriage during some or all of the relevant period, that did not preclude her from unemployment benefit as s.112(2)(d) (as it was in 1984) entitled her to receive a low rate of benefit. It was argued that if there had been any overpayment, it was an overpayment to F in respect of her as a dependent spouse.

Finally it was submitted that if there had been an overpayment to her, the Tribunal should waive the debt in whole or in part under s.251. If any repayment was necessary, it should be by means of very low instalments.

To this argument, the DSS submitted that the AAT had no jurisdiction to consider waiver as no primary decision had been made by a duly authorised delegate.

The legislation

At the time that the alleged overpayment commenced, s.107 of the *Social Security Act* 1947 governed the qualifications for unemployment benefit; s.112 dealt with the rate at which it was payable, while s.114 imposed an income test.

Section 106 defined a 'dependent female' as a woman living with a man as his wife on a *bona fide* domestic basis though not legally married to him. This was later changed to a '*de facto* spouse'.

At the time the overpayment was raised, s.246(1) provided that an overpayment made in consequence of a false statement or breach of the Act was a debt due to the Commonwealth, while s.251 gave the Secretary a discretion to write off, waive or allow payment by instalments of any debt due. (Section 1237 of the *Social Security Act* 1991 currently provides for the waiver of debts.)

The AAT's findings

The AAT found that Ibbotson commenced to live with F as his wife on a *bona fide* domestic basis sometime in the late 1970s and that this relationship continued through the relevant periods. This meant that she was a 'dependent female' and later, his *de facto* spouse. The AAT also found that the relationship was characterised by arguments and occasional violence and that Ibbotson was not financially dependent on F.

The AAT accepted that, when she applied for benefit on 20 September 1984, Ibbotson was living separately from F and had notified the DSS officer of that fact. However, shortly after that time, F insisted on joining her and the relationship was resumed and 'limped on'. The relationship was under severe stress when, on 3 August 1987, Ibbotson and F were interviewed by a DSS officer during which time Ibbotson made admissions about the relationship. Shortly after that, she moved to Western Australia with her parents.

The AAT found that Ibbotson was aware that F continued to receive a benefit in respect of her as a dependant, and that she had signed forms as his dependent spouse. This amounted to a false statement which may have contributed to *him* obtaining a benefit to which he was not entitled.

There was no dispute about Ibbotson satisfying the criteria set out in s.107(1), i.e. the work test requirement for payment of unemployment benefit. Notwithstanding the fact that she was a *de facto* spouse, the AAT determined that, subject to her satisfying the income test in s.114, she was entitled to be paid the 'catch all' rate provided for by s.112(1)(d), and that F should have been entitled to exactly the same amount. That is, Ibbotson was entitled to receive benefit throughout the relevant period as a married person pursuant to s.112(1)(d) and entitled to receive a benefit in relation to her child.

However, the AAT said, F had been overpaid by having received additional payments for Ibbotson during the relevant period. As there was no information on which it could assess her entitlement under the income test, the AAT could not determine whether she had been overpaid and remitted the matter to the DSS to recalculate her entitlement in the light of the decision.

However, in the event that she had been overpaid, the AAT went on to consider recovery action.

Jurisdiction to waive

Relying on the decisions of the Federal Court in *Hales* (1983) 13 *SSR* 136 and *Hangan* (1982) 11 *SSR* 115, and a decision of the AAT in *Mariot* (1992) 66

SSR 937, the AAT held that the steps taken to recover the debt necessarily involved the making of a decision, by way of implication, not to waive the debt.

Moreover, the question of waiver had been specifically put to the SSAT by Ibbotson in a letter (though not considered, in view of its decision that she was not F's *de facto* spouse). Therefore the AAT held that it had jurisdiction to consider the question of waiver as there was a primary decision under s.251 of the Act.

The AAT next considered whether the relevant legislation concerning waiver was s.251 of the *Social Security Act* 1947 or s.1235 of the *Social Security Act* 1991.

Applying *Mariot* (1992) 66 *SSR* 937, the AAT decided that, because the questions of waiver and write-off are not decisions about accrued entitlements but rather involve a current determination about current circumstances, the 1991 Act should be applied to the question of waiver, while the question of Ibbotson's entitlement to benefit should be decided in accordance with the law at the time that the entitlement accrued.

The AAT then referred to the Notice under s.1237(3) (the Minister's direction) dated 8 July 1991 and, in particular, paras (a) and (g). Paragraph (a) provides that a debt may be waived where the debt was caused solely by administrative error, was received by the person in good faith and recovery would cause financial hardship to the person; while para. (g) provides that a debt may be waived where special circumstances apply such that the circumstances are extremely unusual, uncommon or exceptional (see *Beadle v D-G of Social Security* (1985) 7 ALD 67); 26 *SSR* 321).

The AAT considered Ibbotson's difficult financial circumstances; the fact that she was maintaining her 9-year-old daughter; the fact that she was to an extent housebound in order to look after her invalid father; the fact that the overpayment (if any) resulted from false statements made; and her lack of means to repay the debt. The AAT determined that any amount in excess of $6000 should be written off for a period of 6 years and a decision whether to waive that amount should be made after that time. Meanwhile, recovery of the debt should be made by instalments not exceeding $20 a fortnight.

Formal decision

The decision under review was set aside and a decision substituted that during the relevant period Ibbotson was living with F as his wife on a *bona fide* domestic basis though not legally married to him; that she was entitled to unemployment benefit at the rate specified in s.112(1)(d) subject to the application of the income test provided in s.114; and the matter was remitted to the Department to determine whether there had been an overpayment in light of the decision. In the event that there was an overpayment, the tribunal limited recovery in accordance with the directions outlined above.

[R.G.]

Sole parent's pension: living separately

STAUNTON-SMITH and SECRETARY TO DSS

(No. 6144A)

Decided: 16 March 1992 by B.H. Burns.

In October 1991, the Federal Court heard an appeal from Lynn Staunton-Smith against the AAT's decision that her sole parent's pension should be cancelled from July 1989 because she was a 'married person'. (See *Staunton-Smith* (1992) 62 *SSR* 924.)

In March 1989, Staunton-Smith had recommenced living with her husband, from whom she had separated in 1981. She had moved back to her husband's house because she was ill and unable to look after her son, who had Down's syndrome.

The Federal Court decided that the AAT had treated Staunton-Smith's case as if it had to decide whether she was living in a *de facto* relationship, rather than whether she was living separately and apart from her husband.

The Court found that the AAT's reasons for decision were inadequate as the AAT had not indicated the weight it had attached to the fact that Staunton-Smith and her husband had no sexual or social relationship, that they did not regard themselves as married nor hold themselves out as married, that her husband had provided care to her son before she had moved back into his house and that Staunton-Smith's financial dependence on her husband only commenced when her sole parent's pension was cancelled.

The Federal Court had remitted the matter to the AAT for reconsideration in accordance with the Court's reasons. This appeal represented that reconsideration.

The legislation

A person was eligible for a sole parent's pension under the *Social Security Act* 1947 if the person was a 'single person'. A person was a 'single person' if the person was a legally married person living separately and apart from her or his spouse.

The evidence

The AAT received evidence from Staunton-Smith, her husband and her eldest son and her son's wife. The AAT said that it found Staunton-Smith an impressive witness.

The AAT found that the couple separated in April 1981, shortly before Staunton-Smith began to receive a sole parent's pension. Staunton-Smith and her husband lived apart until about May 1989 but her husband provided care for Staunton-Smith's children from a previous relationship, in particular a son P, who had Down's Syndrome, when Staunton-Smith was ill. (She suffered from Addison's disease.)

In May 1989, Staunton-Smith was ill and had nowhere to live so she moved in with her husband.

> 'Both the applicant and Mr Staunton-Smith understood this arrangement to be short-term until she could find more suitable surroundings for herself and P, and conditional on Mrs Staunton-Smith paying half the rent and power bill, and her own expenses'

(Reasons, para. 14).

The 'couple' led separate lives with Staunton-Smith and her son P sharing one bedroom and her husband having the other. Staunton-Smith paid for and cooked her and her son's meals, and her husband looked after his own cooking, washing and cleaning.

Her husband drove her to the supermarket once a fortnight and they had their own friends. When her sole parent's pension was cancelled, Staunton-Smith was unable to pay the rent and had to borrow money from her husband to buy clothes for P. Both these amounts were considered by each to be a debt.

The only joint social life they had was occasional visits to Staunton-Smith's other son and they did not hold