

Overpayment: waiver or write-off jurisdiction

SECRETARY TO DSS and
CAMPBELL
(No. W90/64)

Decided: 19 December 1991 by P.W. Johnston.

In October 1987 a delegate of the Secretary decided that Iris Campbell had received social security payments, amounting to \$40 510, as a result of false statements and that this amount should be recovered as an overpayment. Recovery through deduction from continuing benefits was instituted by the DSS.

In July 1988 Campbell was convicted of 5 counts of imposing on the Commonwealth under s.29B of the *Crimes Act* 1914 (Cth) and sentenced to 2 years' imprisonment. The court made a reparation order of \$39 502 (the amount of the overpayment still outstanding).

In November 1989 Campbell asked the SSAT to review the decision that she had been overpaid and the rate of recovery.

The SSAT affirmed the decision that Campbell had been overpaid \$40 510 as a result of her false statements. It set aside the decision to recover by withholding \$54.70 a fortnight from her sole parent's pension and family allowance; wrote off recovery for 12 months; and decided that, after 12 months, the debt should be recovered at no more than \$40 a fortnight for no longer than 10 years.

The DSS appealed to the AAT against those decisions.

Jurisdiction

The DSS argued that the SSAT had acted outside its jurisdiction by making decisions about the method of recovery of the overpayment.

The arguments raised by the DSS were substantially the same as those raised in *Pomersbach*, reported in this issue of the *Reporter*. The DSS maintained that, as the delegate had not made a decision on waiver or write-off of the overpayment under s.251 of the *Social Security Act* 1947, the decision under review by the SSAT had not included waiver or write-off. The DSS also argued that the delegate could not have made such a decision because the s.251 powers had not been delegated by the Secretary. Finally, it was argued

that the SSAT had purported to interfere with the court's reparation order by limiting the recovery of the overpayment.

These arguments were rejected for the reasons developed in *Pomersbach* (above): the decision to raise and recover the overpayment had implicitly involved a decision not to waive or write off recovery; the decision to recover by instalments had explicitly involved a decision under s.251; Campbell had raised the issue of waiver and write-off in her dealings with the DSS and appeal to the SSAT; the SSAT and the AAT, on review, could exercise all the powers of the Secretary and neither Tribunal was restricted by internal DSS delegations; and the possible effect of waiver of the overpayment debt on recovery under the reparation order provided no reason to refuse to exercise the waiver or write-off discretion.

The discretion

The AAT considered Campbell's financial circumstances and the fact that she had fraudulently received a large amount of public money. The Tribunal agreed with the SSAT that recovery should be written off (that is, deferred) for 12 months to give Campbell the chance to reduce some other debts; that recovery should then be at the rate of \$40 a fortnight to February 1992, \$50 a fortnight to February 1994 and 14% of her benefit entitlements for the next 2 years. The AAT recommended that recovery after 31 December 1996 'be written off [sic] as long-term recovery action after that date would be undesirable': Reasons, para 35.

The AAT said that the Minister's notice published on 24 July 1991, which limited the discretion to waive recovery of debts arising under the Act, was not relevant because the Tribunal was not exercising the waiver power. (The AAT referred to the 'useful analysis' of the transitional provisions in the AAT's decision in *VXR*, noted in this issue of the *Reporter*).

Formal decision

The AAT —

- decided that it had the power to exercise the discretions in s.251 of the *Social Security Act* 1947;
- affirmed the decision to write off recovery of the overpayment debt for 12 months from the SSAT decision;
- varied the rate of recovery to \$50 a fortnight for 2 years from 1 February 1992 and 14% of benefits

payable to Campbell for 2 years from 1 February 1994;

- directed that Campbell's capacity to repay be reviewed after 1 February 1996 or in the event of her gaining employment;
- recommended that recovery action cease at 31 December 1996 and any amount owing 'be written off' [sic]; and
- remitted the matter to the Secretary to implement these procedures.

[P.H.]

Waiver of overpayment: ministerial notice

SECRETARY TO DSS and VXR
(No. 7563)

Decided: 9 December 1991 by R.A. Balmford, P. Burns and W. McLean.

On 15 January 1990, a delegate of the Secretary decided that VXR had incurred a debt to the Commonwealth under an assurance of support. On review, the SSAT decided on 27 April 1990 that VXR owed no debt to the Commonwealth and that, if she did, recovery should be waived.

The DSS applied to the AAT, on 20 June 1990, for review of the SSAT's decision.

The legislation

Before 1 July 1991, s.251(1) of the *Social Security Act* 1947 provided that the Secretary could waive recovery of a debt arising under the Act, including an assurance of support debt.

From 1 July 1991, s.1237(1) of the *Social Security Act* 1991 gives the same power to the Secretary. However, s.1237(2) provides that, in exercising this power, the Secretary must act in accordance with directions issued by the Minister in writing issued under s.1237(3).

On 8 July 1991, the Minister issued a notice, which was published in the *Gazette* on 24 July 1991 (so that it came into operation on the later day: s.48(1)(b) of the *Acts Interpretation Act* 1901. The notice directed the Secretary to exercise the power of waiver in s.1237 only where one of certain listed circumstances applied.