

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.

The 1991 Act contained, in Schedule 1A, transitional provisions.

Clause 15(1) declared that an application for review made before 1 July 1991 but not determined before that date 'has effect, from 1 July 1991, as if it were an application under sub-s 1283(1) of this Act'.

Clause 15(2) provided that, where an application was determined on or after 1 July 1991 but decision on that application took effect before 1 July 1991, the decision 'has effect for the period [before 1 July 1991] as if it were a decision made under . . . the 1947 Act'.

The debt

The AAT said that the question whether a debt had arisen was to be decided under the 1947 Act. It examined the background to the DSS decision that VXR had incurred an assurance of support debt. It decided that VXR had signed an assurance of support for her parents, her parents had been paid social security benefits and VXR had accordingly incurred the debt under Part 6 of the *Migration Regulations*.

Waiver: which legislation?

The AAT referred to the transitional provisions set out in Schedule 1A of the 1991 Act.

Clause 15(1) declared that an application for review made before 1 July 1991 but not determined before that date 'has effect, from 1 July 1991, as if it were an application under sub-s. 1283(1) of this Act'.

Clause 15(2) provided that, where an application was determined on or after 1 July 1991 but decision on that application took effect before 1 July 1991, the decision 'has effect for the period [before 1 July 1991] as if it were a decision made under . . . the 1947 Act'.

The AAT said that the question whether the debt should be waived was to be decided by applying s.1237 of the 1991 Act and not s.251(1) of the 1947 Act. It seems that the AAT adopted the view that any decision to waive recovery of a debt would take effect from the date of that decision and not from the date on which the debt arose.

Because s.43(1) of the *AAT Act* authorised the AAT to exercise the power conferred on the Secretary by s.1237(1), the AAT said and because that power had been, since 24 July 1991, restricted by the Minister's Notice, the discretion of the AAT was, since that date, similarly restricted. The Tribunal said:

'The power to waive is discretionary, and [VXR's representative], rightly in our view, did not submit that his client had acquired before 24 July 1991 any accrued right to have that discretion exercised unfettered by the terms of the Minister's Notice. The debt arose under the operation of the 1947 Act and continues to exist: but the Tribunal's power to waive the debt can only be exercised as it exists at the date of its exercise, which is to say, the date of this decision. At that date, the Minister's Notice restricts that power.'

(Reasons, para. 18)

Applying the restrictive terms of the Minister's Notice, the AAT could find no ground to waive recovery of the debt.

Formal decision

The AAT set aside the SSAT decision and substituted the decisions that VXR was indebted to the Commonwealth in respect of benefits paid to her parents and this debt should be recovered.

[P.H.]

CLARK and SECRETARY to DSS (No. N90/919)

Decided: 21 January 1992 by D.J. Grimes, J.H. McClintock and A.I. Terrell.

Georgina Clark received social security payments between 1978 and 1985. The DSS decided that she had received these payments in consequence of false statements and that she owed the Commonwealth a debt of \$28 298. The DSS decided to recover this amount by placing a garnishee on Clark's income from employment.

Clark appealed to the SSAT, which affirmed the DSS decision. She then appealed to the AAT.

No false statement?

Clark argued, first, that she had not made any false statements to the DSS in connection with the overpayments. She had described herself as 'divorced' because she had not thought she was living in a de facto relationship, although she was living in the same house as the father of her child. However, the AAT concluded that Clark had falsely stated her marital status, so that a debt to the Commonwealth had arisen under the former s.140(1) of the *Social Security Act 1947* (later s.246(1) of that Act).

Waiver

Clark's representative contended that this was an appropriate case for waiver of recovery. In support of waiver, Clark said that she had not acted dishonestly and that she now had substantial financial commitments.

The DSS referred to the Minister's notice which came into effect on 24 July 1991 and imposed strict conditions on the exercise of the waiver power conferred by s.1237 of the 1991 Act (see VXR in this issue of the *Reporter*).

The AAT said that the Minister's notice did not apply in the present case:

'The Tribunal accepts the contention of the Applicant that the absence of a date of effect raises a presumption against retrospectivity and is therefore not bound by it in this case. Further, the Tribunal believes Mrs Clark has accrued rights to have the exercise of the discretion reviewed unrestricted by the Minister's notice of 24 July 1991 issued pursuant to s.1237(3) of the 1991 Act.'

(Reasons, p. 11)

However, applying the factors enunciated in *Hales* (1983) 13 SSR 136, the AAT could see no basis for waiving recovery. Provided that recovery was done by instalments, it would not cause her too much hardship; and she had given false statements to the DSS.

Formal decision

The AAT affirmed the decision under review

[P.H.]

Family allowance supplement: proof of income

PATRIKI and SECRETARY TO DSS

(No. 7386)

Decided: 1 October 1991 by R.A. Balmford, P. Burns and D. Elsum.

Corina Patriki sought review of a decision of the SSAT of 5 February 1991 to affirm a decision of the Department made on 13 November 1989 to cancel payment of Family Allowance Supplement (FAS).

Facts

Patriki received FAS in 1989. On 24 October 1989 Patriki lodged a review