

pension would cease. She had made a deliberate decision not to advise the DSS of her relationship with L.

**Waiver**

The AAT said that, although L's immigration status had placed her in a dilemma, her circumstances did not justify an exercise of the discretion to waive recovery of any part of the overpayment received by her. That discretion was conferred by s.1237 of the *Social Security Act 1991* and was limited by the Minister's Notice, issued under s.1237(3) of the Act. In particular, there were not, in this case, sufficient "special circumstances" to justify waiver of recovery.

**Formal decision**

The AAT set aside the SSAT's decision and substituted a decision that the overpayment of supporting parent's benefit made to Burwell was recoverable.

[P.H.]

## Overpayment: waiver and write-off of recovery

**HODGSON and SECRETARY TO DSS**

(No. 7903)

**Decided:** 13 April 1992 by T.E. Barnett.

Between November 1986 and August 1988, Geoffrey Hodgson received payments of unemployment benefit. These payments were made because Hodgson had concealed the fact that he was employed.

In May 1989, the DSS decided that Hodgson was indebted to the Commonwealth under s.246 of the *Social Security Act 1947* because he had received payments in consequence of his false statements. The DSS demanded that Hodgson repay the debt.

Hodgson was subsequently prosecuted on 43 charges of obtaining unemployment benefit which was not payable and making false statements contrary to s.239(1) of the *Social Security Act 1947*. He pleaded guilty and was sentenced to a term of impris-

onment. The sentencing court made a reparation order in the amount of \$14 380.86.

While still in prison, Hodgson appealed to the SSAT against the DSS decision to recover the debt arising under s.246. The SSAT affirmed the DSS recovery decision to recover the debt and refused to exercise the Secretary's discretion, conferred by s.251 of the 1947 Act, to waive recovery of the debt.

Hodgson applied to the AAT for review of the SSAT's decision. At the time of the hearing, Hodgson was still in prison.

**Jurisdiction**

The AAT referred to the decisions in *Mariot* (1992) 66 SSR 937 and *Ibbotson* (1992) 67 SSR 953; and said that the DSS decision to recover the debt to the Commonwealth arising as a result of Hodgson's actions had also involved a decision not to write off or waive recovery of the debt.

**Waiver**

The AAT noted that the discretion to waive recovery was conferred by s.1237 of the *Social Security Act 1991*, and was exercised in accordance with the Minister's Notice of 8 July 1991. The AAT noted that Hodgson had received moneys to which he was not entitled as a result of making false statements. He had been convicted of criminal offences and served a sentence of imprisonment. The sentencing court had ordered reparation.

On the other hand, Hodgson suffered a serious disease of thrombosis and his health was so poor that he was unlikely to be able to work again. His wife and 2 young children had suffered considerable hardship as a result of his imprisonment.

Hodgson had substantial debts and to face him with the prospect of repaying the outstanding amount, \$12 748.86, would 'add a crushing burden and there is no realistic possibility that the amount could be recovered'. But there were strong policy reasons why it would be inappropriate to waive the whole of the outstanding sum in view of the criminal activities which led to the overpayment.

The AAT decided to waive \$6748.86 of the debt and write off the balance for 3 years, after which the DSS could seek recovery by instalments. This would give Hodgson a 'breathing space . . . to let him try and improve the welfare of his family'.

**Formal decision**

The AAT decided to waive \$6748.86 of the overpayment; write off \$6000 of the balance for 3 years; direct the Secretary to re-assess the recovery of the balance in the light of the circumstances existing at that time; and allow each party liberty to apply on the question of recovery of the balance.

[P.H.]

[Editors' note: See Federal Court decision on appeal from the AAT, p.983 of this issue.]

## Recovery of overpayment: Minister's discretion

**SECRETARY TO DSS and RIDDELL**

(No. 7913)

**Decided:** 24 April 1992 by B.G. Gibbs, N.J. Attwood and E.H. Stephenson.

The DSS applied to the AAT for review of a SSAT decision to waive the balance of a supporting parent's benefit debt owed by Mrs Riddell.

**The facts**

A debt of \$8163 was raised against Mrs Riddell in September 1985 because she was living in a *de facto* relationship which affected her entitlement to supporting parent's benefit. She accepted that she owed this amount and deductions were made from her family allowance payments.

In October 1990, Mrs Riddell asked the DSS to waive the balance then owing of \$4250.85 under s.251 of the 1947 Act. She made this request on the basis that she was suffering extreme financial hardship which was being compounded by the repayments to the DSS. The request was rejected.

**Should recovery be waived?**

As the debt was not disputed the issue was whether recovery should be waived. Section 1237 allowed waiver of the debt or part thereof in accordance with Ministerial directions. [The relevant extracts from the Ministerial directions are reproduced in VXC, reported in this issue.]

It was submitted for Mrs Riddell that the directions should not bind the exercise of the discretion, as to do so would give the directions retrospective effect. This was because the original decision of the DSS not to waive recovery was made in 1990, before the directions came into force. It was also submitted that she had an accrued right to have her application for waiver considered according to the law in force on the date when she made that application. These arguments failed, the AAT deciding that the applicable law was the 1991 Act and that the Minister's directions limited its discretion. The Tribunal referred to the decisions in *VXR* (1992) 65 SSR 914 and *Cirkovski* (1992) 67 SSR 955.

It was also put on behalf of Mrs Riddell that the term 'special circumstances', mentioned in para. (g) of the directions, was so uncertain as to not amount to a direction, that her circumstances were 'extremely unusual, uncommon or exceptional' and that the directions were of no legal effect because s.1237 did not permit directions which confined the exercise of the discretion in s.1237(1). It was argued that the directions were statutory rules which had not been published as required by the *Statutory Rules Publication Act* 1903 (Cth).

The AAT rejected the argument that the term 'special circumstances' was incapable of application in this context. The Tribunal noted:

'In particular, the Federal Court [*Beadle v Director-General of Social Security* (1985) 7 ALD 670] indicated at p.673 that special circumstances must include events which would render the normal position, in this case that the debt should be recovered, "unfair and inappropriate".'

(Reasons, p.11)

The argument that the directions could not confine the discretion was also rejected by the Tribunal. It was recognised that the directions reduced the range of matters to be considered in the exercise of the discretion to waive recovery which had been set out in *Hales* (1983) 13 SSR 136. It was also acknowledged that the directions required that the special circumstances must be 'extreme'. The Tribunal commented:

'While we are conscious that in *Clark* [(1992) 65 SSR 915], the Tribunal in similar circumstances evaluated whether there were sufficient grounds to support waiver of recovery on the basis of the criteria set out in *Hale's* case, we note that the Tribunal accepted the contention expressed on behalf of Mrs Clark that

the absence of the date of effect in the Minister's Notice raises a presumption against retrospectivity and that consequently the Tribunal was not bound by it in that particular case. The Tribunal further believed that Mrs Clark had accrued rights to have the exercise of the discretion reviewed unrestricted by the Minister's Notice. As we have already stated, while Mrs Riddell incurred a debt under the operation of the 1947 Act, a debt which continues in part to exist, nevertheless the power of the Tribunal to waive the balance of the debt can only be exercised as it exists at the date of its exercise, which is to say, the date of our decision. It follows, therefore, that we must exercise our discretion restricted by the terms of the Minister's Notice . . . That paragraph (g) of the . . . Notice introduces the notion that the special circumstances are extremely unusual, uncommon or exceptional, a notion arguably more strict than the criteria expressed in *Hale's* case, is not to the point.'

(Reasons, p.12)

The AAT also rejected the other submissions: para.(g) in the Notice was not uncertain; and s.46A(c) of the *Acts Interpretation Act* provided that directions are not statutory rules for the purposes of the *Statutory Rules Publication Act*.

#### The exercise of the discretion

The Tribunal expressed sympathy with Mrs Riddell's family circumstances which included a range of medical and social problems. These included assaults by her husband on some of their children, her husband's unemployment, psychological problems stemming from her abused childhood, restricted employment potential due to her limited education, medical and behavioural problems on the part of her twin sons, a son who is asthmatic and special dietary needs of a daughter.

The AAT observed that, based on an income and expenditure statement, there appeared to be an excess of income over expenditure in the family at the moment. She owed \$270 in legal, medical and domestic accounts, and had \$1500 available in arrears of child disability allowance. The present debt to the DSS was \$3750.85 and with deductions of \$50 per fortnight this would be repaid in 2 years and 9 months.

It was submitted by Mrs Riddell that although her income seemed able to allow for such deductions, her list of expenses offered to the AAT did not take into account potential expenses which, given the family circumstances, could be quite high.

The Tribunal concluded:

'While we are sympathetic to Mrs Riddell's family circumstances, particularly in respect of the range of medical and social problems confronting her children, we are nevertheless of the view and find that while these may be characterised as special circumstances and are certainly unfortunate, they are not circumstances which, even in conjunction with the family financial state, can properly be regarded as "extremely unusual, uncommon or exceptional" within the terms of the Minister's Notice.'

(Reasons, p.19)

#### Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with a direction that the balance of debt owed to the Commonwealth by Mrs Riddell be recovered.

[B.S.]

## Recovery of overpayment: which Act?

SECRETARY TO DSS AND VXC  
(No. 7907)

Decided: 15 April 1992 by B.G. Gibbs, D.B. Travers and E.H. Stephenson.

The DSS asked the AAT to review a SSAT decision to set aside a Departmental decision that the respondent was not entitled to widow's pension and sole parent's pension between March 1984 and April 1989 and to raise and recover an overpayment of \$42 604.40 for that period.

#### The issue

The respondent had applied for widow's pension in February 1980, having separated from her husband in October 1979. She was paid this pension from April 1989 until March 1989 when she was transferred to the new sole parent's pension. This payment was cancelled on her request in April 1989. The overpayment was raised when it was decided by the DSS that the respondent was 'residing in a relationship similar to that of a married couple' while in receipt of the pensions. The respondent appealed against that decision in May 1990.