

under review was not the primary decision which had been reviewed by the SSAT. Instead, the AAT followed an earlier AAT decision in *Gee* (1981) 3 ALD 132 and said that:

'The Tribunal in *Gee*'s case decided . . . that the affirmation of a decision simply leaves the original decision in place. It is that original decision which remains operative and which is under review rather than the affirmation itself. It does not follow from this, however, that the original decision is necessarily the decision under review in every case. As the Tribunal said in that case, where a decision is set aside, that is the end of that decision and it no longer operates. . . . the decision under review must be determined according to the relevant legislation and the facts of each case.'

(Reasons, para.14)

However the AAT did not explain why it was necessary to consider this issue and its determination of this case did not seem to depend on its resolution.

The facts

Mr Summers lodged a claim for unemployment benefit on 17 May 1991. A few days later his wife lodged a claim for age pension. In her claim form Mrs Summers did not answer a question which asked whether her partner was also claiming a pension and in answer to a question enquiring whether her partner had ever claimed a social security benefit answered 'yes' and stated this was in 1971.

Mr Summers started receiving unemployment benefit payments on 6 June 1991 but received no payment advice from DSS about it. Mrs Summers was granted age pension on 6 June 1991 and received her first payment in early July.

Between 6 August and 9 September 1991 Mr Summers made four enquiries of DSS as to whether he was being paid too much by DSS, the last one being in writing to the local DSS Office Manager. It was not until 17 September 1991 that DSS realised that it was incorrectly paying Mr Summers in respect of his wife. Before then he had been told that he was being paid at the correct rate. Mr Summers also had informed DSS in forms lodged on 8 August and 5 September 1991 that his wife was receiving age pension.

Waiver

The amount of the overpayment was not in dispute and the whole amount was recovered by DSS by 1 October 1992, before the AAT hearing. The only issue was whether the overpay-

ment should be waived. Because the overpayment had not been fully recovered at the time of the SSAT decision, the AAT commented that:

'As we are considering the issue of waiver as at the date of the SSAT's decision and in view of our final decision [not to waive], we do not need to consider at this stage whether we have power to waive a debt which has been recovered in full.'

(Reasons, para.48)

The AAT decided that 'Ministerial Directions of one kind or another bind the Tribunal in considering the power to waive' an overpayment under s.1237 of the *Social Security Act* 1991: Reasons, para. 39 and that there was no difference in substance between the provisions in the July 1991 and May 1992 directions that were relevant to this case. These were paragraphs (a) and (d) of the May 1992 directions which permit waiver:

'(a) where the debt was caused solely by administrative error on the part of the Commonwealth, and was received by the person in good faith, and recovery of the debt would cause financial hardship to the person; . . .

(d) where, in the opinion of the Secretary, special circumstances apply such that the circumstances are extremely unusual, uncommon or exceptional'

The AAT was satisfied that the overpayment was caused by the DSS's failure to cross check Mr and Mrs Summers' applications. However, although Mrs Summers acted in good faith, the AAT was of the view that the answers in her age pension application 'lulled the Department into a false sense of security' and contributed to the error being made in the first place by DSS. On that basis it was decided that the overpayment was not caused solely by DSS administrative error and paragraph (a) of the directions was inapplicable.

The circumstances were not considered to be special within the meaning of paragraph (d) of the directions, principally because the AAT could not find that Mr and Mrs Summers were placed in a position of financial hardship by recovery of the debt. They had savings of \$8794, some fixed trust units (of undisclosed value), owned their own house unencumbered, Mrs Summers continued to receive age pension and Mr Summers received a reduced amount of 'unemployment benefit'. The cause of the overpayment and Mr Summers' efforts to have his rate recalculated were also considered in deciding whether the circumstances were special.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Overpayment: cause and waiver

SECRETARY TO DSS and LEA

(No. 8551)

Decided: 19 February 1993 by P.W. Johnston, J.G. Billings and R.D. Fayle.

The DSS claimed an overpayment of sole parent's pension from the respondent. There were three separate occasions on which an overpayment had been made. On the first two occasions the respondent had notified the DSS about her other income, but the information was supplied about a week outside the 14-day period required by the *Social Security Act*. On the third occasion it was not clear whether she had provided the information within the 14-day period but she may have done so.

The SSAT had set aside the decision of the DSS to recover the overpayment and substituted a decision that the third overpayment be waived and that the balance be written off over two years. The DSS applied to the AAT for review of that decision.

The applicable legislation

The SSAT had decided to apply the *Social Security Act* 1947 in relation to liability for the debt, but the provisions of the *Social Security Act* 1991 in relation to waiver. The legislation is set out in *Thick* (reported in this issue). The significance of determining which legislation should apply was that the Ministerial determinations issued under the 1991 Act restricted the exercise of the discretion under the relevant section. The restrictive nature of the 1991 Act arose from the effect of the Ministerial determination which had been issued under s.1237. The effect was that

'in relation to the 1992 [Ministerial] determination, the exercise depends on a finding that as a matter of objective fact . . . that under [the determination] the Secretary or his delegate forms the opinion that there are "special circumstances" which are "extremely unusual, uncommon or exceptional". The forma-

tion of such opinion is the gateway to the field in which the discretion operates. Once that pre-condition is fulfilled, the Secretary – and in this instance, the Tribunal – as a secondary step must then have regard to those special circumstances in determining whether it is appropriate that the discretion should be exercised.'

(Reasons, para.17)

The 1947 Act did not restrict the discretion to waive recovery in this way.

Liability for the amount

The AAT noted that although it was not until 17 December 1991 that the decision to seek recovery was reviewed, the original decision to recover the amount was made on 27 November 1990. At that time the operative legislation was the 1947 Act. As it was the November decision which was effectively under review, the AAT found that liability arose under s.246 of the 1947 Act.

Did the DSS or the respondent cause the overpayment?

Section 246(1) of the 1947 Act provided that an overpayment was a recoverable debt if certain conditions were met. These required that the overpayment occurred 'in consequence of' or a failure or omission to comply with the Act and that it would not have been paid but for the failure or omission. The AAT referred to *Greenwood* (1992) 67 SSR 963 in which the Federal Court had said that it was sufficient, under s.246, to establish that the failure or omission of the recipient was a contributory cause of the overpayment.

The DSS claimed that the respondent's failure to notify the DSS of her earnings within 14 days of commencing employment resulted in an overpayment. This required the AAT to examine the DSS recovery procedures. The AAT found that even in cases where changes in income were notified to the DSS within the 14-day period overpayments would continue for some months while the DSS made further enquiries of employers and the level of overpayment was assessed. The AAT commented:

'The fact that notification of the relevant information within 14 days would have made no difference to the Department's continuing to pay pension at the full rate, is borne out by the fact that in each instance notification was made only a matter of a short time after the 14-day period had expired. Departmental procedures were the same no matter when notification was made. In relation to the June-July overpayment notification it was 10 days outside the period and only 3 days outside in the case of the August

overpayment whilst on the evidence of the respondent, which was vague on this point, notification in relation to the September-October overpayment could well have occurred within the 14 days, but more likely was three weeks after commencing work. It is therefore difficult to see how the failure to notify of any relevant circumstances within 14 days would have affected the outcome, given the departmental practice at the time. The juggernaut would still have rolled on irrespective of the breach of the notice under s.163 of the 1947 Act. Given those circumstances it is difficult to see how the debt to the Commonwealth arising from the overpayments in the second and third employment periods could be said to be "in consequence of" the failure to give the necessary particulars nor that the overpayment would not have occurred "but for" her omission to notify in time. Had the respondent informed the Department in time it would not, on the evidence, have prevented the overpayment of pension. Her failure was irrelevant to the outcome. The first period raises some slight difference in that she did commence work on 17 June 1990 prior to the first receipt of pension on 21 June 1990 but there is nothing in evidence from the respondent's [sic] officers to suggest that any different outcome would have followed.'

(Reasons, paras 23-24)

The conclusion was that the overpayment was not a recoverable debt under s.246(1). But it was still an amount to which the respondent was not entitled and under s.246(2) which authorised the DSS to recover the amount by deduction from any pension, benefit or allowance being paid to the respondent. Thus the next consideration was whether any of the amount should be waived.

Waiver of recovery: the applicable law

The AAT decided to follow *Bradley* (1992) 70 SSR 1003 in which the AAT decided 'that where a person has incurred liability under s.246, an integral part of that liability was that it could be waived in accordance with the law in force at the time the liability was created'. The consequence of applying the 1947 Act was that a less restrictive exercise of the discretion to waive recovery would be applied. If the Tribunal was:

'satisfied that in having regard to the kind of considerations that were indicated to be relevant in *Hales* [(1983) 13 SSR 136] the Tribunal need not, as a preliminary exercise, decide whether, if it finds special circumstances exist, it must also find that the circumstances are extremely unusual, uncommon or exceptional.'

(Reasons, paras 26-27)

The AAT took into consideration the 'fairly stringent circumstances' of the respondent, the fact that she was bringing up a teenage son alone and that most of her expenditure was committed to necessities. Against this it was also accepted that she had received public moneys to which she was not entitled and which she had used to reduce her overdraft. It was also noted that:

'[a]s a matter of whether the original decision was fair, she quite rightly feels that she had little to do with bringing about the situation of overpayment. In this respect the Tribunal puts considerable weight on the fact that although the Department had evidence as early as 9 August 1990 that the respondent had probably received moneys to which she was not entitled, and by 3 September 1990 has certainly confirmed that fact, it was not till late November that it took any steps to formally notify her. By that time the overpayment was over \$2000. This situation must be regarded as unusual when compared with normal commercial debt practice.'

(Reasons, para.28)

The AAT concluded that the overpayment in respect of the third period of employment should be entirely waived 'on the basis that by that point of time, the applicant should either have instituted withholdings or if it were not prepared to do so, at least have informed the respondent of its intentions'. The AAT also decided that the balance of the overpayments should not be recovered for a period of two years from the date of the SSAT decision, but that after that period the DSS may recommence withholdings having regard to the respondent's financial circumstances at that time. An amount of \$219 imposed as a penalty was also to be waived as it had been applied mechanically under the 1947 Act in relation to a debt which should not have been raised under s.246(1).

Formal decision

The AAT set aside the decision under review and substituted a decision giving effect to the above conclusions.

[B.S.]