Waiver of overpayment: special circumstances

SECRETARY TO DSS and DELGAS

(No. 8557)

Decided: 26 February 1993 by I.R. Thompson, G. Brewer and L.S. Rodopoulos.

On 20 November 1991 the DSS decided that Delgas had been overpaid $26,234.95 in unemployment benefits. This decision was reviewed on 3 December 1991 and the review officer amended it by changing the amount to $25,290.74. Delgas then applied for review by an SSAT which set aside the decision finding that no debt existed. The DSS then applied to the AAT for review. Delgas was unrepresented.

The facts

Delgas injured his back in an accident at work in 1977 and was paid invalid pension under the *Social Security Act* 1947. In December 1988 payment of invalid pension ceased and he lodged a claim for unemployment benefit. From then until at least 21 May 1991 unemployment benefit was paid to him under the 1947 Act. On 3 April 1989 he entered into a driver's leasing agreement with a company which operated taxis. From at the latest 3 July 1989 until 20 May 1991 he drove taxis for the company and had the use of the taxi seven days a week, except for a ten-week period between April and June 1990 when he did not have use of the taxi. From then until the end of 1990 he had the use of a taxi from Friday afternoon until Monday morning each week. Thereafter he again had the use of the taxi for seven days a week. The terms of the agreement required him to pay the company half the amount registered on the meter. When he had the taxi seven days a week he was required to operate it so that fares amounted to not less than $800 per week. When he had it from Friday afternoon to Monday morning the relevant amount of fares was $400.

To be eligible for unemployment benefits Delgas had to lodge a claim each fortnight but only the first claim, lodged in December 1988 was available. Copies of two periodic review forms for May 1989 and June 1990 were available. The forms asked if the applicant had done any work at all since getting unemployment benefits. In the first form Delgas has responded 'Yes', 'Taxi driving one day per week' but on the second he had responded 'No'. In a pre-interview questionnaire completed in August 1990 he also answered 'No'.

DSS had obtained information from the taxi company which led it to believe that Delgas had obtained income from taxi driving in excess of $16,000 in the year from 1 July 1989 to 30 June 1990 and in excess of $14,000 in the following year. An overpayment was raised on the basis that he had failed to inform the Department. It was calculated that , except during a few weeks in 1990, his fortnightly income was such that the income test in s.122 of the 1947 *Social Security Act* would have resulted in a benefit entitlement at a nil rate.

The DSS argued that during the whole of the period that Delgas was driving the taxi he had not met the qualification for unemployment benefit set by s.116(1)(c) of the 1947 Act, as he was not unemployed.

Delgas said that while he had driven the taxi with its meter running for sufficient distances to record fares in excess of the minimum required, he had in fact not carried fare-paying passengers for all the journeys. He said he used the taxi a good deal for his own private purposes. He also gave evidence that in the period that he had the taxi seven days a week he did carry fare paying passengers every day except when back pain prevented this. He claimed to have earned only $100 per week and sometimes he had to use his unemployment benefit to pay the taxi company.

The cases

In *McKenna* (1981) 2 *SSR* 13 the AAT held that in s.116 the word 'unemployed' bore its colloquial or popular meaning of not being engaged in work of a remunerative nature. The AAT has frequently pointed out that underemployment is not to be equated with unemployment (*Te Velde* (1981) 3 *SSR* 23).

The findings

The AAT applied 'our knowledge as passengers in Melbourne taxis' and found that on average the time that Delgas was using his taxi to carry fare paying passengers was about ten to twelve hours per week, and he would have spent more time waiting for passengers. The AAT found there was no doubt that Delgas was engaged in work of a remunerative nature. He was not qualified to be paid unemployment benefit except for a period of ten weeks during 1990 when he was not driving the taxi. Delgas' circumstances were extremely unusual, uncommon or exceptional. He and his family were not merely suffering financial hardship; their whole lives had been turned upside down by a stroke and its consequences.

The respondent's financial hardship was so great, and the prospect of recovery of the debt so poor that those factors outweigh the fact that public moneys were paid in breach of the 1947 Act.

Section 116(4) of the 1947 Act gave the DSS a discretion to treat a person as having been unemployed in any period, notwithstanding that the person undertook paid work if it was of the opinion that given the nature and duration of the work and any other relevant matters, the work should be disregarded. Delgas had completed an RMIT boiler attendant's course during the relevant period, which he hoped would help him 'get off social security'. He had no financial assistance and the course restricted the number of hours he could drive the taxi. The AAT did not consider these to be factors which would justify the exercise of the discretion to treat him as unemployed.

Since Delgas received unemployment benefit to which he was not entitled there was an overpayment of the whole amount paid during the period he drove the taxi. An amount of $991.60 had already been recovered but the overpayment was considerably more. The AAT concluded that the discretion given by s.1237(1) of the 1991 Act to waive recovery of the overpayment should be exercised except for the amount already recovered. The evidence did not allow it to calculate precisely what the amount should be so the AAT accepted the amount calculated by DSS.

On 13 November 1992 Delgas had resumed taxi driving when he was involved in a collision during which he suffered a stroke. He was severely paralysed down his left side, lost eye coordination and experienced double vision, and was brought to the hearing in a wheelchair. His chances of being able to undertake remunerative work in the foreseeable future were non-existent.

He had two dependent children, and an $80,000 debt to the Ministry of Housing which had threatened to sell his house. He had applied for a disability support pension under the 1991 Act

and the family's income was restricted to special benefit. The family had also incurred debts of $2000 whilst Delgas was in a coma following the stroke. His wife was seeking part time work but had been unsuccessful.

Section 1237(1) of the 1991 Act empowers the DSS to waive the Commonwealth's right to recover the whole or part of a debt. At the time when Delgas' debt was incurred that power was given by s.251(1)(b)(i) of the 1947 Act. Both sections provide that the discretion can only be exercised in accordance with directions given by the Minister in writing. No such determinations were made while the 1947 Act was in force but two have been made under the 1991 Act.

Ministerial Directions

In *Bradley* (1992) 70 *SSR* 1003 the AAT presided over by the President, held that the power to waive recovery of a debt incurred progressively from 1978 to 1989 was not fettered by the determination of the Minister made on 5 May 1992. The principles expressed in *Hales* (1983) 13 *SSR* 136 were to be applied in deciding whether or not to waive the debt. Before 22 December 1988, s.251 of the 1947 Act did not contain provision for the power of waiver to be fettered by Ministerial directions; however from that date it did so. In *Bradley* the AAT looked at the whole of the debt, not just that part of it which was incurred before 22 December 1988. Its conclusion that the Minister's directions did not fetter its discretion was made on the basis that no directions had been made until after the debt had been incurred.

A decision on a point of law made by the AAT with the President presiding should normally be followed unless and until the Federal Court decides it is wrong. In the present case the result would be the same whether the principles expressed in *Hales* were applied or if the decision was made in accordance with the directions given by the Minister. Clause 2 of the Ministerial Directions of 5 May 1992 states that the power of waiver must be exercised in the circumstances set out in paragraphs (a) to (g) and not in any other circumstances. Although the conjunctive 'and' appears between paragraphs (f) and (g) it is clear that the power of waiver may be exercised if the circumstances described in any of the paragraphs exist. The circumstances are so diverse that if they had to be read conjunctively there would almost never be a case in which the power of waiver could be exercised. Paragraph (d) provides that the power may be exercised 'where, in the opinion of the Secretary, special circumstances apply such that the circumstance are extremely unusual, uncommon or exceptional'. The AAT was satisfied that Delgas' circumstances fitted that description.

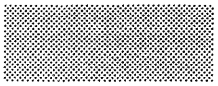
Amount of overpayment to be waived

Delgas argued the whole of the overpayment should be waived and the amounts already recovered should be repaid to him. The AAT acknowledged that repayment to him would ameliorate his present dire financial situation but that it would be inappropriate to waive the part already repaid. Delgas had not informed the DSS of the taxi driving nor had he disclosed his earnings. Had the DSS been given the correct information unemployment benefit would not have been paid and no overpayment would have occurred. At the time the amounts had been recovered his circumstances had been different.

Formal decision

The AAT set aside the decision under review and substituted a decision that Delgas was overpaid $25,290.74 unemployment benefit between 1 July 1989 and 20 May 1991, but waived the Commonwealth's right to recover from the respondent the whole of the amount except for the amount that had already been recovered.

[B.W.]



THICK and SECRETARY TO DSS

(No. 8571)

Decided: 26 February 1993 by S.D. Hotop, J.G. Billings and R.D.F. Lloyd.

In August 1986 the applicant had appealed to the AAT against a DSS decision to recover an overpayment of unemployment benefit. The AAT had decided that the applicant had received an overpayment and that a specified portion of it was to be repaid to the DSS. The matter was sent back to the Department to decide whether recovery would be by way of instalments by deduction from any pension, benefit or allowance paid to the applicant. The DSS decided that the method of repayment should be by monthly instalments of $10. The applicant did not make regular payments and no payments were made between December 1990 and December 1991.

On 17 January 1992 the DSS requested the Department of Veterans Affairs to recover the debt by deducting amounts from a pension paid to the applicant by that Department. This request was made under s.205 of the *Veterans' Entitlements Act* 1986 (Cth). From 5 March 1992, deductions of $42.22 per fortnight were made pursuant to this request. In February 1992 the applicant sought a departmental review of the decision to request the deduction. This review upheld the decision. An application to the Authorised Review Officer resulted in the reduction of the deductions to $18 per fortnight. In March 1992 the SSAT affirmed that decision. The applicant then applied to the AAT for review of the decision to recover the debt and to deduct the instalments from his pension.

The applicable legislation

As the original debt had arisen under the *Social Security Act* 1947 a question arose as to the applicable legislation when deciding whether to waive recovery of the debt.

Section 1237 of the *Social Security Act* 1991 authorises the Secretary to the DSS to waive recovery of a debt. In exercising this power the Secretary is to act in accordance with directions given by the Minister. In July 1991 the Minister issued the following direction:

> 'where in the opinion of the Secretary special circumstances apply such that the circumstances are extremely unusual, uncommon or exceptional (as discussed by the Federal Court of Australia in *Beadle v Director-General of Social Security* (1985) 7 ALD 670)'.

In May 1992 reference to *Beadle's case* was omitted from this reference.

Section 251(1) of the *Social Security Act* 1947 provided that the Secretary may decide to:

> '(a) write off debts arising under or as a result of this Act, or debts arising under or as a result of this Act that are included in a class of debts specified by the Minister by notice in writing published in the Gazette;
>
> (b) waive the right of the Commonwealth -
>
> (i) to recover from a person the whole or a part of a debt that is payable by the person under or as a result of this Act; or
>
> (ii) to recover debts under or as a result of this Act included in a class of debts specified by the Minister by notice in writing published in the Gazette; or
>
> (c) allow an amount that is payable by a person to the Commonwealth under or as a result of this Act to be paid in instalments.'

Under s.251(1A) the exercise of this power by the Secretary was to be in accordance with Ministerial Directions issued under s.251(1B). No such directions were issued while the 1947 Act was in force.

The AAT referred to the decision in *Bradley* (1992) 70 *SSR* 1003 which decided that where a debt had arisen under the 1947 Act then the issue of waiver of the debt should be decided under that Act without regard to the 1991 Act and directions issued under s.1237. The AAT decided to follow this decision and determine whether the debt should be waived in accordance with the 1947 Act.

Waiver of the debt

The discretion to waive recovery under s.251 of the 1947 Act had to be determined according to the principles set out in the Federal Court's decision in *Director-General of Social Services v Hales* (1983) 47 ALR 281. That decision referred to the need to consider such matters as: the fact that public moneys have been paid to a person who was not lawfully entitled to them; the circumstances in which the overpayment arose – whether as a result of innocent mistake or fraud; the present financial circumstances of the payee; the prospect of recovery; whether a compromise has been offered; whether recovery should be delayed because the payee's financial circumstances might improve; compassionate circumstances as the 1947 Act is social welfare legislation.

The applicant did not deny the receipt of the overpayment and that this occurred as the result of false statements or representations or the failure or omission to comply with the 1947 Act on his part. He gave evidence that his financial circumstances were such that his monthly income was $215.71 less than his required monthly expenditure. He also owned a house worth $80,000 and household contents worth $15,000 and a car valued at $800. The applicant also claimed that, as a result of his recent marriage, his pension income had been reduced to the married rate. The AAT ascertained that his wife also received a married rate pension from the Department of Veterans' Affairs. His wife had no assets of her own, paid for her own food and clothing but did not contribute to other household expenses. The combined monthly family income was $1151.60. The AAT noted with respect to the prospect of recovery that with deductions of $18 a fortnight the debt would be repaid within four years. There was little prospect of the applicant's financial circumstances improving.

The applicant claimed that he was suffering extreme financial hardship. He could not afford to pay for dental treatment, spectacles, an ambulance subscription, the repair of his solar hot-water system and guttering in his house and lawn-mowing. He told the AAT that he had to steal food to survive.

The AAT noted that he had a substantial asset in his house which was not mortgaged. Also, the family income exceeded the applicant's expenses by $150 a fortnight. The AAT expressed the view that it would not be unreasonable to require his wife to contribute to other household expenses apart from food.

The AAT's conclusion was that it was not appropriate to exercise the discretion to waive recovery wholly or in part. It was also decided that deductions at the rate of $18 a fortnight were appropriate. It was also noted that had the matter been decided under the 1991 Act the decision would have been the same, as the discretion to waive debts under that Act 'is more narrowly circumscribed than the corresponding discretion conferred by s.251(1) of the 1947 Act'.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

[**Comment:** The AAT concluded that the combined income of the applicant and his wife exceeded *the applicant's* expenses by $150 a fortnight, although there was no evidence of the wife's expenses other than food and clothing. Furthermore, the AAT did not explain how the applicant could realise the 'substantial asset in his house' (valued at $80,000), nor how the realisation would affect his financial position.]

Payment of claimant's benefits to another person

EVERY and SECRETARY TO DSS

(No. 8522)

Decided: 10 February 1993 by S.A. Forgie.

Allan Every was injured in 1980. His mother lodged a claim for sickness benefits on his behalf. A form, purporting to authorise payment of pension (but not sickness benefit) to Every's mother, was also lodged with the DSS. The form was signed by a welfare officer at the hospital where Every was a patient. A doctor at the hospital wrote to the DSS, declaring that Every was unable to transact any business on his own account.

The DSS granted sickness benefit to Every and made payments covering 2 months to his mother. When Every was discharged from hospital, he asked that future payments be made to him and the DSS complied with that request.

Every subsequently recovered damages for his injury and the DSS recovered from him an amount equal to the sickness benefits paid out, including the amounts paid to Every's mother.

Every than applied to the DSS for payment to him of the benefits paid to his mother. The DSS refused to make that payment and the SSAT affirmed the DSS decision. Every appealed to the AAT.

Legislation

Section 161(1) of the *Social Security Act* 1947 provides that, subject to s.161(2), a pension, benefit or allowance shall be paid to the person to whom the pension, benefit or allowance was granted or was originally payable.

Section 161(2) gave the Secretary a discretion to direct that payment of benefits be made to a person on behalf of a grantee.

The DSS Guide contained instructions on the exercise of the s.161(2) discretion. The Guide stated that 'payment processes should endeavour as far as possible to place clients in control of their own finances and avoid conflict with s.249 of the Act, which declared that benefits were 'absolutely inalienable'.