Jurisdiction: recoverable debt

FARMER and SECRETARY TO DSS
(No. 8694)

Decided: 7 May 1993 by P.W. Johnston.

Background

Farmer asked the AAT to review a decision to recover $1528.40 by means of withholdings from Farmer's Disability Support Pension (DSP) at the rate of $36 a fortnight.

On 6 December 1991 a delegate had imposed a preclusion period expiring on 3 April 1992, following receipt of a lump sum payment of compensation from a workers' compensation claim. On review, the SSAT had set aside that decision and, on the basis that special circumstances existed, had substituted a new decision that a portion of the workers' compensation payment should be disregarded. The Department sought review of that decision and at a directions hearing, the AAT made an order that had the effect of partially staying the decision. Specifically, it directed that half the lump sum amount owing to Farmer as a result of the SSAT decision be paid to him, with the other half to be withheld pending the determination of his appeal. When the appeal was heard, the AAT set aside the SSAT decision and affirmed the original decision.

The first AAT hearing

The Tribunal here set out in some detail extracts from the oral reasons given by the AAT. The SSAT had pointed out to Mr Farmer that he had been paid some money in accordance with the SSAT decision that was not payable. The AAT had stated that it was not proposing to make any order and the Senior Member commented:

> 'And I will be interested to see what the Department does about that [money paid to Mr Farmer]. It was paid to Mr Farmer pursuant to a valid order of the Social Security Appeals Tribunal properly set up, and I am not at all clear at this stage whether the law enables you to collect the money back again, or whether it does not.'

(Reasons, para. 6)

The Member went on to speculate whether, if the Department did seek recovery, that would be a reviewable decision and advised Mr Farmer that if that occurred he could ask for the matter to be reviewed.

On 25 June 1992, a delegate of the Department decided to recover the sum of $1,528.40 by means of withholdings from the applicant's DSP, and he was advised in writing of this decision. The letter to him concluded:

> 'As the recovery is based on reversing a previous temporary decision I have formed the view that the action to recover the money is not reviewable. Not withstanding this conclusion and following the matters raised by Senior Member Barnett at the above mentioned hearing, you may wish to lodge an application for review to the appropriate authority if you now believe that recovery should not proceed.'

(Reasons, para. 7)

Farmer sought review of that decision in a letter sent directly to the AAT. He was advised by the Deputy Registrar that the AAT could not accept the application in the first instance and that he should apply to the SSAT.

The SSAT

At the SSAT, the Department objected to jurisdiction on the basis that it claimed that the debt which was the subject of the appeal arose pursuant to a decision of the AAT and not of a delegate of the Secretary. This submission was accepted by the SSAT which decided that it did not have jurisdiction to consider whether or not recovery should occur and therefore could not consider the issue of waiver.

However, the SSAT decided that it had jurisdiction in this and all cases concerned with the implementation of decisions of the AAT to determine the appropriate rate of recovery. In the event, the SSAT affirmed the decision to recover by withholding deductions at the rate of $36 per fortnight. The matter then went to the AAT.

Jurisdiction of the AAT

The Department's submissions

The Department's main argument, as it was at the SSAT, was that the decision to recover the debt resulted from a decision of the AAT and was not a decision made under the *Social Security Act* 1991 (and, therefore, was not reviewable). A further submission was that as the AAT had made the decision, it could not in the exercise of its powers under s.1283 of the Act or under the *Administrative Appeals Tribunal Act* review its own decisions as it had become functus officio. Alternatively, the Department submitted as the SSAT had decided that it had no jurisdiction in respect of waiver, that decision deprived the AAT of jurisdiction on that issue, as the AAT may only review a decision where the SSAT has affirmed, varied or set aside a decision of an officer of the Department. It was argued that a decision of the SSAT that it lacks jurisdiction is not a decision affirming, varying or setting aside any such decisions. A final submission was that the provisions regarding waiver apply only to debts under the Act, and, the Department argued, nothing in the Act authorised recovery of the amount in contention because no provision of the Act made it a debt under the Act. Here the Department referred to s.1222A of the Act.

The Department effectively conceded that the amount in contention was not recoverable under s.1233(1)(b)(i). This is because that provision creates a debt where an amount has been paid to a person who was not qualified and the amount was not payable. While the AAT agreed that amount was not payable as a result of the Tribunal's decision, Farmer had remained qualified for pension throughout the period. Moreover, the Department noted that if this amount was not a debt under s.1223(1)(b)(i), no other category prescribed in s.1223 applied. Nor was recovery permissible under s.1224 which deals with debts arising from a contravention of the Act. Similarly, ss.1227 and 1228 had no application.

The AAT pointed out the difficulty with this submission which was, effectively, that there was no statutory basis for recovering the debt. However, the Department's response was that a debt had arisen which could be recovered by normal proceedings in a civil court. And, on s.1231, which facilitates recovery of a debt 'under the Act' by withholdings, the Department suggested that as the definition of 'debt' in s.1235 included a debt under the 1947 Act, and an amount payable under the *Veterans' Entitlements Act*, this indicated that there may be debts other than those specifically referred to in the Act, which are recoverable.

Farmer's arguments on jurisdiction

The applicant submitted, by contrast, that the decision of the AAT to award an interim payment was a decision under the Act. Therefore, the AAT could review all issues of recovery including waiver and the amount of deductions. As the ultimate effect of a decision of the AAT is to substitute a new decision for the original decision, the new decision takes effect as if made under the Act.

In any event, the AAT has no general power to make a payment under the Act. Its power to do so is only in relation to a decision already made under the Act. Though the effect of the order was that money was paid, the AAT was not making an original grant but rather, inter alia, authorising the decision of the SSAT to be partially implemented. It was also submitted that the withholding decision was a mode of recovery under s.1223(1)(c) and that the rate of repayments was reviewable by both the SSAT and the AAT. It followed from that, that in reviewing that decision, the AAT could also consider waiver and write-off and had all the powers that had been available to the original decisionmaker. This submission was based on the decision of the Federal Court in *Secretary to DSS v Hodgson* (1992) 68 *SSR* 982. The applicant further submitted that the fact that the SSAT had decided that it lacked jurisdiction in respect of waiver did not preclude the AAT from considering the issue. Finally, it was submitted that if the debt was not one arising under the Act, then any administrative attempt by the Department to recover it was questionable.

The AAT's reasoning

The SSAT's decision on waiver

The AAT decided that the decision of the SSAT that it was unable to consider waiver did not preclude the AAT from doing so. It relied on the Federal Court decision in *Ward v Nicholls* (1988) 16 ALD 353 and referred also to *Re Crompton and Repatriation Commission* (Purvis J, 15 October 1992).

The decision under review

The AAT held that the decision of the Department to recover the money founds the jurisdiction of the AAT in this matter. The Department relied on s.1231 as its authority for the recovery action and made a decision pursuant to that provision. On that basis, the decision was one made by an officer under the Act, and the AAT was satisfied that it was competent to review the decision.

Is there a recoverable debt?

The AAT went on to consider whether there was a recoverable debt. Referring to s.1223(1), the AAT decided that the scheme involving preclusion under the Act envisages a continuing qualification for pension during a preclusion period but that during that period, entitlement to payment ceases. Therefore, a person remains qualified though an amount of money is not payable. On that basis, the amount in question is not a recoverable debt under the Act. It is not a debt under s.1223 nor under s.1224. 'Indeed the effect of s.1222A means that it is not a debt in any way due to the Commonwealth'. The AAT referred to s.1222A which provides:

> 'if an amount is paid by way of pension, benefit or allowance under this Act or the 1947 Act, the amount is not a debt due to the Commonwealth unless a provision of this Act or the 1947 Act expressly provides that it is.'

It pointed out that s.1222A, which had no parallel in the 1947 Act, prevented a debt from arising in a manner such as envisaged in the *Auckland Harbour Board case* [1924] AC 318, under which principle payment of any moneys out of Consolidated Revenue without Parliamentary authority is unlawful, and an amount so paid is recoverable by the Government. On this basis, the AAT described as untenable the proposition put forward by the Department that there might be a debt recoverable by the Commonwealth at common law in the present circumstances. Nor was it possible for there to be any other kinds of debt not specifically mentioned in the Act which can be recovered. On this view, it followed that it was not possible to take recovery action by way of withholdings under s.1231 of the Act. Here, the position was contrasted with the position under s.246(2) of the 1947 Act where recovery action by means of withholdings was open to the Department simply on the basis of an amount that had been paid that should not have been paid. In support of the view that the amount was not recoverable, the AAT referred to *Buhagiar* (1981) 4 *SSR* 34 and *Repatriation Commission and Delkou* (1985) 8 ALD 454. In those cases, it was considered that where implementation of a decision of an intermediate review tribunal was not stayed, the amount paid in consequence might not be recoverable.

The recovery issue

Having decided that there was no debt, the AAT then considered whether it could make an order requiring repayment of the amount already recovered. Following the decision of the Full Federal Court in *Ridley* (1993) 73 *SSR* 1066, the Tribunal took the view that it could make a direction that the matter be remitted to the Department for calculation of the amount recovered.

The AAT pointed out that having found that the amount was not a debt due to the Commonwealth that was sufficient to dispose of the application. However, out of caution, it considered that it should address further aspects of the matter under review and went on to consider waiver.

Waiver

The AAT discussed at some length the relationship between the phrase 'special circumstances' as used in the preclusion provisions scheme under s.1165 and the phrase used in the ministerial direction made under s.1237 [since found to be invalid by the Full Federal Court in *Riddell* (1993) 73 *SSR* 1067]. On the merits, the AAT decided that if the

> 'circumstances put forward to reduce the preclusion period failed to satisfy the Tribunal that such a course was warranted, the same circumstances, unless significantly augmented by new facts, must necessarily fall short of establishing "special circumstances" to justify waiver under s.1237'

(Reasons, para. 50).

Accordingly, the Tribunal did not accept that there were circumstances which would justify waiver.

The rate of deductions

The Tribunal agreed with the SSAT that it had jurisdiction to review the rate of withholdings, and after discussing the evidence given by the applicant, expressed the opinion that the rate of recovery of $25 a fortnight should be substituted for the original decision of $36 per fortnight. The Tribunal further commented that it was of the view that action by way of recovery should not extend more than 18 months if, on any appeal, the view of the Tribunal that there is no recoverable debt due to the Commonwealth is not to be sustained.

Decision

After summarising its conclusions extensively, the Tribunal set out its final decision as follows:

1. To set aside the decision of the respondent of 25 June 1992 to recover the amount by way of deductions from the applicant's pension at the rate of $36 per fortnight; and
2. to substitute in its place a decision that the applicant does not owe the amount to the Commonwealth;
3. to remit the matter to the respondent to calculate the amount of the deductions which were withheld from the applicant and to take the appropriate action concerning their payment to him;
4. alternatively, that if it be determined that the applicant does owe the amount, it should be recovered by

deductions from pension at the rate of $25 per fortnight for a period of no longer than 18 months from the commencement of such recovery.

[R.G.]

[**Editorial note**: It is perhaps somewhat unorthodox for the AAT to include as part of its 'decision' an alternative to its own first-mentioned decision. Clearly, the AAT had in mind the possibility that there might be an appeal to the Federal Court which resulted in setting aside the decision that no debt existed, if it was considered that that constituted an error of law. The Tribunal appears (though quaere with what effect) to have attempted to pre-empt the matter in the event that the Federal Court be inclined to send it back to the AAT].

Sole parent pension: whose SPP child?

JUREN and SECRETARY TO DSS (No. 8726)

Decided: 21 May 1993 by I.R. Thompson, A. Argent and C.C. Baker.

On 30 January 1992 Juren claimed sole parent pension. The claim was rejected on 4 February 1992, and the applicant applied to the SSAT for review of the decision. Before the SSAT heard her application, she was granted disability support pension at the single rate. No amount was paid to her for a dependent child. The SSAT affirmed a decision which it identified as a decision that the applicant was 'not entitled to any payments for her son Bruno'. Juren applied to the AAT.

Following Juren's separation from her husband in 1991, orders were made by consent determining financial matters and awarding to the husband sole custody of the child of the marriage, Bruno, born 1978. Bruno lived for a time with the husband in Queensland. During an access visit in January 1992 Bruno decided that he wished to remain with the applicant at her home in Melbourne. His father did not consent to this, and continued to try to persuade Bruno to return to his care. While Bruno stayed with the applicant, she accommodated and fed him and provided for all his material needs. Her husband sent no money for Bruno's support.

In July 1992 Bruno willingly accompanied his father on a trip to Croatia. The Reasons do not indicate where Bruno lived thereafter. It appears that the issues considered in the appeal were confined to the period from when Bruno came to live with the applicant until he went to Croatia.

What was the decision under review?

The DSS argued that the decision under review was the decision to pay DSP at the single rate without any amount for a dependent child. That was the decision that the SSAT had reviewed. But the applicant had sought review by the SSAT of the decision to refuse sole parent pension. The AAT decided that it should treat the SSAT's decision 'as at least extending to that decision', so as to enable it to be reviewed by the AAT.

Legislation

To qualify for sole parent pension under s.249(1)(b) *Social Security Act* 1991 the applicant must have 'at least one SPP child'. An SPP child is either a 'dependent child' or a 'maintained child' of the applicant' (s.250(1)(a)). 'Dependent child' is defined in s.5(2) and 'maintained child' is defined in s.5(9A). Even if the child meets the criteria for an SPP child, s.251(1) provides that a young person can be an SPP child of only one person at a time. If satisfied that a child would otherwise be an SPP child of 2 or more persons, the Secretary is required by s.251(2) to make a written determination specifying the person whose SPP child the young person is to be.

The AAT found that Bruno was not a 'dependent child' of the applicant. She did not have, as required by the definition in s.5(2), the right to have the daily care and control of Bruno or to make decisions about his daily care and control. Those rights were vested in the husband, who had been granted sole custody by the Family Court. Further, Bruno did not cease to be in his father's care and control while staying with the applicant in Melbourne. His father never surrendered the care and control of Bruno, and continued to exercise it as best he could.

While Bruno was a 'dependent child' of the husband, he was at the same time a 'maintained child' of the applicant. The AAT rejected the argument of the DSS that a child must be 'maintained' by the provision of a sum of money paid regularly. Referring to the wide construction placed by Hill J in Secretary, *DSS v Wetter* (1993) 73 *SSR* 1065 on the meaning of the word in the phrase 'substantially maintained' used in s.44(1) *Social Security Act* 1947, the AAT said that it should not be taken as excluding maintenance of a child by a parent in the home.

Whose SPP child?

As the husband's 'dependent child' and the applicant's 'maintained child', Bruno would but for s.250(2) have been an SPP child of each of them. Under s.250(2) the delegate was required to make a determination specifying whose SPP child he was to be. The delegate in rejecting the applicant's claim had made no determination under s.250(2) because the delegate did not consider that the situation referred to in s.250(2) had arisen.

The AAT considered that the proper course was to specify that Bruno was the SPP child of the husband. To specify the applicant would be contrary to the public interest because to do so would enable the applicant to gain an advantage from her conduct in keeping Bruno with her and not counselling him to return to his father, conduct which was:

> 'not only contempt of the Family Court but also inconsistent with the dealings between the husband and herself which had led to the making of those orders with the consent of both of them.'

(Reasons, para. 17).

Formal decision

The AAT affirmed the two decisions that it identified as the decisions under review:

1. the decision to reject sole parent pension; and
2. the decision not to pay DSP at a rate including an amount paid in respect of a dependent child.

[P.O'C.]