Overseas payment of age pension: recipient notification notice

SECRETARY TO DSS and PERETTI

(No. 9190)

Decided: 17 December 1993 by T.E. Barnett.

The Department of Social Security (DSS) applied for review of an SSAT decision which had varied the DSS decision to cancel the age pensions of Mr and Mrs Peretti as they were absent from Australia for more than 6 months and did not obtain a departure certificate before leaving; and to raise and seek recovery of an overpayment. The SSAT had varied the decision by deciding that: there was an overpayment of pharmaceutical allowance of $33.80 each; there was no overpayment of age pensions; and Mr and Mrs Peretti's pensions should be restored from the date of cancellation.

The facts

Mr and Mrs Peretti had been in receipt of age pensions since 1977 and 1981 respectively. On a number of occasions they had left Australia to reside in Italy and it had been their usual practice to notify the DSS. Their most recent return to Australia had been on 12 December 1991. On 16 March 1992, while still in Australia, both Mr and Mrs Peretti received a notice from the DSS which, inter alia, advised them to notify the DSS of changes in their circumstances including if they 'decide to leave Australia, even if just for a holday'. Mr and Mrs Peretti left Australia on 3 May 1992 but did not notify the DSS of their departure and so were not issued departure certificates. Their age pensions payments continued until 3 December 1992 when the DSS became aware of Mr and Mrs Peretti's absence, through a computer data matching exercise with DILGEA, and first suspended, then cancelled, their pensions. Overpayments of $815.30 were raised against both Mr and Mrs Peretti for the period 3 November 1992 to 3 December 1992. At the date of the hearing Mr and Mrs Peretti had not yet returned to Australia.

The legislation

Section 1218 of the *Social Security Act* 1991 provided that if a person leaves Australia without receiving a departure certificate under s.1219 and remains absent for more than 6 months, the person ceases to be qualified for age pension at the end of the period of 6 months. Under s.1219, if a person who is receiving an age pension proposes to leave Australia and notifies DSS of the proposed departure as required by a recipient notification notice, the Secretary to DSS, if he is satisfied that the person is in Australia and is qualified for the pension, must give the person a departure certificate. Recipient notification notice is defined in s.23(1) to include a notice given under s.68 which, in turn, sets out the requirements for the notice.

The case turned on 2 issues:

- whether s.1218(1) operated independently of s.1219; and
- whether the respondents were issued with valid recipient notification notices.

As to the first issue, the AAT found itself unable to agree with the interpretation of s.1218 in *Glover* (reported in this issue) and *Olgyay* (to be reported) which concluded that the sections operated independently (although it eventually came to the same decision). The AAT agreed with submissions for the respondents that the 2 sections must be read together because:

- s.43 and s.1213 each made reference to both s.1218 and s.1219 when referring to departure certificates, thus clearly indicating the intention of the legislature that reference be made to both sections; and
- s.1218 itself picks up s.1219 thus requiring it to be applied.

As to the second issue, the AAT found that the formalities specified in paragraphs (a)-(d) of s.68 had been complied with in the notices and agreed with the comments in *Gellin* 76 *SSR* 1101 (in which the notice had been issued on the same day as the Perettis' notices and was in similar terms). In following *Gellin*, the Tribunal distinguished the AAT decision in *Carruthers* 76 *SSR* 1100, presided over by the President of the AAT, Justice O'Connor, that the notice was invalid and therefore void in its effect, stating:

> 'Carruthers may be authority that strict compliance is required with the provisions of of s.163 of the 1947 Act (and by analogy with s.68(3)(e) of the 1991 Act). It is not however authority for the view that strict, literal word by word compliance is necessary. The non-compliance in Carruthers was on a matter of substance because the Notice did not inform the recipient about what manner of notifying the Department would be acceptable and this is vital to the recipient's ability to comply with the Notice. The non-compliance in the present case [with paragraph (e)] was merely the insertion of a sensible, more meaningful form of words on the Notice in substitution for the words "recipient notification notice". It was a failure to comply literally in a matter of mere formality and the result was to provide more meaningful explanation to the recipient.'

The AAT found that there had been strict compliance with the substantive matters in s.68(3).

Formal decision

The Tribunal set aside the decision under review and substituted the following:

- there was an overpayment of pharmaceutical allowance to each respondent of $33.80;
- there was an overpayment of age pension to each respondent for the period 3 November 1992 to 3 December 1992 of $807.50 each;
- the overpayments constituted debts to the Commonwealth under s.1223; and
- the respondents entitlements to age pension ceased on 3 November 1992.

[B.W.]

[Editor's comment: The *Social Security (Budget and other Measures) Legislation Amendment Act* 1993 retrospectively amended both s.163 of the *Social Security Act* 1947 and the notice provisions of the *Social Security Act* 1991 so that the failure of the DSS to comply with the notice requirements to specify how a person must give information to the DSS (the issue in *Carruthers*) and that the notice is a recipient notification notice given under the Act (an issue in this case and in *Gellin*), will not invalidate a notice.]

Overpayment: agreement with DPP; reviewable decision

ALVARO and SECRETARY TO DSS

(No. 8820)

Decided: 2 July 1993 by B.H. Burns, B. Lock and D.L. Davies.

The applicant sought review of a decision described as 'the decision of the SSAT [which decision] affirmed a decision of a Review Officer to recover the overpayment of $66,682'. It was common ground that the applicant had

from 1 July 1978 to 5 November 1981 received benefits totalling that amount, and that the applicant's income during the relevant period precluded all entitlement.

The AAT found that the decision that there was a recoverable debt could only have been made under s.1224(1) of the *Social Security Act* 1991. The overall scheme of the Act was to vest the administration of the Act in the Secretary unless delegated by written instrument. There was no evidence that the Secretary had delegated the power under s.1224(1). The AAT was not satisfied that the delegate was authorised to make a decision under s.1224, and it followed that there was no decision properly before the SSAT and therefore no decision reviewable by the AAT.

Although it lacked jurisdiction, the AAT expressed its views on the issues argued by the parties.

Whether the proceedings were contrary to an indemnity

On 27 September 1990 the applicant and the Director of Public Prosecutions (DPP) agreed in writing that the applicant would plead guilty to certain charges of conspiracy to defraud the Commonwealth. The DPP agreed that no additional federal charges would be laid against Alvaro in relation to the same matter, and that the DPP would not apply for confiscation of alleged profits under the *Proceeds of Crime Act* 1987.

It was argued for Alvaro that by reason of the agreement there was no debt due to the Commonwealth, the agreement constituting a 'compromise, accord and satisfaction'. It was argued that the indemnity against further 'charges' must be taken to include the action taken by the DSS to recover the overpayment.

The AAT preferred the submission of counsel for the DSS that the word 'charge or charges' in the agreement imported the conventional legal meaning, being a criminal accusation, and did not include the civil debt recovery proceedings brought by the DSS. The agreement therefore did not in any way preclude the DSS from taking proceedings for recovery of an overpayment debt under the social security legislation. The AAT added that there were no grounds for waiving any debt which may be recoverable.

Formal decision

The AAT dismissed the application.

[P.O'C.]

Finance direction: act of grace payment

HAMILTON and SECRETARY TO DSS

(No. 8835)

Decided: 13 July 1993 by M.T. Lewis.

Background

Hamilton had applied for special benefit and her claim had been rejected on the ground that she was not residentially qualified. This decision was affirmed by the SSAT on 23 April 1993. Hamilton had asked the SSAT to consider making a recommendation to the Minister for Finance that she receive an act of grace payment if she was found not eligible for special benefit, but the SSAT declined to do so.

When the matter came before the AAT, Hamilton conceded that as she was not an Australian resident she did not meet the requirements of s.729 and was, therefore, not eligible for payment of special benefit. On this basis, given her concession, the AAT affirmed the decision that Hamilton was not qualified to receive special benefit. However, 'the real purpose of the application for review was, having failed to receive support from the SSAT for a recommendation of an act of grace payment, to enlist assistance from [the AAT] to support such recommendation': Reasons, para. 7.

Hamilton had first lived in Australia in 1974 and she lived and worked here until 1983 when she received her return residence visa. In that year she went overseas again, but prior to her anticipated return in 1986, she was prevented from returning and applied for an extension of her return residence visa. She told the AAT that her application was lost, and since 1986 she has been trying to regain entry to Australia.

The AAT documented much of the history of her attempts to re-establish permanent residence status, during which she entered Australia on a one-month temporary entry permit. In February 1992 she was detained as an illegal entrant at the Detention Centre at Villawood.

Hamilton had proceedings pending before the Federal Court concerning her application for permanent residence. She was living in considerable hardship with her mother and her son in her mother's Housing Commission premises and was supported by them, with some help from charities. She told the AAT that employment was available to her if she were permitted to work by DILGEA but she was not, and she submitted that her lack of income or financial resources was causing tension within her family and was affecting her ability to conduct her Federal Court litigation.

After reviewing the evidence concerning her legal claims before the Federal Court, the AAT turned to consider the circumstances under which it might be appropriate to consider an act of grace payment. Of those, the only one considered relevant was 'where in a particular case there are special circumstances which lead to the conclusion that there is a moral obligation on the Commonwealth to make payment'. The Department submitted that because the matters in issue here were not the fault of the Department of Social Security, the best solution would be for the applicant to be granted permission to undertake paid work.

The AAT noted that act of grace payments are made by the Minister for Finance, and are non-departmental in that sense. However, the only route through which recommendations can be made to the Minister for Finance is through Departmental channels. As the issues raised in the AAT related to the applicant's need for income support until her litigation with DILGEA had been completed, or until she was permitted to undertake paid employment, the AAT considered it appropriate for a submission to the Minister for Finance to be made via the Department of Social Security as income support is the responsibility of the Department of Social Security.

At the hearing the Department agreed that it was open to the AAT to consider making a recommendation for an act of grace payment, despite the fact that the SSAT and the Department did not support such a recommendation.

Formal decision

The AAT affirmed the decision that Hamilton did not qualify for special benefit, and recommended through the Secretary to DSS to the Minister for Finance that because of the very unique circumstances of this case, which could be construed as 'a moral obligation on the Commonwealth to make payment', an act of grace payment equivalent to what she would receive in special benefit should be paid to Hamilton until such time as restrictions on her undertaking paid employment are waived, or until she is granted permanent residence status, or alternatively until she is deported.

[R.G.]