

Abdelahad submitted that his case could be distinguished from the AAT decision of *Secretary to DSS and Booker* (1993) 77 SSR 1126. 'The two claims were negotiated and settled separately and it was a "matter of chance" that the two releases were signed on the same day': Reasons, para.17. In *Booker* the payment was made in one cheque and only one release was signed.

After referring to the Federal Court authorities of *Secretary to DSS v Banks* 20 ALD 19 and *Secretary to DSS v Hulls* 22 ALD 570, the AAT concluded there is:

'No provision in the Act requiring that two separate payments made in respect of separate proceedings arising out of the same incident be treated as one lump sum compensation payment'.

(Reasons, para.28).

In *Banks* and *Hulls* the Court was dealing with one lump sum only. The lump sum in *Banks* included a number of heads of damages not all of which related to loss of earnings or loss of capacity to earn. *Hulls* referred to the situation where a number of lump sums are made each of which relates to incapacity for work. Neither of these situations applied here.

The AAT was concerned that its interpretation frustrated the object of the relevant legislative provisions, which was to eliminate 'double dipping' in a practical straightforward manner. In the AAT's opinion there was a loophole in the provisions which the Government might consider amending along the lines mentioned by the AAT in *Secretary to DSS and Kilinc* (1993) 77 SSR 1125.

**Formal decision**

The AAT affirmed the SSAT decision.

[C.H.]

[Note: This decision has been followed in a recent decision of the former President of the AAT, Justice O'Connor in *Secretary, Department of Social Security and Ward* decided on 4 March 1994. A full note of this decision will be included in the June edition.]

**Overpayment – validity of recipient notification notice**

SMYTH and SECRETARY TO DSS (No. 9267)

Decided: 21 January 1994 by D.P. Breen.

Smyth requested review of an SSAT decision which affirmed a DSS decision

to raise and recover an overpayment of sickness allowance (SA) and job search allowance (JSA) paid from 30 October 1991 to 10 March 1992. It was considered that Smyth's assets exceeded the asset test limit initially, and then his combined income exceeded the income test limit.

**The facts**

Smyth was entitled to \$120,000 in superannuation after he resigned from the police force on 23 September 1991. Smyth advised the DSS that he was owed this money when he applied for SA. The DSS recorded that the money would be paid in 2 months. The DSS was advised by Smyth on 9 January 1992 in a SA review form that he had received the money. Smyth had actually received \$106,153 on 30 October 1991.

On 6 January 1992 Smyth's wife commenced work part time, and on 15 January Smyth sold the family home and bought another one. Smyth transferred to JSA on 20 February 1992 and advised the DSS of his wife's employment and his change of address at the same time. He also recorded that he had \$75,000 invested. In answer to a request for further information from the DSS, Smyth advised that he had purchased real estate (a block of land) with the rest of the money.

After a number of contacts with the DSS an officer came to Smyth's home to interview him. On 7 July 1992 the DSS raised an overpayment of \$3,469.83.

**The law**

Section 1224 of the *Social Security Act 1991* provides that a debt due to the Commonwealth has been incurred where an amount has been paid by way of an allowance which was paid as a result of a failure to comply with a provision of the SSA. The DSS argued that Smyth had failed to comply with a recipient notification notice.

Pursuant to s.727(1) of the *Social Security Act*, the DSS may give a person who is receiving SA a notice requiring that person to inform the DSS if an event or change of circumstances occurred. Section 727(3) provides:

- '(3) A notice under subsection (1):
- (a) must be in writing; and
- (b) may be given personally or by post; and
- (c) must specify how the person is to give the information to the Department; and
- (d) must specify the period within which the person is to give the information to the Department; and

(e) must specify that the notice is a recipient notification notice given under this Act.'

Section 727(5) provides for imprisonment if a person unreasonably refuses to comply with a notice. Similar provisions apply for a person receiving JSA.

**Validity of the notice**

The AAT stated that if the notice issued to Smyth was invalid then no debt could be raised as he could not fail to comply with an invalid notice. The validity of notices had been referred to in the AAT decision of *Gellin and Secretary to DSS* (1993) 76 SSR 1101. It was decided that the intention of the legislature was that the requirements set out above were mandatory, but that a notice did not have to strictly comply with the requirements. A recent AAT decision of *Secretary to DSS and Carruthers* (1993) 76 SSR 1100 also considered this issue. The President of the AAT decided that statutes are to be construed strictly where penalties apply. A penalty applies if a person does not comply with a notice, and therefore the requirements for issuing a notice set out in the SSA must be strictly complied with.

The AAT followed the decision in *Carruthers* and concluded that this notice was invalid because it did not strictly comply with the requirements of s.727(3). Simply stating that the notice had been issued under a certain section of the SSA was not enough. It must also state that it is a recipient notification notice.

**Formal decision**

The AAT set aside the decision under review and substituted a decision that there was no overpayment.

[C.H.]

[Note: The AAT did not refer to a specific notice sent to Smyth, and did not specifically state what the defect in the notice was.

The *Social Security Act 1991* and the *Social Security Act 1947* were amended by ss.90-93 (and Schedule 8) of the *Social Security (Budget and Other Measures) Legislation Amendment Act 1993* (No. 121). Sections 90, 91 and Schedule 8 amend the notice sections of the *Social Security Act 1991* so that a notice which does not specify how a person is to give information to the DSS or that it is a recipient notification notice, is not invalid. These amendments were made retrospective to 1 July 1991. Section 92 amended the notice provisions of the SSA 1947, so that a notice is not invalid if it does not specify how a person is to notify the DSS. This amendment was made retrospective to 1 January 1988.]