

# Administrative Appeals Tribunal decisions

## Waiver: overpayment job search allowance

ALLINSON and SECRETARY TO  
DSS

(No. 9431)

**Decided:** 15 April 1994 by Bulley J,  
J.D. Horrihan and A.M. Brennan.

Allinson was advised by letter dated 25 June 1992 that he had been overpaid job search allowance (JSA) because he had failed to advise the DSS that he was receiving a pension from the Royal Air Force (RAF). The SSAT affirmed the DSS decision that Allinson owed a debt of \$4233.45 and that the debt should not be waived. Allinson requested review of these decisions by the AAT on 28 October 1992.

### The overpayment

Allinson and his family immigrated to Australia in August 1991. Allinson had retired from the RAF after 23 years service and was paid a service pension from 15 August 1991. He lodged a claim for JSA on 9 September 1991 in which he stated that he was receiving retirement payments from overseas. Allinson told the AAT that an officer from the DSS has recorded that he was receiving the RAF pension. The AAT noted that there was no note of this on the DSS file. Allinson advised the DSS that he had \$31,000 invested which he intended to use to buy furniture etc. The DSS decided to pay Allinson JSA at a reduced rate taking into account the income earned on the investment only.

Continuation forms were lodged by Allinson with the DSS every fortnight. In these forms Allinson was required to advise the DSS if he 'got any money from investments' or 'got any other Government payment'. He did not tell the DSS in these forms that he was receiving the RAF pension, although he did contact the DSS when he was underpaid.

On 22 November 1991 Allinson was advised by letter the amount of income being taken into account by the DSS. Allinson explained that he did not understand the social security system in Australia. After speaking to another recipient of JSA, Allinson approached the DSS in May 1992 about his rate of

payment. The DSS then realised that Allinson was being overpaid JSA.

### What law applies?

The AAT noted that the *Social Security Act 1991* had been amended a number of times between the date of decision, the date Allinson lodged his request for review with the AAT and the decision of the AAT. The AAT decided that the applicable law was that in force at the date Allinson lodged his request for review by the AAT. The AAT quoted extensively from a case decided by Bulley J in another jurisdiction. The general rule, it was noted, was that the AAT would have regard to the law as enacted at the time of the original decision. However where accrued rights or liabilities were not involved, then the law at the date of the AAT decision should be applied. Where an accrued right or liability is involved, then unless the contrary intention appears in the amending provision, according to s.8 of the *Acts Interpretation Act 1901*, the right or liability is preserved. Once an applicant lodges an application with the AAT, the applicant has the right to have the decision reconsidered and determined by the AAT. This is a right and therefore the applicable law was that in force at the date the applicant lodged the request for review with the AAT. In this case the applicable law was that in force at 28 October 1992.

### The debt

Section 575 of *Social Security Act 1991* allows the DSS to give a recipient of JSA a notice requiring the person to give a statement to the DSS. The continuation forms were such notices. According to s.1224 of the *Social Security Act* a debt is owed to the Commonwealth if a person failed or omitted to comply with a provision of the Act. The AAT found that Allinson failed or omitted to comply with s.575 when he did not set out the information about his RAF pension in the continuation forms, and therefore Allinson owed a debt to the Commonwealth.

### Waiver

According to s.1237 of the *Social Security Act* the DSS may waive recovery of a debt. The ministerial directions made pursuant to s.1237(3) purporting to restrict the exercise of this discretion were not valid according to the Federal Court case of *Riddell v Secretary, DSS* (1993) 73 SSR 1065. Section 1237 was

repealed and replaced by ss.1236A, 1237 and 1237A with effect from 24 December 1993. Pursuant to s.1236A, ss.1237 and 1237A apply to all debts whenever incurred arising under either the *Social Security Act 1991* or the *Social Security Act 1947*. These sections allow the DSS to waive a debt, but only when certain requirements set out in the sections are met. The AAT stated:

'If these sections as so amended applied to Mr Allinson's circumstances we feel [they] might not permit of a waiver, either wholly or in part'.

(Reasons para.46)

As noted above the AAT found that the relevant law was that in effect at 28 October 1992. At that date there was a general discretion to waive a debt to the Commonwealth. The AAT found that the DSS had made an administrative error in not taking into account the RAF pension when calculating the rate of JSA payable. However, by 22 November 1991, Allinson should have become aware of this error and advised the DSS. The letter of that date had set out Allinson's income and advised him of his responsibilities under the *SS Act*. Therefore the extra JSA paid after that day was a debt due to the Commonwealth.

### Formal decision

The decision of the SSAT was set aside and the debt up to and including 22 November 1991 was waived.

[C.H.]

## Waiver: assurance of support debt

SECRETARY TO DSS and  
KRATOCHVIL

(No. 9326)

**Decided:** 25 February 1994 by K.L.  
Beddoe, T.R. Gibson, and J.D.  
Horrihan.

On 9 December 1992 the SSAT affirmed the decision of the DSS to raise a debt of \$10,725.72. Kratochvil's mother was paid special benefit from 7 September 1988 to 20 February 1991 when an assurance of support signed by Kratochvil was in force. The SSAT set aside the DSS decision to recover the