

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

debt and substituted a decision that the debt should be waived.

The facts

The assurance of support was signed on 16 October 1986. Kratochvil's mother lived in Australia for a year before the document was signed. She returned to Australia in June 1988 and left again in March 1990, returning in June 1990. She was granted Australian citizenship on 3 April 1991. In June 1988 Kratochvil's mother applied for special benefits even though she was living with Kratochvil and her family. In a statement to the DSS it was recorded that Kratochvil supported her mother but could not pay her an allowance for her personal needs. Special benefit was paid at one-third of the single rate.

In September 1989 Kratochvil's mother went to live with her son. She was paid the full rate of special benefit because she had to pay board and lodging. At the AAT the DSS was unable to state with certainty that Kratochvil was aware that her mother was being paid a benefit. The DSS's instructions required the assessor of support to be notified. Kratochvil's daughter gave evidence that she and her mother had been present when the DSS initially interviewed Kratochvil's mother concerning the special benefit. The AAT found that Kratochvil knew that her mother had been granted special benefit but not that the benefit had been increased in September 1989. Even though Kratochvil had submitted that her brother should be responsible for her mother's support because he had invited her to Australia, the AAT found that Kratochvil understood that she had accepted responsibility for her mother's support.

Kratochvil is employed as a cleaner with a weekly income after tax of less than \$300 per week. Her husband suffers from a terminal illness but refuses to apply for a social security benefit. Kratochvil bought a new (small) car in 1993 which she is paying off.

The assurance of support

Pursuant to s.1227(1) of the *Social Security Act* if a person is liable to pay an assurance of support debt, then that debt is recoverable by the Commonwealth. An 'assurance of support debt' is defined in s.23 as a debt due and payable because of the operation of certain regulations of the *Migration Regulations* and in respect of certain social security payments paid under the *Social Security Act 1991* and the *Social Security Act 1947*. The special benefit paid to Kratochvil's mother

was such a payment.

In October 1986 Kratochvil signed an assurance of support although reg. 22(1) of the *Migration Regulations* in force at that time referred to a maintenance guarantee. Regulation 22(1) states that if a person who is the subject of a maintenance guarantee, is paid an amount of maintenance by the Commonwealth, then that amount is recoverable from the person who gave the guarantee. The AAT concluded that the debt did not arise under s.1227 of the *Social Security Act 1991*, but under reg. 22(1). The only issue for the AAT was whether recovery of the debt should be waived.

Waiver

Because the recovery of debt provisions of the *SS Act 1991* includes debts incurred under the *Social Security Act 1947*, it was appropriate to consider the waiver provisions of the *Social Security Act 1991*. At the date of hearing s.1237 provided that the Commonwealth's right to recover a debt could be waived. Subsequent to the hearing, and before the AAT made its decision, s.1237 was repealed and replaced with ss.1236A, 1237 and 1237A with effect from 24 December 1993. Section 1236A provides that the new provisions apply to all debts whenever incurred arising under the *Social Security Act 1991* and the *Social Security Act 1947*. The AAT referred to s.8 of the *Act Interpretation Act 1901* and noted that this section:

'preserves the applicant's [DSS] right to have the decision of the SSAT reviewed under the legislation applicable at the time it applied for review in this Tribunal. There is nothing in Act 121 of 1993 [the amending Act] which suggests that section 8 does not apply on the facts in this case.'

(Reasons, para.37)

The AAT considered the following circumstances when considering whether recovery of the debt should be waived. Kratochvil knew she had signed an assurance of support on behalf of her mother and she agreed with the payment of special benefit to her mother. However Kratochvil was not advised of the increased benefit paid to her mother. The AAT concluded that it was not appropriate to waive that part of the debt which represented the amount of special benefit paid to Kratochvil's mother at one-third of the single rate. The debt representing the increased payment of special benefit paid after 3 September 1989 should be waived because Kratochvil had not been advised of the increased payment to her mother. The AAT stated:

'There is an essential issue of fairness in a situation where a person has given an Assurance of Support but is not consulted in any way by the Department when it proceeds to pay out special benefits to the person who is the beneficiary of the Assurance of Support.'

(Reasons, para.35)

Formal decision

The AAT set aside the SSAT decision and substituted a decision that recovery of so much of the debt exceeding \$74.74 per fortnight paid as special benefit to Kratochvil's mother be waived.

[C.H.]

[Editor's note: The DSS has appealed to the Federal Court.]

Waiver: longer custodial sentence

DENNIS and SECRETARY TO DSS,

SECRETARY TO DSS and DENNIS (No. 9306)

Decided: 15 February 1994 by D.W. Muller.

Both Dennis and the DSS sought review of an SSAT decision to waive half the debt owed by Dennis to the Commonwealth. The debt is \$28,876.71 and Dennis maintained that the whole of the debt should be waived, while the DSS maintained that none of the debt should be waived.

The debt

The facts were not in dispute. Dennis perpetrated a large number of fraudulent acts on the DSS between 1981 and 1986. He pleaded guilty to 6 offences on 26 August 1988 and a further 32 matters were taken into account when Dennis was sentenced. The total debt was alleged to be \$48,498.20. Dennis advised the court that he had no assets and could not offer restitution. In sentencing Dennis, the judge took into account that Dennis was not in a position to make any restitution. Dennis was sentenced to 2 years imprisonment on each charge, concurrent. He was released on parole after 12 months and was granted sickness benefits.

The DSS deducted 14% from Dennis' sickness benefit payment to repay his debt. Dennis considered declaring himself bankrupt to force the DSS to cease withholding part of his