

Age pension: validity of recipient notification notice and issue of departure certificate

MOE and SECRETARY TO DSS
(No. 9486)

Decided: 19 May 1994 by B.J. McMahon.

Mrs Moe lodged a claim for an age pension in June 1992. She then left Australia, at short notice, on 7 July 1992. On 10 July 1992, the DSS sent her a letter informing her of the grant of her pension from 2 July 1992. The letter purported to contain a recipient notification notice advising her of her obligations to inform the DSS of certain matters listed under the heading 'What you must tell us'. Under the heading 'Going Overseas' it stated: 'If you intend to travel overseas, you should tell the Department of Social Security at least 6 weeks before you leave'. Moe did not receive the letter which remained unopened.

On 20 November 1992 a cross-match of data with DILGEA brought her departure to the attention of the DSS. The DSS sent a letter to Moe at her Australian address on 14 January 1993. This was also unopened. On 25 January 1993 the DSS decided to cancel Moe's pension pursuant to s.1218 of the *Social Security Act 1991* as she had not received a departure certificate under s.1219 and had remained absent from Australia for more than 6 months. The decision came to the attention of her son and, after internal reviews, the cancellation finally occurred on 25 March 1993.

Although the DSS had sought recovery of an overpayment made between 14 January 1993 and 25 March 1993, that matter was not before the AAT: the AAT was only asked to review the decision to cancel Moe's age pension. As Moe had returned to Australia on 26 June 1993 and had her pension restored, the application dealt with the closed period from 14 January 1993 to the date of resumption of her payments.

Was the letter a valid recipient notification notice?

As a pre-requisite to the grant of a

departure certificate, s.1219(1)(c) required the person to notify the DSS of the proposed departure 'as required by a recipient notification notice'. The Tribunal found 3 reasons why the DSS's letter of 10 July 1992 did not contain a valid recipient notification notice under s.68 of the *Social Security Act 1991*:

- as pointed out in *Glover* (1993) 77 SSR 1122, there is a clear distinction in the terms of the notice between the nature of those matters under the heading of 'Must tell us' and those in the 'Going Overseas' paragraph... the notice does not require the recipient to do anything... there is a difference between the meanings of 'must' and 'should';
- the time prescribed by any notice must be reasonable to ensure its validity: *O'Brien v Dawson* (1941) 41 SR (NSW) 295 at 304. If a recipient forms an intention to leave the country within 14 days, it is not possible to give 6 weeks prior notice of departure, and consequently the time prescribed by the notice was unreasonable;
- there are serious consequences for a recipient failing to comply with a valid recipient notification notice and the failure to make these consequences clear to the recipient vitiates the notice: *Balog v Crestani* (1975) 132 CLR 289 at 296 and ff.

Cancellation could not be avoided

Although finding that there was no valid recipient notification notice requiring Moe to notify the DSS of her proposed departure, the AAT concluded that this did not assist Moe. It followed a consistent line of AAT decisions that s.1218 is absolute in its terms and operates 'mechanically' so that if a person does not obtain a departure certificate, for whatever reason, and remains outside Australia for more than 6 months then that person ceases at the end of 6 months to be qualified for an age pension.

Formal decision

The AAT affirmed the decision to cancel Moe's age pension.

[B.W.]

[Note: See the article by S. Koller on p. 1174]

Overpayment: discretion to waive?

NASSIF and SECRETARY TO DSS
(No. 9532)

Decided: 7 June 1994 by D. J. Grimes, M.E.C. Thorpe and D.D. Coffey.

The DSS raised and sought recovery of a debt to the Commonwealth of \$27,605.46 paid as unemployment benefits and job search allowance between 6 July 1986 and 9 September 1992. Nassif sought review of that decision by the SSAT which affirmed the decision on 29 March 1993. He then sought review by the AAT on 4 May 1993.

The debt

Nassif claimed unemployment benefits in December 1985. He advised the DSS that his wife was working part-time and declared his wife's net earnings rather than her gross earnings. As a result Nassif was paid a benefit at the incorrect rate. At the hearing it was conceded that Nassif owed a debt of \$27,605.46 to the Commonwealth pursuant to s.1224 of the *Social Security Act 1991*.

Waiver

On behalf of Nassif it was submitted that the debt should be either waived pursuant to s.1237 or written off pursuant to s.1236 of the *Social Security Act*.

The AAT referred to the general discretion to waive a debt in s.1237 which had been repealed from 24 December 1993, and replaced by a s.1236A and a new s.1237 which restricted the exercise of the discretion to waive the whole of the debt. Section 1236A provided that s.1237 applied to all debts incurred whether arising under the *Social Security Act 1991* or the *Social Security Act 1947*.

The AAT stated that generally it applies the law at the time of the decision. However, where there is an accrued right or liability, the AAT may apply the law as at an earlier date. Section 8 of the *Acts Interpretation Act 1901* preserves a right where an Act repeals that right, provided the repealing Act does not express a contrary intention. The AAT found that Nassif acquired a right to have the decision under review reconsidered when he lodged an application for review with the AAT. This is an accrued right pursuant to s.8 of the *Acts*