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*

Interpretation Act. The AAT then considered whether s.1236A expressed a contrary intention. The AAT adopted the reasoning in *Allinson* (1994) 79 *SSR* 1145 and found that the wording was not sufficiently clear to express a contrary intention. The AAT also referred to the Second Reading Speech and the Explanatory Memorandum introducing the amending Act, and found that there was no intention that the s.1236A was meant to operate retrospectively.

The AAT referred to the principles set out in *Director-General of Social Services* v *Hales* (1983) 13 *SSR* 136, and *Ward and Secretary, DSS* (1985) 24 *SSR* 289 as applicable when applying the general discretion to waive a debt. These are:

(a) whether the applicant has received public moneys to which he was not entitled;
(b) the way in which the overpayment arose;
(c) the financial circumstances of the applicant;
(d) the prospect of recovery of the debt;
(e) whether a compromise is offered;
(f) whether recovery should be delayed because there is a prospect of the applicant's financial circumstances improving; and
(g) compassionate considerations given that this is social welfare legislation.

Circumstances of the overpayment
Nassif and his wife gave evidence that they had not known that they were completing the claim forms incorrectly. These forms were quite often completed by Mrs Nassif or friends. Nassif did not understand the difference between gross and net income. The first claim form was completed by a friend and Nassif used this as a guide to complete the later forms. On a number of occasions Nassif had provided the DSS with pay-slips which resulted in the DSS officer amending the form, but the reason for the change was not explained to Nassif. Nassif's command of English was limited, although his wife's English was adequate.

Financial circumstances
Nassif received part payments of job search allowance plus additional family payments. His wife earned $319.13 per week. The DSS was withholding $20 a week to repay the debt. None of the 5 children was paying board although 2 were working and 2 were receiving job search allowance. The children contributed towards expenses on an irregular basis. One child was still at school and received Austudy. Nassif owned the family home valued at approximately $270,000 (mortgage of $63,000), and an old car.

Administrative practices of the DSS
Nassif had provided the DSS with copies of his wife's pay-slips and bank statements, and the DSS had not acted on this information. The DSS had failed to provide Nassif with an interpreter when he was interviewed. These poor administrative practices of the DSS might have contributed to the overpayment.

Health
Nassif had suffered from a back condition for 10 years. He also had diabetes which required medication, and depression. Nassif believed that he was able to work but on light duties only.

Write off
The AAT stated that the same principles that apply to the exercise of the discretion to waive the debt, apply to the discretion to write off the debt.

Conclusion
The AAT was satisfied that the overpayment occurred because of an innocent mistake made by Nassif. Because of his limited command of English he did not understand the necessity of distinguishing between net and gross income. Nonetheless, Nassif had received a large amount of public moneys which he was not entitled to receive. Although the family were having financial problems, the rate at which the DSS was recovering this large debt was not onerous. Nassif's prospects of gaining employment were limited, and in spite of this, he had chosen to support his adult children financially. In all these circumstances the AAT decided that the debt should not be waived or written off because recovery of the debt would not cause financial hardship.

Formal decision
The AAT affirmed the decision under review.

C.H.]

Waiver of debt: which law applies?

JIN and SECRETARY TO DSS (No. 9463)
Decided: 11 May 1994 by S.A. Forgie, K.L. Beddoe and A.M. Brennan.

The SSAT affirmed a decision of the DSS on 19 January 1993, that Jin had been overpaid sole parent pension (SPP), because she did not meet the residency requirements of the *Social Security Act 1991*.

Jin claimed SSP on 10 April 1989, and advised the DSS in her claim form that she had permission to remain permanently in Australia. She had first arrived in Australia on 15 March 1987 on a student visa (temporary entry permit). This visa was extended several times to 15 March 1989. Jin applied for permanent residence 27 May 1988, and this was granted on 11 February 1991. This meant that between 16 March 1989 and 26 November 1990 Jin was an illegal entrant to Australia.

Residence requirements for SPP
According to s.249(1)(c) of the *Social Security Act* there are various ways by which a person can qualify residentially for the SPP. Common to all requirements is that the person be an Australian resident, a term which is defined in s.7(2). To be an 'Australian resident' a person must either be an Australian citizen or hold one of the permanent residency permits. As Jin was not an Australian citizen and did not hold a permanent residence permit, she was not qualified for SPP and owed a debt to the Commonwealth in respect of the SPP paid to her until she was granted permanent residence on 11 March 1989.

Waiver – which law applies?
The AAT considered whether the debt owed by Jin should be waived. The issue for the AAT was which waiver provisions applied – the general discretion in force before 24 December 1993, or the more restricted discretion in force after that date. The general principles determining the law to be applied at a particular time are set out in *Costello and Secretary, Department of Transport* (1979) 2 *ALD* 934. The AAT would normally apply the law to the facts at the date of its decision. Where the law has been changed, the law to be applied will depend on the nature of the decision under review and