

## **Overpayment: failure to notify of departure from Australia, NESB**

**SOMSAK and SECRETARY TO  
DSS**  
(No. 10480)

**Decided:** 10 October 1995 by G.L.  
McDonald.

The DSS sought to recover an overpayment of JSA totalling \$4356. This decision was affirmed by the SSAT and Somsak sought review by the AAT.

### **The facts**

Somsak and his wife migrated to Australia from Slovakia on 17 December 1991. Somsak told the AAT through an interpreter that he neither spoke nor understood English on arrival in Australia. He completed a claim form for JSA with assistance and subsequently received benefits. This claim form was misplaced by the DSS. A second claim form, completed by Somsak after returning from overseas in August 1993, requested a Czechoslovakian interpreter. The AAT thought it reasonable to conclude that he would have had as great or greater need for an interpreter in 1991. A letter dated 23 January 1992 advised that Somsak would receive JSA from 18 December 1991 and enclosed a notice pursuant to s.574 of the *Social Security Act*. The notice advised that he was required to notify the DSS should he or his partner leave or decide to leave Australia. Both the letter and the notice were in English. Somsak did not recall receiving this letter.

An officer from the DSS interviewed Somsak in March 1992 with an interpreter present. Somsak told the AAT that the discussion concerned his attempts to find work. This discussion did not cover the notification requirements under the *Social Security Act*.

Somsak's wife and son returned to Bratislava in May 1992 to obtain medical treatment for their son who suffered from a blood disease. Somsak did not notify the DSS of his wife's departure as required by question 10 of the JSA application form. He continued to receive JSA at the married rate. On 6 November 1992, Somsak left Australia to join his wife and son in Bratislava. He did not notify the DSS of his departure. Somsak told the AAT that he left suddenly because all

flights were fully booked and he had to wait for a cancellation.

Somsak denied lodging the JSA application form for the fortnight ending 17 November 1992 and the three subsequent fortnights. He claimed that his signature had been forged and that he had not authorised anyone to lodge the forms with the DSS. He also said that he had not received any of the money paid subsequent to 6 November 1992. There is a suggestion in the facts that the forms may have been completed and the money retained by the people Somsak was living with prior to returning to Bratislava. Somsak told the AAT that he had not known that JSA had been paid after 6 November 1992 until February 1994, when he was interviewed by a DSS officer. Somsak said that he had reported the matter to the State and Federal police who had both since closed their investigations.

### **The issues**

It was not in dispute that Somsak had been paid the married rate when he was not entitled to receive it. It was also clear that the DSS had continued to make payments into Somsak's former bank account after 6 November 1992, and that he had failed to notify the DSS of his wife's or his departure from Australia.

It was submitted for Somsak that the notice of 23 January 1992 (requiring notification of any changes in circumstances) was of no effect. It was argued that the notice was not in a form that Somsak could understand and that it should have been translated into Slovakian. Somsak's representative referred to the DSS guidelines about providing the services of an interpreter for non-English speaking clients. It was submitted that there was a failure to abide by the guidelines which amounted to an administrative error under s.1237(2) (the waiver provisions). This administrative error should result in the debt being waived by the DSS. Because the notice was not in a language Somsak could understand, he had a reasonable excuse for not complying with the requirements of the notice and the provisions of s.574(5) of the *Act*.

The DSS argued that there was no binding requirement that a notice under s.574 be translated, and that a failure to comply with the guidelines did not amount to an administrative error. There was a debt due to the Commonwealth which the Secretary was entitled to recover.

### **Findings**

The AAT was satisfied that the notice was posted to Somsak and must be deemed to have been received by him.

The DSS guidelines did not have the force of delegated legislation. There was no requirement that every letter or notice be translated into the recipient's preferred language. The AAT said:

'Not every letter or notice sent by the Department can be translated into the recipient's preferred language. That such a course is desirable is undeniable. However, it is equally understandable that, given the constraints of funding, such a course is currently unrealistic and indeed the guide does not provide for its occurrence.'

(Reasons, para. 16)

The AAT indicated that some responsibility must lie with social security recipients to make their own inquiries about notices they receive and do not understand. The guidelines contemplate that the assistance of an interpreter will be available on request. The AAT noted that Somsak could have asked about the notice at the interview in March 1992, where an interpreter was present. It found no administrative error and that Somsak had not complied with the notification requirements.

### **Formal decision**

The AAT affirmed the decision that Somsak owed a debt to the Commonwealth.

[H.B.]

## **Compensation: preclusion period; lost earnings or lost earning capacity**

**CUNNEEN and SECRETARY TO  
DSS**  
(No. 10533)

**Decided:** 16 November 1995 by K.L.  
Beddoe.

The DSS decided to apply a lump sum preclusion period because Cunneen had received a payment of compensation. Payment of a pension or benefit was to be precluded from 25 March 1994 to 15 June 1995. An authorised review officer (ARO) reduced the preclusion period to 52 weeks. The decision of the ARO was affirmed by the SSAT and Cunneen appealed to the AAT.