

Administrative Appeals Tribunal decisions

Age pension: notification of change in circumstances

MR AND MRS VITALONE and SECRETARY TO DSS (No. 10284)

Decided: 11 July 1995 by J. Mathews.

The Vitalones requested review by the AAT of 2 decisions of the SSAT that they each owed debts of invalid pension and wife pension. The SSAT waived both debts.

The facts

On 12 July 1989 the Vitalones lodged claims for invalid pension and wife pension. In her claim form Mrs Vitalone advised that she was working as a casual packer and that her wages varied. The DSS had advised her to complete the form this way. The Vitalones were paid pension from 20 July 1989, and the rate took into account Mr Vitalone's superannuation payments but not Mrs Vitalone's income. The Vitalones each received notification of the DSS decisions in letters. They were advised to notify the DSS within 14 days if their combined income exceeded a certain amount. Mrs Vitalone's income alone exceeded this amount.

After receiving the letter Mr Vitalone went to an office of the DSS to explain about his wife's job. He was told that the DSS does not worry about casual work. He rang the DSS a few days later but was told that he should contact an Italian association because the officer could not understand him.

A data matching program with the Taxation Department identified Mrs Vitalone's income in early 1993. Mrs Vitalone told the DSS that she had stopped work on 13 September 1991. The DSS calculated that Mr Vitalone owed a debt of \$3124 and Mrs Vitalone owed \$8775.

The debt

To establish a recoverable debt, the DSS must show that the Vitalones failed to comply with relevant notices. The relevant legislation was that set out in s.163 of the *Social Security Act 1947*, and s.1224 of the *Social Security Act 1991*. Section 163 provided that a person must advise the DSS of any change in circumstances specified in a notice. Section

1224 provides that if a person fails or omits to comply with a provision of either the 1947 Act or the 1991 Act, then any amount paid as a result is a debt due to the Commonwealth.

The initial letters to the Vitalones were such notices, as were computer generated letters which were sent to them over the subsequent years. There was a dispute between the parties about exactly which letters were sent. Following the first letters which set out the income being taken into account by the DSS, Mr Vitalone went to the DSS with details of his wife's wages. Therefore, neither of the Vitalones failed to comply with the first notices, because they advised the DSS within 14 days that the income amount being taken into account was incorrect.

The DSS argued that the Vitalones had failed to comply with later notices. The relevant part of these notices would have stated:

'You only have to contact us if your details have changed.'

Please remember we do not need to know changes in your income together with your (SPOUSE'S) income unless it becomes more than (INCOME NOTIFICATION AMOUNT) a week.'

In the Vitalones' situation the income notification amount would have been \$3380. On behalf of the Vitalones, it was submitted that they had complied with these notices because their income had always exceeded this amount, and they believed that the DSS knew this.

The AAT found the Vitalones to be witnesses of truth who gave an honest and truthful account of their dealings with the DSS. Both are of Italian origin and have had little contact with the social security system in Australia. Mr Vitalone's English is limited. The present situation was due to lack of communication, and the DSS should bear responsibility for the Vitalones being unable to communicate with the DSS. The Vitalones had attempted to comply with the provisions of the Act set out in the notices.

'Section 163 is a penal provision. Non compliance with it is potentially punishable by imprisonment. Accordingly, it needs to be interpreted in a manner which is favourable to the individual concerned. It should certainly not be construed so as to impose strict liability. An element of fault on the part of the individual concerned is thus inherent in the concept of "refusing or failing" to comply with the section.'

(Reasons, para. 31)

The AAT accepted that subsequent notices had been sent to the Vitalones, based on the evidence presented by the DSS that notices were sent to pensioners following a CPI increase twice a year. The notices required the person to notify the DSS if their details had changed, and if the change had led to an increase in income above a certain level. There was no change to the Vitalone's circumstances leading to an increase in income above the specified level. The Vitalone's income already exceeded that level. Therefore there was no failure to comply with these notices.

Formal decision

The AAT set aside the decision and substituted its decision that there was no debt.

[C.H.]

Debt: waiver and write off

BRUCE AND SECRETARY TO DSS (No. 10547)

Decided: 22 November 1995 by S.D. Hotop.

Background

The DSS had raised an overpayment of \$97,270 on the basis that Bruce had received widows pension and sole parent pension from 9 April 1974 until 17 December 1989 while she was living with a man, Maurice Kennett, as his wife.

In April 1993 Bruce had been convicted of the offence of defrauding the Commonwealth, and had been sentenced to 3 years imprisonment. The Court also ordered reparation of \$41,933. The conviction related to receipt of pension from October 1984 till December 1989.

Both the authorised review officer and the SSAT had affirmed the decision to raise and recover the overpayment. Bruce then appealed to the AAT.

The issues

The AAT considered the following issues:

- was Bruce eligible for either widows pension or sole parent pension?
- was there a debt owing to the Commonwealth?

- should the debt be either waived or written off?

The facts

Bruce claimed widows pension in February 1972. In 1974 she began living with Maurice Kennett, who soon proved to be physically violent and abusive towards her and her children. Two more children were born in June 1978 and April 1981. On occasion Bruce had to seek assistance from the police as Kennett's behaviour was endangering her life. Bruce lived with Kennett at various addresses until 1989 when they separated after Kennett breached a domestic violence intervention order and was imprisoned.

Shortly after the separation Bruce discovered that Kennett had sexually abused one of her children.

Qualification for widows pension and sole parent pension

The AAT considered the eligibility criteria under the *Social Security Act 1947* to determine if Bruce was entitled to receive either widows pension or sole parent pension.

The AAT held that under the 1947 Act, to be qualified to receive widows pension, a person could not be living with a man as his wife on a bona fide domestic basis although not legally married to him.

In relation to qualification for sole parent pension, the AAT found that a claimant needed to come within the definition of a 'single person' and not a 'married person' which included a 'de facto spouse'. 'De facto spouse' was defined in the Act as someone who is living with another on a bona fide domestic basis although not legally married to that other person.

In determining if Bruce was qualified to receive these payments the AAT considered the relationship from 1974 till 1989, having regard to the financial aspects of the relationship, the common household in which they lived, the nature of any sexual relationship, social factors, and the commitment to each other.

In their overall assessment the AAT commented:

'The Tribunal has no doubt that the period during which the applicant lived with Maurice Kennett was, for the most part, a very unhappy and unsatisfactory one from her point of view. However, the happiness of the parties and their mutual satisfaction with their relationship are not prerequisites of the existence of a de facto or marriage-like relationship between them. Unfortunately, unhappy and unsatisfactory relationships between persons living together, whether on a de facto or legally married basis, are relatively common in contemporary society.'

(Reasons, para. 36)

In conclusion, the AAT found that:

'Having regard to all the circumstances of the relationship between the applicant and Kennett between 1974 and 1989, and in particular to the factors summarised above, the Tribunal finds that, throughout that period, the applicant was living with Maurice Kennett as his spouse on a bona fide domestic basis although not legally married to him.'

(Reasons, para. 36)

Thus the AAT held that Bruce was not qualified for widows pension or sole parent pension from March 1974 till December 1989.

Was there a debt?

The AAT considered whether or not there was a debt under s.1224 of the *Social Security Act 1991*. The AAT was satisfied that the amount of \$97,270 had been paid and that such payments had been made as a result of false statements made to the DSS by Bruce throughout the period.

Waiver

The AAT considered whether the debt should be waived, and applied ss.1237 and 1237A of the 1991 Act. It concluded that the debt did not fall into any of the categories specified in either s.1237 or s.1237A.

Write off

The AAT then turned to the power to write off a debt conferred by s.1236(1). When considering the power to write off a debt, the AAT referred to *L and Secretary, Department of Social Security* (1995) 21 AAR 412 in which the Tribunal found that the financial circumstances of the debtor and the prospect of recovery of the debt will necessarily be the primary considerations in deciding whether to write off a debt. The AAT also noted the customary regard taken of the Federal Court's decision in *Director General of Social Services v Hales* (1983) 47 ALR 281 in deciding whether to write off a debt.

The Tribunal found that Bruce would never be able to repay more than a fraction of the total debt, and considered as well, 'the depressing and stressful effect that such a large debt would be likely to have on the applicant who is now trying — with great success . . . to build a happy and secure family life for herself and her children': Reasons, para. 49. The Tribunal noted that \$41,933 of the total overpayment was covered by a reparation order.

The Tribunal decided, having regard to Bruce's financial circumstances, and the prospects of recovery of the debt, that it would be appropriate to write off the balance of the total debt after deduction of the amount ordered for reparation.

Formal decision

The Tribunal set aside the decision under review and substituted a decision that the amount of \$55,336 be written off.

[B.M.]

Newstart allowance: notice of previous decision

SECRETARY TO DSS and STING
(No. 10435)

Decided: 29 September 1995 by S.A. Forgie.

The facts

Sting made an application for unemployment benefit on 7 February 1991, in which he completed the section asking for his partner's name, maiden name, date of birth and title. Following a request for further information by the DSS to be lodged by 15 February 1995, Sting's partner completed and returned a 'Partner Details' form within the requested time frame, and later lodged 3 'references of identification' which, it was agreed at the time of the hearing, were not adequate to be regarded as proof of identity. Sting was advised by letter dated 13 March 1991 that unemployment benefit would be paid from 8 February 1991 at the rate of \$134.30, from which \$20 tax would be deducted.

The rate of \$134.30 was the amount of unemployment benefit payable to a single person, and Sting continued to be paid benefit, then jobsearch and newstart allowance at the rate applicable to a single person until May 1994 when, as a result of a standard review by the DSS, Sting's partner again completed a 'Partner Details form' and a further form entitled 'Questions for clients with insufficient proof of identity', these being lodged with the DSS on 26 May 1994. Following this, the DSS made a decision to pay Sting newstart allowance at the married rate from 26 May 1994, this being varied to the earlier date of 22 March 1994 on review by an authorised review officer. This decision was set aside by the SSAT, and the DSS sought review of the decision of the SSAT.

The legislation

The AAT made a preliminary determination that, as the decision to increase Sting's rate of newstart allowance was a decision taken under the *Social Security Act 1991*, the date of effect of that deci-