Administrative Appeals Tribunal decisions

Newstart allowance: payment overseas

SECRETARY TO DSS and STEWART (No. 10756)

Decided: 30 January 1996 by M.D. Allen.

The DSS raised and sought recovery of a debt of $1770.04, because newstart allowance had been paid to Stewart while he was overseas between 5 July 1993 and 20 August 1993. Stewart requested review of this decision, and the SSAT set aside the DSS decision, deciding that there was no debt. The DSS asked the AAT to review the SSAT decision.

The facts

Stewart travelled to the United Kingdom to see his brother who was dying. He did not advise the DSS that he was leaving Australia. Stewart left Australia on 5 July and returned on 20 August 1993.

The law

Section 593 of the *Social Security Act 1991* provides that one of the qualifications for newstart allowance is that the person be in Australia throughout the period. In addition, s.1211 provides that a social security benefit is not payable to a person who is outside Australia. According to s.41 a social security payment is payable to a person if the person is qualified to receive it and nothing in the Act makes it not payable.

The DSS raised the overpayment pursuant to s.1223 of the Act which provides:

> '1223.(1) Subject to subsections (1A) and (2), if:
>
> (a) an amount has been paid to a person by way of social security payment; and
>
> (b) the recipient was not qualified for the social security payment and the amount was not payable to the recipient;
>
> the amount so paid is a debt due to the Commonwealth.'

The AAT noted that 'social security payment' was defined in s.1223(11) as meaning a social security benefit. Section 23(1) defines 'social security benefit' as including newstart allowance.

The AAT decision

The AAT stated that it was quite clear when the above provisions were applied, that Stewart was 'not qualified for the Social Security payment, namely newstart allowance, and as the allowance was not payable to him the payments in fact made are a debt due to the Commonwealth': Reasons, para. 9.

The SSAT decision

It was the noted by the AAT that:

> 'the reasons given for the decision of the Social Security Appeals Tribunal in this matter are totally misconceived to the point of being perverse and contain a non-sequitur and cannot be applied in any way or form whatsoever . . . If that Tribunal had correctly followed the law, the matter would then have been concluded.'

(Reasons, para. 12).

In the AAT's opinion it was particularly unfortunate that Stewart had been given false hope by the SSAT that the debt did not exist. The AAT did not explain the reasons given by the SSAT, or the SSAT's interpretation of the law.

Payments to a partner

Stewart complained to the AAT that the debt included payments which had been made to his wife and not to him. The AAT followed an earlier AAT decision of *Roseingrave and the Secretary to DSS* (decided 7 February 1995) and decided that it was Stewart who had received the benefit not his wife. The rate of payment of that benefit depended on his personal circumstances and included a component for his wife.

Formal decision

The AAT set aside the decision of the SSAT and substituted its decision that Stewart owed a debt of $1770.04 to the Commonwealth.

[C. H.]

Newstart allowance: payment overseas; waiver

SECRETARY TO DSS and HILL (No. 10876)

Decided: 19 April 1996 by J. R. Dwyer.

The DSS asked the AAT to review an SSAT decision that Hill did not owe a debt of $1546.61 to the Commonwealth. Hill had been paid newstart allowance between 9 May 1994 and 9 June 1994 when he was outside Australia.

The facts

The facts were not in dispute. Hill had been in receipt of unemployment benefit, job search allowance and then newstart allowance since 1988. Since May 1991, at the invitation of the DSS, Hill had been lodging his continuation for payment forms every 12 weeks. Hill's absence from Australia fell between two reporting dates.

Hill and his wife went overseas to attend the wedding of their son. Family members helped them pay for the trip. Hill's wife told the SSAT that they had only decided to go overseas in March 1994 when they had received assistance from family members. She explained that her son could not afford to return to Australia because he is a student, and she and Hill wished to meet their daughter-in-law and her family. Mrs Hill explained that for the last 33 years she had cared for her intellectually disabled daughter. This meant that she had had few holidays. This was also an opportunity for her to have a short holiday. Hill had been retrenched in 1988 and had been keenly seeking employment ever since. Because of his age no positions had been offered to him.

The AAT noted that the DSS had become aware that Hill was overseas because of a data matching exercise with the Department of Immigration and Ethnic Affairs. Hill explained to the AAT that he had completed the 12 weekly continuation forms correctly. The April review form had asked if Hill or his partner had gone overseas between February and April. Hill correctly replied that they had

not. The July continuation form asked the same question for the period May to July. In that form Hill had stated that he and his wife had gone overseas from May to June. The AAT emphasised that there was no suggestion that Hill had made a false statement or had failed to comply with a provision of the *Social Security Act 1991*. In fact, the DSS had now changed the question on the continuation forms to, if 'you or your partner went overseas or decided to go overseas.'

The SSAT decision

The SSAT decided that there was no debt in spite of the fact that s.593 of the Act states that to be qualified for newstart allowance the person must be in Australia. The SSAT relied on s.660(1) which provides:

> '660.(1) A determination that:
>
> (a) a person's claim for a newstart allowance is to be granted; or
>
> (b) a newstart allowance is payable to a person;
>
> continues in effect until
>
> (c) the allowance ceases to be payable under section 660A, 660B, 660C or 660D; or
>
> (d) a further determination in relation to the allowance under section 660I or 660IA has taken effect.'

The SSAT found that the only section specified in s.660(1) under which newstart allowance could be cancelled was s.660I. This section provides that the DSS is to cancel or suspend payment if it forms the opinion that newstart allowance is not payable. The date of effect of such a decision is determined by applying s.660L. This section does not provide for a retrospective determination. Therefore the date of effect of the decision to cancel Hill's allowance would be after his return to Australia, and there could be no debt for the period when Hill was overseas because the allowance remained payable to him throughout the period.

The AAT's decision

The AAT decided that this analysis of the law ignored the other relevant provisions of the Act. According to s.593, Hill was not qualified for newstart allowance when he was overseas. Section 1211 provides that newstart allowance is not payable to a person outside Australia because presence in Australia is essential for qualification. The debt occurs because of the provisions of s.1223(1) which provide:

> '1223.(1) Subject to subsections (1A) and (2), if:
>
> (a) an amount has been paid to a person by way of social security payment; and
>
> (b) the recipient was not qualified for the social security payment and the amount was not payable to the recipient;
>
> the amount so paid is a debt due to the Commonwealth.'

According to the AAT:

> 'The clear effect of those provisions is to render the newstart allowance paid to Mr Hill in respect of the period when he was not "in Australia" "a debt due to the Commonwealth". That conclusion does not necessarily require a determination cancelling Mr Hill's grant of newstart allowance and as the SSAT explained there is no point in applying any of the cancellation provisions of the Act as none of them apply in the circumstances of this matter.'

(Reasons, para. 14)

If Hill had advised the DSS that he was going overseas his allowance would have been suspended. Hill was not obliged to notify the DSS of his trip because of the questions on the review form. The AAT was of the opinion that there was no reason to cancel Hill's allowance, but this did not mean that s.1223(1) did not apply.

Calculation of the debt

The AAT then considered the calculation of the debt. It noted that in the original DSS decision the DSS officer had imposed a '2 week penalty', because Hill did not advise the DSS that he was going overseas. The AAT found that this was clearly incorrect. Nothing in the Act allowed the DSS to impose a 2 week penalty period and add payments made during these 2 weeks to the debt. On review the authorised review officer reduced the 2 weeks, but applied the normal one week waiting period which would apply to any new claim for newstart allowance.

The AAT decided that, because it had found that there was no need to cancel Hill's allowance, there was no need to impose a waiting period for a new claim.

Waiver

Finally the AAT considered whether it was appropriate to write off or waive the debt. After Hill received notification of the debt in 1994, he promptly paid it off. This meant that because the debt was not outstanding at 1 January 1996 Hill was not entitled to the benefit of s.1237AAD of the Act. This section allows the DSS to waive a debt if write off is not appropriate and there are special circumstances. However, s.1236A(1) provides that this section only applies if the debt was outstanding on 1 January 1996.

The AAT agreed with the DSS submission that it could only apply the waiver provisions which existed prior to 1 January 1996. Section 1237(2) provided that the debt could be waived if it was caused solely by Commonwealth administrative error, and the person received the payment in good faith. According to the AAT the debt was caused by administrative error because the continuation forms did not ask the appropriate question. The AAT accepted Hill's evidence that he did not think that he had to volunteer evidence to the DSS. Because Hill was only required to lodge a continuation form every 12 weeks he was encouraged to believe that he was entitled to travel overseas for short periods. The AAT was also satisfied after hearing the evidence that Hill had received the payments in good faith. The AAT considered whether the waiver provisions could apply after a debt had been recovered. After some hesitation, the AAT decided that they could because the former waiver provisions did not explicitly provide that the debt had to be outstanding, as the current provisions do.

Formal decision

The AAT decided that Hill was overpaid newstart allowance for the period 9 May 1994 to 9 June 1994, but that this debt should be waived because of administrative error. Hill was entitled to be refunded the whole amount he had repaid.

[C. H.]

Age pension: meaning of resident

GNISIOS and SECRETARY TO DSS
(No. 10759)

Decided: 22 February 1996 by G. Ettinger, G.A.R. Johnston and S.M. Bullock.

Gnisios was refused an age pension on the grounds that he was not an Australian resident at the time he lodged his claim. Both the authorised review officer and the SSAT affirmed this decision.

The facts

Gnisios migrated to Australia from Greece in 1956. He married and had a daughter born in Australia before the family returned to Greece in 1972. In 1974 Gnisios alone returned to Australia. He obtained Australian Citizenship in April 1975 and returned to Greece in October of the same year, with the intention of remaining there permanently. He purchased property in Greece in his daughter's name and built and lived in a family home there until his daughter's marriage. Following this he and his wife lived either with his daughter and her family or his mother-in-law. Although