

Overpayment: custodial sentence, should the debt be waived?

SEARS and SECRETARY TO DSS (No. 10833)

Decided: 27 March 1996 by B.H. Burns.

Sears appealed to the AAT against a decision of the Social Security Appeals Tribunal not to waive an overpayment debt. Sears had received unemployment benefit whilst he was employed. He was overpaid \$24,215, and was convicted of 55 counts of breaches of the *Social Security Act 1947*. On 27 October 1987, he was sentenced to 12 months imprisonment.

The legislation

Before 1 January 1996, s.1237 of the *Social Security Act 1991* provided that the DSS could waive a social security debt. Section 1237(3) provided that the debt must be waived if:

- the person is convicted of an offence, and
- the court in sentencing indicated that it imposed a longer custodial sentence because the person was unable or unwilling to pay the debt.

Section 1237 was repealed on 1 January 1996. The new s.1237AA similarly provided that the DSS must waive the debt:

- if the debtor has been convicted of an offence that gave rise to a proportion of the debt, and
- the court indicated in sentencing that it imposed a longer custodial sentence because the debtor was unwilling or unable to pay the debt.

Section 1236A provided that these provisions apply both to debts that arise after 1 January 1996 and to debts that were outstanding at 1 January 1996.

The issue

It fell to the AAT to determine whether the court in sentencing Sears had indicated that it imposed a longer custodial sentence because he was unwilling or unable to repay the debt of \$24,215.

An officer from the DSS had sought written clarification from the sentencing magistrate on this issue. She replied that, as the case was 7 years ago, and she no longer had her notebook from the time, she had no independent recollection of the case.

Sears submitted that the magistrate's sentencing remarks did indicate that she regarded him as unable or unwilling to repay the debt, and took this into account when passing sentence.

The DSS submitted that the word 'indicated' in the legislation required that the court show, in a clear and unambiguous way that a longer custodial sentence was imposed because of the person's inability or unwillingness to repay the debt. It was submitted that there must be more than mere inference or speculation.

Meaning of 'indicate'

The AAT referred to the case of *Truscott* (1995) 88 SSR 1280 which considered the meaning of the word 'indicate'. It decided that 'indicate' could mean 'shown', 'stated' or 'expressed' as well as 'implied'. However, in this case, the AAT said that it 'had some difficulty' with the proposition that 'indicate' could mean 'implied': Reasons, para. 38. It preferred the view that 'indicate' means 'showed' or 'made known': Reasons, para. 36.

The AAT also considered the cases of *Ford* (1989) 53 SSR 706 and *Dennis* (1994) 79 SSR 1147, and commented that each sentencing case depends a great deal on its circumstances. Accordingly, rather than looking to other cases, it is necessary to look at the actual sentencing process and court remarks in the case at hand.

Should the debt be waived?

The AAT stated that it was appropriate to only have regard to the remarks in sentencing and the sentence itself, rather than extraneous factors. The sentencing magistrate referred to the considerable amount of the overpayment and to the fact that Sears had not made a convincing effort to repay the debt. Only \$30.00 had been repaid at the date of passing sentence. The AAT considered that the prevalence of offending and the deterrence of others was a relevant factor in the sentencing process.

The magistrate said she made no order for reparation.

The AAT stated that if an offender is given a longer custodial sentence because of unwillingness or inability to repay the debt, they should be so informed by the court. The AAT suggested that 'not to do so would be an abrogation of the duty imposed upon the court': Reasons, para. 32.

Accordingly, the AAT found that the magistrate had not indicated that a longer sentence was imposed because Sears was unable or unwilling to repay the debt.

In concluding, the AAT suggested that when prosecuting, the DSS should inform the court of the nature of the waiver provisions relating to custodial sentences.

Formal decision

The AAT affirmed the decision of the SSAT.

[H.B.]

Rent assistance: retirement village rent

SECRETARY TO DSS and KNIGHT (No. 10810)

Decided: 14 March 1996 by D. Chappell.

Knight took up residence in a retirement village. She claimed rent assistance in respect of two ongoing payments made to the village: unit fees and amounts paid towards the balance of the entry contribution. The DSS granted rent assistance in respect of the unit fees only. The SSAT set aside the decision and determined that rent assistance was payable in respect of both payments. The DSS applied for review by the AAT.

The facts

Knight was aged 76 and in receipt of age pension. In 1994 she made an application for residence at the Avondale Retirement Village. For entry into the village she was required to pay an entry contribution of \$30,000. It was agreed that this would be paid as a lump sum of \$10,000 due 1 July 1994, a further lump sum of \$5000 due in February 1995 and the remaining \$15,000 would be paid over 10 years, by 4-weekly installments of \$154 initially, then decreasing to \$126. Additionally, Knight was liable to pay \$167.50 every 4 weeks as unit fees.

Knight took up residence in the village in July 1994 and advised the DSS of her ongoing payments of \$321.50 every 4 weeks. She requested that her rent assistance be based on that amount. The DSS decided that she was entitled to rent assistance in respect of the unit fees, but not in respect of the \$154 payments which were not considered to be rent.

The issue

It was not in dispute that Knight satisfied the basic eligibility criteria for rent assis-