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SOCIAL SECURITY

Reporter

Including Student Assistance Decisions

Opinion

Waiver: a mere power or an accrued right

Once again the Federal Court has had cause to consider the waiver provisions in the *Social Security Act 1991*, and by implication, in the *Student and Youth Assistance Act 1973*. In *Lee* v *The Secretary to DSS* (p.69) the full court of the Federal Court considered the AAT decision of the President in *L and Secretary to DSS* (1995) 88 *SSR* 1279.

The two issues considered by the Court were: whether the AAT should have applied the broad waiver provisions in the Act prior to 24 December 1993, and whether the AAT had the power to consider write off. Each judge wrote a separate judgment. Davies J (a former President of the AAT) disagreed with Cooper J and Moore J as to whether the power to waive a debt was a right preserved by s.8 of the *Acts Interpretation Act 1901*, or whether it was 'a mere power to take advantage of an enactment'. According to Davies J the power to waive a debt is 'a mere matter of procedure', or 'a claim for the favourable exercise of a statutory discretion'. If it were a substantive right, it would only accrue if review proceedings had commenced before any amendment came into force.

Cooper J and Moore J found that the power to waive a debt was a substantive right, but for different reasons. According to Cooper J the right arose when the decision maker first considered waiver. The new sections on waiver did not purport to deal with past decisions which exercised the discretion to waive a debt under the old provisions. Therefore the amending Act did not evince any contrary intention, so the accrued right was preserved. This was contrary to the decision in *Kratochvil* (1994) 81 *SSR* 1190. However an application for waiver is not enough to create a right. There must be a decision on waiver.

Moore J found that the decision being reviewed by the AAT was the primary decision of the DSS as affirmed by the ARO and the SSAT. He outlined the right preserved as being the right to have the claim determined in Lee's favour if it had been incorrectly refused. All judges agreed that there was no overriding discretion to waive a debt in the waiver provisions applicable after 24 December 1993.

Write off

Moore and Cooper JJ agreed with Davies J that the AAT had the power to write off a debt, and that write off can apply to a current pensioner, even though the debt could be recovered by deductions. When considering write off, the decision maker is not restricted to situations where a debtor cannot be found or has no funds. A range of matters can be taken into account.

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supplement which was a loan rather than a grant, the Tribunal concluded that that money was available for the support of B and her husband and should be taken into account.

AUSTUDY

Coverage of the actual means test: debt, administrative error and receipt in good faith

D & E and SECRETARY TO DEETYA

Decided: 16 August 1996

D and E were tertiary students. Their father was director of a family company, and both parents were shareholders of another family company until April 1996. They stated this on their 1996 AUSTUDY applications. AUSTUDY was granted in early February. The Actual means test was applied to D and her AUSTUDY was cancelled in late February 1996. A debt was raised in respect of AUSTUDY already paid that year. E continued to receive AUSTUDY until May. Her AUSTUDY was then also cancelled and a debt was raised against her.

It was argued for D and E that from the time (in 1996) their mother was in receipt of parenting allowance, the parental income test under the AUSTUDY Regulations would not apply. Therefore, the actual means test should not be applied, and D and E were entitled to AUSTUDY from that date at least. The SSAT rejected this argument. It concluded that the actual means test was a separate requirement from the parental income test, and exemptions from the parental income test did not exempt D and E from the actual means test.

The SSAT found that the Actual means test applied to D and E, and that their family's actual means (expenditure and savings) for 1996 would preclude payment of AUSTUDY. As AUSTUDY was paid to which D and E were not entitled, the debts were properly raised against them. However, it noted that D and E had correctly advised the DEETYA of matters which should have invoked the actual means test, yet the DEETYA granted AUSTUDY unconditionally, only applying the actual means test later in the year. The SSAT concluded that this error was the sole cause of the debt.

The SSAT was satisfied that D and E both genuinely believed that they were entitled to AUSTUDY, and therefore received the money in good faith, until D had received the letter from the DEETYA cancelling her AUSTUDY and raising a debt. The SSAT found that E would have become aware of the letter to her sister on about 29 February 1996. On the basis of her evidence, it concluded that after that date she doubted her entitlement to AUSTUDY, and did not receive subsequent payments in good faith.

The Tribunal waived the whole of D's debt, and the part of E's debt that related to pre-February 1996 payments, under s. 289(1) of the *Student and Youth Assistance Act*. It did not waive the remainder of E's debt, and also concluded that there were no special circumstances justifying waiver under s. 290C of the Act.

Actual means test: calculation of the threshold and the meaning of 'T'

E and SECRETARY TO DEETYA

Decided: 19 September 1996

F's parents were in partnership operating a farm. Therefore, F could only receive AUSTUDY subject to the operation of the actual means test, that is, if total expenditure and savings of his parents and their family for 1996 did not exceed the threshold calculated under the AUSTUDY Regulations (the 'after tax income of the notional parent').

The DEETYA rejected F's application for AUSTUDY on the basis that his parents' actual means was $35,399 and exceeded the after tax income of the notional parent (which in F's case was $33,239.01). This was based on the estimates provided by F's parents early in the year. The Tribunal revised a number of these estimates after hearing from F and his mother, and concluded that the Fs' combined expenditure and savings would be $36,813.

The SSAT proceeded to calculate the after tax income of the notional parent according to the formula in Regulation 12M. One of the components of this formula, T, is defined as 'the amount of income tax . . . that would notionally be assessable on (PI + DC).' (PI and DC are other components of the formula.) The SSAT concluded that, although the Fs in reality might be able to legitimately minimise tax by splitting income, under Regulation 12M, 'T' would have to be calculated as the amount of tax payable on (PI + DC) as a single person's income. The SSAT also found that 'T' did not include the Medicare levy.

The SSAT held that the after tax income of the notional family would in this case be $33,284. As the Fs' combined expenditure and savings exceeded this amount, F was not entitled to AUSTUDY.

[M.D'A.]

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What does it mean?

The majority found that the power to waive a debt is a right in terms of s.8 of the *Acts Interpretation Act*, and it is an accrued right if the decision on waiver is made before 24 December 1993. All judges found that the AAT has the power to write off a debt even if a person is receiving a pension, and the matters to be taken into account when considering write off are not restricted to financial considerations. All judges agreed that there was no general discretion to waive a debt retained in the amendments after 24 December 1993.

The waiver provisions were subsequently amended from 1 January 1996. It would appear that this decision of the Federal Court means that there may be an accrued right to have any debt at 1 January 1996 considered under the pre-1 January 1996 provisions, if a decision on waiver had been made.

[C.H.]