Federal Court

Whether accrued right to seek review of decision not to waive debt

LEE v SECRETARY TO DSS

Decided: 7 August 1996 by Davies, Cooper and Moore JJ.

This was an appeal from an AAT decision by the President, which affirmed a DSS decision not to waive a debt of $1576. The DSS cross-appealed against the AAT decision to write off half the debt, and remit the matter to the DSS, with a direction that repayment of the remaining debt be by instalments of $12 a fortnight.

The facts

Lee was in receipt of a reduced rate of sole parent pension. In April 1992, the Family Court ordered that the father of her child increase the amount of maintenance paid to her by $80 a week. Even though Lee had been advised by the DSS that she should tell them if her maintenance payments increased, she did not do so until April 1993. Her local Member of Parliament wrote to the DSS advising that she had been ill for 12 months, and for this reason had failed to notify the DSS. He requested that the DSS not seek to recover the debt.

On 15 December 1993, an officer of the DSS decided that Lee had been overpaid, and the debt should be recovered. Lee sought review of that decision, and on 9 February 1994, an authorised review officer affirmed the decision. Lee requested review by the SSAT which also affirmed the decision.

The legislation

Prior to 24 December 1993, the power to waive a debt was contained in s.1237 of the *Social Security Act 1991*.

> '(1) The Secretary may, on behalf of the Commonwealth, decide to waive the Commonwealth's right to recover from a person the whole or a part of a debt.
>
> (2) In exercising the power conferred under subsection (1) the Secretary must act in accordance with directions from time to time in force under sub-section (3).
>
> (3) The Minister may, by determination in writing:
>
> (a) give directions relating to the exercise of the Secretary's power under sub-section (1); and
> (b) revoke or vary those directions.'

This section was repealed from 24 December 1993, and replaced with a section giving the Secretary power to waive a debt but only in accordance with the criteria set out in the section. Section 1236(A) was added to the Act and provided:

> 'Sections 1237 and 1237A apply to all debts whenever incurred, owed to the Commonwealth and arising under this Act or under the Social Security Act 1947.'

The write off provision was contained in s.1236 of the Act and was not altered.

> '(1).The Secretary may, on behalf of the Commonwealth, decide to write off a debt . . .'

In Lee's case, the debt was said to be owed pursuant to s.1224 of the Act which provides that if an amount is paid to a person by way of a pension, and the amount was paid because the person failed or omitted to comply with a provision of the Act, then the amount so paid is a debt due to the Commonwealth.

Section 1234 allows a person to repay a debt by one or more instalments.

The AAT decision

The AAT affirmed the decision not to waive the debt, pursuant to s.1237 of the Act as amended. It found that that section did not give any discretion outside the criteria set out in the section to waive the debt. As Lee's circumstances did not fit into the criteria set out in s.1237, the debt could not be waived. However, the AAT remitted the matter back to the DSS with directions that half the debt be written off pursuant to s.1236, and the remainder be repaid by Lee at the rate of $12 a fortnight, pursuant to s.1234.

Waiver

Each judge gave separate reasons for the court's judgment.

Davies J referred to s.8 of the *Acts Interpretation Act 1901* (AIA) which provides:

> 'Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:
>
> . . .
>
> (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or
>
> . . .'

It was submitted on behalf of Lee that she had an accrued right, prior to the commencement of the 1993, amendment to have her application for review heard and determined on its merits, under s.1237 as it was prior to 24 December 1993.

Davies J referred to *Esber v The Commonwealth* (1992) 174 CLR 430, in which it was stated that the AAT determines applications for review after a *de novo* hearing, acting on the material before it when it makes its determination. The law as it then exists is applied, not the law as it existed in earlier times. This is in contrast to judicial proceedings. However, the majority of the High Court had found that s.8 of the AIA overrode that principle. If the application to the AAT had been lodged prior to the commencement of the new legislation, then according to the majority of the High Court:

> 'Once the appellant lodged an application to the Tribunal (AAT) to review the delegate's decision, he had the right to have that decision of the delegate reconsidered and determined by the Tribunal. It was not merely, 'a power to take advantage of an enactment' . . . Nor was it a mere matter of procedure . . . It was a substantive right.'

(Reasons, p.7)

Davies J found that the powers conferred by the Act to write off or waive a debt gave the debtor no right other than to request that waiver or write off be considered. He considered this to be a mere power to take advantage of an enactment. The power to waive or write off a debt was not conditional but discretionary. Davies J referred to *Secretary to DSS v Kratochvil* (1994) 53 FCR 49; 81 *SSR* 1190, where the Court found that it was the intention of Parliament that the new s.1237 was to apply and exclude the former s.1237.

Davies J then went on to discuss the role of the AAT which he said was, to determine 'applications on their merits, having regard to the material which is before it': Reasons, p.10. Quoting *Azevedo v Secretary Department of Primary Industries and Energy* (1992) 35 FCR 384, he noted that the AAT is empowered to exercise all the powers and discretions that are conferred by any relevant enactment on the original decision maker. It is not discharging a merely supervisory role, but rather ensuring that the decision is the correct or preferable one, on the material before the AAT. The AAT considers the applicant's entitlement, from the date of the application to the date of the AAT's decision.

Davies J concluded that as there had been no application to the AAT when the legislation was amended and the claim being pursued was a claim for a favourable exercise of the statutory discretion, there was not a right either inchoate or contingent.

Davies J rejected Lee's submission, that there was an overriding discretion-

ary power to be found in s.1237(1) to waive a debt. The specific words of that section, 'but only in accordance with this section', indicated the parameters for the exercise of the power to waive a debt.

Cooper J

It was submitted on behalf of the DSS that Lee had no right to waiver of the debt until the favourable exercise of the discretion had been exercised. She did have some rights in relation to the exercise of the discretion to waive the debt, which gave rise to the decision to refuse to waive or write off the debt. The nature of those rights was considered in *Esber* (above). Lee had the right to have her application for waiver determined in her favour, if the delegate had wrongly refused her application. In Cooper J's opinion that right arose at the time the decision on her application for waiver was made on 13 December 1993. From that date onwards, the right was enforceable, pursuant to the review procedures provided for under the Act. Once those review procedures were initiated on 23 December 1993, Lee had the right to have the decision of 13 December 1993 reconsidered. The right of review is analogous to the right of appeal, and is substantive and not a procedural right.

> 'The right of review was to have the application for waiver reconsidered *de novo* in accordance with the discretion vested in s.1237 as it stood on 13 December 1993.'

(Reasons, p.6)

The original decision did not become incorporated in each new decision on review and lose its character as the operative decision. (See *Yolbir v Administrative Appeals Tribunal* (1994) 48 FCR 246.) Cooper J then considered whether the amending Act revealed any intention to deny the application of s.8 of the AIA. Section 1237 as amended, did not have a retrospective operation. It created a new limited power in the secretary to waive a debt. It operated in respect of all present debts. However, it did not purport to deal with past decisions, to waive debts due to the Commonwealth. A future decision to waive a debt, even though that debt had been incurred prior to 24 December 1993, did not make the section operate retrospectively. Cooper J agreed with the Court in *Kratochvil* that the amended section was intended to apply to applications for waiver pending but not decided when the amendment came into force. However, Cooper J did not believe that the amending Act evinced an intention to abrogate substantive rights.

Cooper J referred to the explanatory memorandum for the amending Act and decided that it was consistent with his interpretation of the section, namely:

> 'Decisions as to waiver by the Secretary or a delegate made after the commencement date are to be made under the new sections and those sections apply to all debts whenever incurred.'

(Reasons, p.11)

Cooper J agreed with Davies J that the amended section 1237 did not give any residual discretion to the Secretary to exercise the power of waiver in any other circumstance than those set out in the section.

Moore J

An issue in this appeal is the legal status of the right to seek internal review. In what way was this affected by the amending Act. He also looked at the legal character of the right to further review after internal review, and the effect of any amending Act on that right.

After examining the facts, Moore J was satisfied that the decision of 15 December 1993, was a decision not to waive the right to recover the debt. On 23 December 1993, Lee exercised her right to seek internal review of that decision. That is, she sought review the day before the amended Act came into operation. The review mechanisms of the Act provide for internal review by an ARO, external review by the SSAT and then by the AAT. The applicant must go through each step of the review process before proceeding to the next level. The AAT is invested with all the powers and discretions conferred upon the original decision maker. Even if the original decision maker had not considered the discretion to waive, the Tribunal could exercise this power. The decision being reviewed by the AAT was the decision of the primary decision maker as affirmed by both the ARO and the SSAT.

Moore J quoted extensively from *Esber*, noting the High Court's observation that the first step to consider when applying s.8 of the AIA is to identify what right the applicant says was acquired or accrued under the repealed Act. In *Esber* it was the right to have the application to the AAT determined under the repealed Act. That is, a right to have the claim determined in his favour if it had been incorrectly refused. This was not merely a power to take advantage of an enactment, nor was it a mere matter of procedure. It was a substantive right. Moore J stated that two matters emerged from the *Esber* judgment. The first was that a statutory right to seek a review of the decision made under a repealed Act is a right for the purposes of s.8 of the AIA. It is a right to have the review conducted pursuant to the power exercised by the original decision maker under the repealed Act.

The second matter is that the right to seek review remains, even if the decision which is being reviewed involves the exercise of a discretionary power.

> 'It confers on a person affected by the exercise of the statutory power a right to have the exercise of the power reviewed and exercised again as it might have been exercised initially.'

(Reasons, p.14)

Moore J stated that it was not clear whether it was critical in *Esber* that an application to the AAT be made prior to the repeal of the Act. The joint judgment indicates that it was. In this case, Lee had requested review prior to s.1237 being amended. It was internal review but this was necessary before Lee could seek review by the SSAT and then the AAT if the decision was unfavourable. The right to have the decision further reviewed was a conditional right, similar to the right considered in *Esber*. Thus, it was a conditional right which was protected by s.8 of the AIA.

Moore J then considered whether a contrary intention was expressed in the amending legislation. He disagreed with Cooper J and the Court in *Kratochvil* stating:

> 'It cannot be assumed that the Parliament was attempting to remedy what it had earlier failed successfully to do.'

(Reasons, p.18)

It had been suggested in *Kratochvil* that the amendments to s.1237 were to overcome the problems that had been identified in *Riddell v Secretary to DSS* (1993) 42 FCR 443; 73 *SSR* 1067. Moore J was of the opinion that the only possible contrary intention could be that in s.1236A. However, he interpreted the phrase, 'whenever incurred', as meaning that the discretion could be exercised after the amending act came into force, in relation to a debt that arose prior to that date. Therefore there was no contrary intention and the right was preserved by s.8 of the AIA.

Write off

Only Davies J dealt with write off, the other two judges agreeing with his reasons.

It was submitted by the DSS that writing off a debt does not alter the liability of the debtor, and the creditor can decide to pursue the debt at any time. This made the order of the Tribunal meaningless and outside its powers. Davies J referred to two Federal Court decisions, *Director General of Social Services v Hangan* (1983) 45 ALR 23; 11 *SSR* 115 and *Director General of Social Services v Hales* (1983) 47 ALR 281; 13 *SSR* 136 in which it was found that the AAT had the power to review such decisions even though it did not alter legal relationships. It was

said that a declaration or a statement which had a real and practical effect could be reviewed, even though it did not alter rights or impose penalties. The definition of decision in the Act and in the *Administrative Appeals Tribunal Act* 1975 included doing or refusing to do any act or thing. There was no reason to think that definition excluded the exercise of powers under s.1234 and 1236 of the Act. These are expressed statutory powers which have a significant effect upon a pensioner.

It was also submitted that the write off provisions could not apply to a person who is currently receiving a pension, as was Lee. This ignored the effect of s.1231(2) which provided that a debt could be recovered by deductions unless the debt was written off or waived. That is, the section envisaged write off and waiver applying to a person who is currently receiving a pension.

It was also submitted that the AAT took into account matters it should not have considered when exercising the power to write off the debt. Davies J disagreed with that submission saying that there is a distinction between the waiver and write off powers. The AAT had considered Lee's psychiatric problems and the need to reduce the financial pressure on her. Davies J stated that the consideration of write off is not restricted to cases where the debtor cannot be found or has no funds. There is no limit to the range of matters the AAT may take into account. If the person's circumstances change, then the debt may be recovered.

Formal decision

The Court allowed the appeal and set aside the AAT's decision not to waive the debt. The matter was remitted to the AAT to determine the matter again. The cross-appeal by the DSS was dismissed.

[C.H.]

SSAT decisions

Important note: Decisions of the Social Security Appeals Tribunal, unlike decisions of the Administrative Appeals Tribunal and other courts, are subject to stringent confidentiality requirements. The decisions and the reasons for decision are not public documents. In the following summaries, names and other identifying details have been altered. Further details of these decisions are not available from either the Social Security Appeals Tribunal or the Social Security Reporter.

Social Security

Full-time study; reliance on DSS advice

A and SECRETARY TO DSS

Decided: 28 June 1996

A enrolled in a course that was regarded by the institution concerned as full time. The course involved only 9 contact hours a week. She claimed job search allowance on 1 May 1995. Before doing so, she discussed her course with an officer of the DSS. She was advised that as the course involved less than 15 contact hours a week, it was 'part time' and she could claim job search allowance.

On this basis, A claimed job search allowance and described her course as 'part-time' on her claim and on subsequent forms. She received payments until August, when an overpayment was raised on the basis that she was a full-time student.

The SSAT held that the course was full-time since it was considered to be full-time by the educational institution concerned. Therefore, in describing the course as 'part-time' on her forms, A had made a false statement, even though she had believed it to be true at the time. Job search allowance was paid because of that false statement; therefore a debt arose under s.1224(1) of the *Social Security Act*.

However, the SSAT was satisfied that A had relied completely on the advice of the DSS officer in describing her course as 'part time'. It distinguished the AAT decision of *McKnight*, as A was far less experienced and therefore her reliance on DSS advice did not demonstrate the 'wilful blindness' demonstrated by Ms McKnight. It concluded that the debt arose solely as a result of DSS error (the incorrect advice), and A received the payments in good faith. Accordingly, the SSAT waived recovery of the debt under s.1237(2) of the Act.

(This decision has been appealed to the AAT.)

Rate of special benefit

B and SECRETARY TO DSS

Decided: 9 September 1996

B arrived in Australia on 9 April 1996 and married on 21 April. She was granted permanent residence on 5 June. Her husband was in full-time education and receiving a combination of AUSTUDY and financial supplement at the rate of $406 a fortnight. This was not enough to support the couple. B applied for special benefit on 24 June and job search allowance on 26 June. Her claim for job search allowance was rejected because she was still subject to the 26-week newly arrived residents waiting period. Her claim for special benefit was rejected, primarily because she had been aware (according to the DSS) that she would not be entitled to social security payments for 26 weeks.

The SSAT did not accept that B and her husband were aware of the 26-week waiting period. It noted that B's husband had told the immigration authorities that his wife would be dependent on government support on her arrival, and concluded that when a visa was issued, B and her husband not unnaturally assumed that this had been taken into account and that government support would be available.

The SSAT held that B was not entitled to job search allowance or any other payment, and that as a holder of a permanent visa she met the residence requirements for special benefit. It accepted that her husband's income was not sufficient to support the couple, and concluded that B's limited English prevented her from obtaining employment, and therefore earning a sufficient livelihood. It determined that it was appropriate to exercise the discretion to pay B special benefit.

The Tribunal held that the appropriate rate of special benefit would be the equivalent of the maximum rate of job search or newstart allowance that would have been payable to B and her husband as a couple, less the $406 a fortnight AUSTUDY received by B's husband. While this amount included the financial