

The facts

In 1992 Hickman had been seriously injured in a motor vehicle accident. Medical evidence showed that his injuries included frontal lobe damage, fitting, loss of hearing and smell, urinary and sexual dysfunction. He suffered from depression and epilepsy following the accident. He was easily distracted and impulsive and was only able to perform simple structured and familiar tasks if he did them slowly.

Hickman separated from his wife after the accident and he used part of the compensation money to pay off the home she occupied with their two children. He bought himself an isolated property and a vehicle and placed the balance of the money in long-term investments for himself and his children. The compensation money had been totally expended, and Hickman was being supported financially by his former wife.

The legislation

The AAT considered s. 1184 of the *Social Security Act 1991* which contains a discretion to treat the whole or part of a compensation payment as not having been made or not liable to be made, if it is thought appropriate to do so 'in the special circumstances of the case'.

The caselaw

The AAT referred to those decisions where the meaning of 'special circumstances' had been considered, and it noted that the occasions when circumstances are special will vary with the facts of each matter.

Special circumstances

The AAT concluded that there were a range of factors which, taken together, satisfied it that special circumstances existed in this case. These included the severity of Hickman's injuries and the impact of the injuries on his life and on his relationship with his former wife.

The AAT acknowledged that there was a need for separate households, and that Hickman will need the emotional support of his former wife in the future. This should not be jeopardised by the forced sale of the former matrimonial home.

Length of preclusion period

The AAT noted that there were sound reasons for Hickman to use some of his invested funds to support himself. It was proposed by the DSS that in calculating the length of the preclusion period the AAT should take into account the current pension rate or Hickman's weekly living expenses rather than average weekly earnings.

The AAT decided to treat \$250,000 of the compensation payment as not having been made. This sum reflected what had been expended on accommodation, a suitable vehicle, medical and living costs. The balance of \$100,000 should be divided by average weekly earnings to arrive at a preclusion period.

Formal decision

The AAT set aside the decision under review. It remitted the matter to the DSS with directions that \$250,000 of the compensation payment be treated as not having been made and that the preclusion period be determined under the relevant provisions of the *Social Security Act 1991* in accordance with the AAT's reasons.

[A.A.]

Waiver: administrative error, good faith

FALCONER and SECRETARY TO
DSS
(No. 10896)

Decided: 1 May 1996 by K.L. Beddoe.

Falconer sought review of a decision to raise and recover an overpayment, caused by Falconer being paid a prepayment to which he was not entitled, as he had earnings for the same period which precluded payment of job search allowance.

On 8 December 1994, Falconer, in lodging his form had advised the DSS that he had regular employment as a cleaner at a local shopping centre. Falconer was paid an advance payment of the full amount of job search allowance on the 22 December 1994.

The issue

The AAT addressed whether or not the overpayment of job search allowance should be waived on the ground that Falconer had advised the DSS that he had work which would preclude him from receiving job search allowance.

The legislation

The relevant section of the *Social Security Act 1991* was:

Waiver of debt arising from error

Administrative error

1237A.(1) The Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in

good faith the payment or payments that gave rise to that proportion of the debt.

Note: Subsection (1) does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).

Administrative error

The AAT when looking at administrative error in the context of s.1237A(1) commented that:

'I am satisfied, and so find, that when the applicant told the officer on 8 December 1994 that the continuation report lodged on that day would be his last because he had obtained regular employment, he gave the respondent good and sufficient advice of his change in status. The error was not the applicants, but was rather the respondents in its failure to input this into the system.'

(Reasons, para. 14)

After finding that the first part of s.1237A(1) was satisfied because there was administrative error by the DSS, the AAT considered whether the payment had been received by Falconer in good faith.

When Falconer discovered that there was extra money in his bank account, he approached the DSS and tried to repay it. Falconer's attempts to repay the money failed in two ways when in the first instance, the DSS refused to pick up a cheque from his home, and second, when he waited at the DSS office to be served but left after having to wait around unattended.

The AAT noted that administrative error in this matter was not confined to the incorrect payment, but also in the DSS failure to accept repayment when offered by Falconer.

Good faith

The AAT considered the decision of the Full Federal Court in *PT Garuda Indonesia Ltd v Grellman* (1992) 107 ALR 199 at page 211 where the court found that 'good faith' refers to receipt of the payment by the debtor in circumstances without notice of irregularity which is contrary to the Act.

The AAT asked the question:

'At the time the amount was credited to the applicant's bank account he had no knowledge of the payment. He did not know he was not entitled to such a payment. Is that knowledge sufficient to say the payment was not therefore received in good faith?'

(Reasons, para. 23)

The AAT decided the payment had not been received in good faith and reasoned that:

'... the answer must be that because the applicant knew he was not entitled to the payment it cannot be said that he received the payment without noticing an irregularity. As the evidence shows, when the applicant became aware of the nature of the deposit in his bank account he took steps to pay the amount back to the respondent. The fact that the respondent fell

further into error by frustrating the applicant's two separate attempts to repay the overpayment does not, in my view, change the essential character of the payment as received by the applicant. It was, and remained an amount paid contrary to the Act and which the applicant knew had been paid to him contrary to the Act.'

(Reasons, para. 24)

The DSS had been recovering the debt of \$384 by instalments, and the debt amounted to \$119 at the date of the AAT hearing. The AAT decided it was not cost effective to recover this debt and waived it pursuant to s.1237AAA(1) of the Act.

Formal decision

The AAT set aside the decision under review and waived the remainder of the debt.

[B.M.]

Practice and procedure: joinder of parties

SCOTT and SECRETARY TO DSS
(No. 11188)

Decided: 24 July 1996 by J. Dwyer.

Mrs Scott had asked the AAT to review the decision of the SSAT to affirm a DSS decision not to grant her a disability support pension (DSP). On 24 May 1996 her husband, Scott asked to be joined as a party to the proceedings.

The law

The application by Mr Scott to be joined as a party was made under s.30 (1A) of the *Administrative Appeals Tribunal Act 1975*. That section provides:

'Where an application has been made by a person to the Tribunal for a review of a decision, any other person whose interests are affected by the decision may apply in writing, to the Tribunal to be made a party to the proceeding, and the Tribunal may, in its discretion, by order, make that person a party to the proceeding.'

The AAT decided that there were two steps to this process. The first involved the AAT deciding whether Scott was a person whose interests were affected by the decision, and the second, whether it should exercise the discretion to join Scott as a party to the proceedings.

Person whose interests are affected

Scott submitted that there were financial and medical reasons why his interests were affected by this decision. His financial interests were affected because he and his wife were forced to live on his

DSP which was paid at the married rate. Mrs Scott had been receiving the special benefit but it had been cancelled. The financial pressure meant that stress was being placed on Scott which affected his heart condition. The DSS argued that Scott was in no different position than any other partner of a recipient of a social security benefit.

The AAT quoted from the decision in *Control Investments Pty Ltd and Australian Broadcasting Tribunal* (1980) 3 ALD 74, and stated that to determine whether a person's interests had been affected required consideration of that person's particular interest. 'The interest affected need not be a legal interest but there must be some definable relevant interest': Reasons, para. 11. The interest in any particular case would be influenced by the type of decision under review. The AAT concluded that Scott was a person whose interests were affected by the decision not to grant his wife a DSP. The interest was not legal but Scott's financial interests were affected.

The discretion

The AAT cited *Control Investments* for the proposition 'a finding by the Tribunal that a person is an interested person does not necessarily mean that the person is entitled to be joined as a party to the proceeding': Reasons, para. 13. The duty to join a person as a party to a proceeding will be limited by the AAT's duty to provide a fair hearing and to deal with matters as expeditiously as possible. A person will only be joined if the person's interests are substantial and significantly different from the other party to the proceeding. The AAT concluded in this case that Scott's interests were substantially similar to his wife's. Scott could still be called as a witness for his wife and he could explain his particular situation.

Formal decision

The AAT refused Scott's application to be joined as a party to the proceedings.

[C.H.]

Freedom of information: 'dob in' letter

HAYES and SECRETARY TO DSS
(No. 11221)

Decided: 6 September 1996 by J.A. Kiosoglous.

Hayes sought review of a decision of a Freedom of Information Review Officer of 4 April 1995, which had exempted from release a certain document pursuant to s.37(1)(b) of the *Freedom of Information Act 1983* (the *FoI Act*).

Hayes had been granted access to all documents on his file except those pertaining to a letter which had accused him of breaching the provisions of the *Social Security Act 1991*. Hayes was in receipt of a disability support pension and the letter alleged that Hayes went overseas without notifying the DSS, and that he was possibly not medically qualified to receive the pension. There was an allegation that Hayes undertook activities such as painting and car repairs for family and friends, and that he may have received undeclared income.

The law

Section 37(1) of the *FoI Act* provides:

'A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

- (a) ...
- (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; or ...'

An officer of the DSS had determined that the anonymous letter should be exempt from release under the *FoI Act* because the release of the letter in its original form would probably identify the author because of the handwriting, the information provided, and the spelling and grammatical style used. This also meant that a typed copy of the document could not be released because of the nature of the information, the spelling and the grammatical style.

The DSS investigated the allegations some 21 months after the letter had been received. The investigation concluded that the allegations were incorrect.

The AAT found that the *FoI Act* provided no protection to Hayes, who was the subject of malicious and wrongful allegations. These allegations had caused him considerable distress, were anonymous, and appeared to have been written for the purpose of causing him problems.