Administrative Appeals Tribunal decisions

Job search debt: false statement, requirements under data matching

SAWYER and SECRETARY TO THE DSS (No. 11336)

Decided: 25 October 1996 by J. Dwyer.

Background

Sawyer was in receipt of job search allowance (JSA) during the period July 1991 to June 1992. On 30 June 1991 she received a distribution from the family trust of $13,619, and she did not disclose this to the DSS. She had received similar payments in previous years. On Sawyer's claim form, dated 1 July 1991, she answered the question 'Do you or will you get money from any other source?' in the negative. In December 1991, Sawyer signed the declaration accompanying the (JSA) review form which stated, 'I declare that the information supplied on pages 3 to 11 in this form has been read by me/read to me and is true and correct'. In that form, in answer to the question, 'Do you get any moneys from any other source, e.g. . . . trusts . . . etc', 'no' has been ticked. In May 1995 a letter was sent to Sawyer by the DSS advising that information had been received through a data-matching exercise relating to her taxable income for the financial year 1993/94. In September 1995 the DSS raised an overpayment in relation to the period July 1991 to June 1992.

There was no dispute that s.1074 of the *Social Security Act 1991* (the Act), as at the relevant date, required that a lump sum annual distribution from a trust be taken into account as income for the following year.

The issues

1. Did Sawyer make a false statement or omit to comply with the Act?
2. If so, was the amount of job search allowance paid to Sawyer, paid because of that false statement or failure or omission?
3. Did the DSS fail to give notice as required by s.11(1) of the *Data-Matching Program (Assistance and Tax) Act 1990* (the Data-Matching Act)?
4. If the DSS did not give the required notice, can it take action to recover any overpayment make to Sawyer?

The legislation

The overpayment was raised under s.1224(1) of the Act which provides:

> 'If:
>
> (a) an amount has been paid to a recipient by way of social security payment; and
>
> (b) the amount was paid because the recipient or another person:
>
> (i) made a false statement or a false representation; or
>
> (ii) failed or omitted to comply with a provision of this Act or the 1947 Act;
>
> the amount so paid is a debt due by the recipient to the Commonwealth.'

Section 11(1) of the the Data-Matching Act provides:

> 'Subject to subsection (1A), (1B) and (4) where, solely or partly because of information given in Step 1, 4 or 6 of a data matching cycle, an assistance agency considers taking action . . .
>
> (d) to recover an overpayment of personal assistance made to;
>
> a person, the agency:
>
> (e) must not take that action unless it had given the person written notice:
>
> (i) giving particulars of the information and the proposed action; and
>
> (ii) stating that the person has 28 days from the giving of the notice in which to show cause orally or in writing why the action should not be taken; and
>
> (f) must not take that action until the person has responded orally or in writing to the notice or the 28 days end, whichever occurs first.'

False statement

The AAT did not accept Sawyer's submission that the question in the claim form was limited only to payments or money to which Sawyer had a strict entitlement, or to payments she was expecting to receive in the current year. Sawyer had received an annual distribution from the family trust all her life, and the pattern of distribution was well established. Consequently the answer 'no' to the question 'do you get money from any other source?' was false.

In relation to the review form, the Tribunal found that as Sawyer was 22 years old, English was her first language and she was a university student, she was obliged to read the review when signing it. If she had done so, she would have seen the example of trusts given in regard to moneys from other sources, and she could have corrected the false answer on the form.

Overpayment caused by false statement

Sawyer submitted she would have received the same payments even if she had declared her trust distribution. She relied on an extract from a DSS handbook, and submitted that it was DSS policy in 1991 to not apportion a trust distribution over a 52-week period for recipients of JSA but to treat it as income only for the fortnight in which it was received.

The AAT considered

> 'it more probable than not that if Ms Sawyer had disclosed that she has received an amount of over $13,000 as a trust distribution a day before lodging her claim for job search allowance, an officer would have realised that the payment should have been taken into account under the income test.'

(Reasons, para.21)

The AAT referred to *McAuliffe v Secretary, Department of Social Security* (1992) 69 *SSR* 996, and applied the reasoning that although there is no express evidence that the false statements contributed to the overpayment, the practical conclusion that they did, is inevitable. The AAT found that the payment was paid because of the false statements.

Failure to give proper notice

Sawyer submitted that the DSS letter dated 9 May 1995 sent to her under the provision of s.11 of the Data-Matching Act did not comply with the requirements of the Act, in that it did not give particulars of the information given in a data-matching cycle, and did not state the action the DSS proposed taking. She contended that as the DSS had not given proper notice, it was precluded from taking action to recover the overpayment of personal assistance made to her 'solely or partly because of the information' provided by a data-matching exercise.

The AAT found that the letter of 9 May 1995 did not comply with s.11(1) of the Data-Matching Act. It also found that the decision to recover the overpayment of personal assistance to Sawyer was taken partly because of information given in steps 1, 4 or 6 of the a data-matching cycle.

Consequence of defective notice

The AAT found that the DSS cannot take action to recover an overpayment of personal assistance before it has complied with s.11(1) of the Data-Matching Act.

But there was nothing to stop the DSS from giving Sawyer a further notice which strictly complies with s.11(1), and then taking further action to recover the overpayment. The AAT also recommended the DSS reconsider the form of its standard letter.

Formal decision

1. The Tribunal set aside the decision under review.
2. The Tribunal remitted the matter to the Secretary to the DSS for reconsideration in accordance with the recommendation that a further notice strictly complying with s.11(1) of the Data-Matching Act be given to Sawyer before any further action is taken to recover the overpayment of personal assistance made to her.

[M.A.N.]

Debt recovery: garnishee notice

YOUNG and SECRETARY TO DSS (No. 11309)

Decided: 11 October 1996 by J.R. Dwyer.

Young requested that the AAT review an SSAT decision which affirmed the DSS decision to garnishee an amount of $8,078.60 as part recovery of a debt owed by Young to the Commonwealth.

The facts

Young owed a debt to the Commonwealth because she had received sole parent pension (SPP) and had failed to declare that she was receiving superannuation payments at the same time. Young pleaded guilty in the Magistrates Court to a number of charges under the *Social Security Act 1947*. The DPP advised that a non-custodial sentence was imposed because Young had repaid the amount set out in the Garnishee Notice. The total amount of the overpayment was $46,918.90. Young did not dispute that she owed the money nor that it was as a result of her failure to disclose the superannuation payments. The DSS continues to recover the overpayment at the rate of $500 a month. Young disagreed with the DSS submission that the Magistrate imposed a non-custodial sentence because she had repaid a large part of the debt. She argued that it was because it was her first offence.

As a consequence of an assault, Young had been awarded $5000 by the Crimes Compensation Tribunal in Victoria.

The issue

Young argued that the sum of $5000 should not have been included in the Garnishee Notice because it was an award by the Crimes Compensation Tribunal for pain and suffering as a result of the assault. The *Criminal Injuries Compensation Act 1983* (Vic.) provides in s.24(3) that an award of compensation shall not have any claim set off against it, and therefore the DSS could not claim the $5000.

The AAT identified one of the issues as whether or not the SSAT and the AAT had jurisdiction to review the issuing of a Garnishee Notice by the DSS. Section 1224 of the *Social Security Act 1991* (the Act) provides that an amount is a debt due to the Commonwealth if a person failed to comply with the provisions of the Act, and as a result was paid a social security payment. Such a debt is recoverable by the Commonwealth by way of a Garnishee Notice (s.1224(2)(c)). Section 1223(1) states that if a debt is recoverable pursuant to s.1224 of the Act, the DSS may give a notice to another party and require that party to pay the amount in the notice to the Commonwealth. According to s.1223(7F):

> 'This section applies to money in spite of any law of a State or Territory (however expressed) under which the amount is inalienable.'

Section 1253 provides:

> '(3) Subject to sub-section (4), the Social Security Appeals Tribunal may,
>
> for the purpose of reviewing a decision under this Act, exercise all the powers and discretions that are conferred by this Act on the Secretary.
>
> (4) The reference in sub-section (3) to powers and discretions conferred by
>
> this Act does not include a reference to powers and discretions conferred by:
>
> ...
>
> (f) Section 1233 Garnishee Notice.'

In *Walker and Secretary to DSS* (decided 8 March 1996) the AAT had agreed with the SSAT that it had no power to change the decision of the DSS to recover a debt by way of a Garnishee Notice. It was argued by the DSS that this decision is inconsistent with an earlier AAT decision *Secretary to the DSS and Matthews* (decided 15 March 1989). That decision dealt with the *Social Security Act 1947*, although those provisions are similar to those in the 1991 Act. It was suggested by the DSS that *Matthews* had decided that the decision to issue a Garnishee Notice was reviewable, but the SSAT and the AAT cannot themselves issue a Garnishee Notice. The AAT disagreed with that interpretation of *Matthews*. The decision dealt with whether the amount of the debt had been correctly calculated. The AAT decided that the debt could be recalculated even though a Garnishee Notice had been issued. The AAT concluded that in *Walker* and *Matthews,* the AAT had decided it does not have the jurisdiction or power to review a decision to give a Garnishee Notice.

The adjournment

The Tribunal was subsequently advised by the DSS that the decision of *Walker* had been appealed to the Federal Court. The AAT decided to adjourn awaiting the outcome of the Federal Court decision, even though this was a rare occurrence by the AAT. Because the Federal Court will be directly dealing with the issue of whether or not the SSAT and the AAT have power to review the issuing of a Garnishee Notice, it was appropriate to adjourn this matter because it was directly on point. The delay would not be of inconvenience to the parties.

The Tribunal was also of the opinion that it was appropriate to adjourn the matter to enable the parties to make submissions on whether the award from the Crimes Compensation Tribunal was inalienable. As the AAT pointed out, s.24(3) of the State Act was inconsistent with the Act, and the *Australian Constitution 1901* provides that the Commonwealth Act should prevail.

Formal decision

The AAT adjourned to a date to be fixed after the Federal Court has finalised *Walker v Secretary to the DSS.*

[C.H.]

[Editor's Note: Two aspects of this decision of the AAT should be commented on. The first is the decision of the Tribunal to adjourn. Pursuant to s.40(1)(c) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act), the AAT may adjourn proceedings from time to time for the purposes of reviewing a decision. In this matter, the AAT appears to have made a decision to adjourn. According to s.43(1) of the AAT Act when the AAT makes a decision in writing that decision will be either to affirm, vary, or set aside the decision and substitute another decision or remit the matter back with directions. There would not appear to be power to make a decision in writing to adjourn. The AAT has identified one of the issues in this matter as whether the SSAT and the AAT had jurisdiction to review the decision of the DSS to issue a Garnishee Notice. However, the application for review by Young did not complain about the issuing of a Garnishee Notice but rather about the amount set out in the Garnishee Notice. Young's complaint was that the $5000 should not be included in the amount garnisheed. A careful reading of s.1233 of the Act reveals that it deals with the issuing of a Garnishee Notice. There does not appear to be any provision of the Act which precludes either the SSAT or