

Recovery of overpayment

SECRETARY TO THE DSS and BLISS
(No. 11473)

Decided: 13 December 1996 by M.D. Allen.

The DSS decided to raise and recover a job search allowance overpayment of \$9100 from Bliss. After the SSAT waived recovery of half of the debt, the DSS applied for review of that decision.

Background

Bliss claimed job search allowance on 18 September 1992 and indicated in his initial claim form that he was self-employed. After an interview with a DSS supervisor on 23 September 1992, his claim was granted.

During the period 18 September 1992 to April 1993 Bliss continued to work in his business as a demolition contractor and excavator. For the same period he completed and returned to the DSS applications for job search allowance every fortnight. In those forms he indicated that he had not done any part-time or casual work, and that neither he nor his partner had received any other money.

The issue

It was not in dispute that there was a debt. The issue was whether all or part of it should be waived and which legislative provisions applied.

The legislation

The SSAT had made its decision on 16 June 1994 and the application to the AAT had been lodged on 16 July 1994. The AAT delayed the hearing until after the decision of the Full Court of the Federal Court in *Lee v Department of Social Security* 139 ALR 57. The majority, in *Lee* decided that s.1236A of the *Social Security Act 1991* which 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*'

did not apply to a claim for waiver when an application for review had been made prior to the date of effect of s.1236A, namely 24 December 1993.

The applicant in these circumstances had a right to have the application for waiver considered *de novo* in accordance with the discretion vested in s.1237 as it stood prior to that date.

The AAT noted that from 12 December 1995, s.1236A was repealed and substituted by a new s.1236A. The AAT could see no difference between the re-

pealed and new sections which would make the reasoning of the majority in *Lee* inapplicable to the new s.1236A.

As a consequence, the AAT decided that the question of waiver was to be determined on the principles set down in *Director-General of Social Services v Hales* 47 ALR 281.

The law as applied to the facts

The AAT found that if Bliss 'had completed the job search allowance forms in a correct manner, it would have become apparent to the Department that in fact he was carrying on business as a demolition contractor and was not unemployed but rather was under-employed'. The AAT found that Bliss had supplied false information to the Department, namely that he had not received income and that he was not engaged in part-time or casual work. As to the respondent's ability to repay, the AAT found that Bliss was employed and received \$500 gross a week. In conclusion, the AAT said that special circumstances could not be said to exist in Bliss' case.

Alternate reasons for decision

As the case of *Lee* was before the High Court on appeal, the AAT decided to also consider the matter on the presumption that the new s.1236A applied, together with ss.1237, 1237A and 1237AAD relating to waiver as current at the date of hearing.

The AAT considered s.1237A(1) which states:

'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.' [emphasis added]

On the facts as found, Bliss' debt did not arise solely because of administrative error by the Commonwealth but arose because of non-disclosure of his income. The debt could not be waived under s.1237A(1).

The AAT also considered s.1237AAD which states:

'The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or a false representation; or
 - (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (c) it is more appropriate to waive than to write off the debt or part of the debt.'

The meaning of knowingly making a false statement or false representation re-

quired the making of a statement with intent and knowledge of its falsity. The AAT was satisfied that Bliss had made false representations as to the amounts which he had earned knowing they were false. He may not have had the intention to defraud the DSS but s.1237AAD does not require an intention to defraud.

In conclusion, waiver of the debt was not permitted, if the law applicable was that set out in ss.1237, 1237A and 1237AAD of the *Social Security Act* as it stood at the date of the hearing.

Formal decision

The AAT set aside the decision under review and substituted the decision that the debt of job search allowance in the sum of \$9100 be recovered from Bliss at the rate of \$50 a fortnight.

[G.H.]

Debt under s.1224, waiver and write-off

DINGLI and SECRETARY TO THE DSS
(No. 11436)

Decided: 28 November 1996 by A.M. Blow.

The DSS claimed that Dingli had received an overpayment of age pension due to her failure to declare her husband's income. An overpayment of \$4407.50 was raised and recovery had commenced.

The facts

Dingli applied for and was granted age pension in August 1992. On the initial claim form she indicated that she had not been employed in the past 12 months but left blank a similar question in respect of her husband who had, in fact, been employed for the previous 9 years.

A recipient notification notice was sent to Dingli in September 1993. She was required to notify the DSS if her and her partner's gross combined income exceeded \$76 a week. She provided the DSS with information about interest but did not mention that their combined income exceeded \$76 a week.

In September 1994 Dingli returned an 'Income and Assets' form to the DSS in which she advised that her husband was working and had earned 4760.51 Maltese lire in the past 12 months.