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The AAT noted that from 12 December 1995, s.1236A was repealed and substituted by a new s.1236A. The AAT could see no difference between the repealed and new sections which would make the reasoning of the majority in *Lee* inapplicable to the new s.1236A.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 required 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.

The overpayment

Section 1224 of the *Social Security Act 1991* (the Act) provides:

(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 the provision of this Act or the 1947 Act;

the amount so paid is a debt due by the recipient to the Commonwealth.'

The DSS sought to rely on s.1224(1)(b)(ii) to show that the overpayment of age pension was a debt because Dingli had failed to comply with a provision of the Act. This was on the basis that she did not notify the DSS, in response to the September 1993 notice, that her and her husband's combined income exceeded $76 a week.

The AAT rejected that argument on the basis that the Dinglis' combined income already exceeded $76 a week and thus no event occurred which Dingli had to notify the DSS about.

The AAT did, however, find that the overpayment was a debt pursuant to section 1224(1)(b)(i) of the Act on the basis that Dingli had made a false representation about her husband's employment status in the claim form. By leaving the relevant question blank she conveyed the impression that her husband was not working.

Waiver

The AAT first considered whether the debt should be waived due to administrative error under s.1237A of the Act. It stated that the DSS had made an administrative error in processing Dingli's claim without requesting her to complete the questions which she had left blank. However, the debt was not solely due to administrative error because it was also attributable, in part, to Dingli's failure to complete the whole of the claim form.

The AAT then considered whether the debt should be waived due to the existence of special circumstances pursuant to s.1237AAD of the Act. The first requirement of that section is that the debt did not result from the debtor knowingly making a false representation.

The AAT considered whether Dingli had knowingly made the false representation in her claim form. It decided that Dingli understood the question in the claim form and had deliberately chosen not to disclose her husband's employment details in the hope of obtaining a financial advantage for herself. In view of this and the fact that the AAT did not feel that there were any special circumstances in Dingli's case the debt could not be waived.

Write off

The AAT finally considered whether the debt should be written off pursuant to section 1236 of the Act. As the debt was being recovered from Dingli by withholdings from her pension the AAT concluded that it was not appropriate to write off the debt.

Formal decision

The decision under review was affirmed.

[A.A.]

Student Assistance Decisions

AUSTUDY: whether prior degree the normal requirement?

PETERKIN AND OTHERS and SECRETARY TO THE DEETYA (No. 11552)

Decided: 20 January 1997 by D. Chappell.

Background

The cases of 6 students were heard together as their fact situations were either identical or analogous. The 6 students were completing the degree of Bachelor of Veterinary Science. Five of the students had completed a Bachelor of Science (Honours) degree before commencing Veterinary Science. The sixth student had completed a Bachelor of Applied Science (Agriculture).

The Faculty of Veterinary Science at the University of Sydney has two mutually exclusive categories of entry: one for school leavers and one for students with previous tertiary experience. The six students gained entry under the second category.

The 6 students had received AUSTUDY up until end of 1994 but were deemed ineligible in 1995. The students sought review of a decision of the SSAT that they were ineligible for AUSTUDY in 1995.

The issue

The issue was whether completion of the students' previous degrees should be treated as the normal requirement for admission to the Bachelor of Veterinary Science?

The legislation

The relevant AUSTUDY Regulations made under the *Student and Youth Assistance Act 1973* are regulations 41 and 47:

'41.(1) A student can get AUSTUDY in a year of study for a tertiary course only if, at the relevant date, the time already spent by the student in full-time study at the level of the tertiary course, is less than:

(a) if the minimum time for the course is more than one year — the sum of the minimum time for the course plus:

(i) half a year; or

(ii) if the student is enrolled in a year-long subject — one year; or

(iii) if the student's further progress in the course depends on passing a whole year's work in the course — one year

(3) In this regulation:

'minimum time' means:

(a) the minimum time needed to complete the course at pass level: and

(b) any additional honours years that the student had undertaken or is undertaking in the course.'

The parties agreed that the students were ineligible unless regulation 47 applied.

'47. For the purposes of subregulation 41(1), no account is taken of a course completed by a student if completion of the course is the normal requirement for admission to the student's current course (unless the current course is a Master's qualifying course).'

Is completion of a prior degree 'the normal requirement for admission'?

The students submitted that the completion of their first degree was 'the normal requirement' under regulation 47. The normal requirement was to satisfy either of the categories of entry. There are other 'special' admission requirements available to students. They argued that 'normal' does not mean 'most common' so it is irrelevant that more students are admitted straight from school. Finally they submitted that the legislation should be interpreted beneficially.

The Department submitted that each word in the phrase 'the normal requirement' was significant. If there was a choice of methods of admission, whether