# Garnishee decisions and review

**WALKER v SECRETARY TO THE DSS**
**(Federal Court)**

**Decided:** 4 February 1997 by Spender J.

**Background**

On 5 April 1995, the DSS decided to recover moneys owing by Walker by way of garnishee action under s.1223 of the *Social Security Act 1991* (the Act). On that date, a garnishee notice was served on the Advance Bank at which Walker held an account and into which, on the same day, the DSS deposited funds of $2134.40, being arrears of sickness benefits due to Walker. As a result the DSS recovered the amount of $2134.40 toward the debt owed by Walker.

Walker sought review of the garnishee decision. In essence his complaint was that he was entitled to have advance notice of the intention by the DSS to issue a garnishee notice. The SSAT considered s.1253(4) of the Act pursuant to which the Tribunal cannot exercise any power or discretion contained in s.1233 to direct that garnishee action proceed. The SSAT decided that the DSS had complied with s.1233 of the Act, which provides for notice of the garnishee action to be given to the debtor after the event, and that it had no power to direct that garnishee action proceed in a manner different from that.

On review, the AAT concluded that neither the SSAT nor the AAT had power to review the decision of the delegate to recover a debt by way of garnishee action, and as a consequence affirmed the decision of the SSAT 'that it had no power nor any discretion to enable it to change the decision sought to be reviewed'.

**The legislation**

Section 1233 of the Act empowers the Secretary to issue a garnishee notice to a third party. Section 1253(3) provides that subject to subsection (4), the SSAT can exercise all the powers and discretions of the Secretary. Subsection (4), however, provides that those powers and discretions do not include, amongst other things, a reference to powers and discretions conferred by s.1233 (garnishee notice). Section 1250 sets out the decisions which the SSAT cannot review, but does not exclude a decision as to garnishee.

**Was the decision to garnishee a reviewable decision?**

The Court stated that there was a difference between a power to review a decision and a power in the course of that review to exercise other powers or discretions. This was a distinction that the AAT had failed to make. Section 1252(4) prevented the SSAT and the AAT from exercising any of the powers or discretions of the Secretary in relation to s.1233. The exercise of a power entails the grantee of the power doing something which he or she is authorised to do by virtue of a power or discretion. Merely forming an opinion is not the exercise of a power or discretion. The Court agreed with the submission made by Walker that:

> '. . . subsection 1253(4) clearly prohibits the SSAT from issuing a garnishee notice. It is also likely that the sub-section would prevent the SSAT from deciding that such a notice should not be issued, for that might entail an exercise of the discretion to issue the notice or not to do so. Nor is it likely that the SSAT could set aside a decision to issue a garnishee notice and substitute a decision that a notice should be issued to a third party requiring them to pay a lesser amount than that specified in the original notice.'

The Court disagreed with a further submission that the SSAT may be able to remit the matter back to the Secretary for reconsideration in accordance with any directions or recommendation as this would permit the original decision to be set aside and thus indirectly permit the SSAT to do that which it is prevented from doing by the legislature in s.1253(4).

Although the Court found there was jurisdictional error in the way the AAT expressed its view of the restriction of the SSAT's powers in s.1253(4), the correct decision was made by the AAT to affirm the decision of the SSAT that it had no power or any discretion to enable it to change the decision sought to be reviewed, being the decision to garnishee the bank account. That decision was not vitiated by the jurisdictional error made. Even though there was a perceived error, it was therefore futile to remit the matter back to the AAT.

**Formal decision**

The application was dismissed with no order as to costs.

**[A.T.]**

[**Editor's note:** although there is a formal power on the part of a tribunal to review a decision to garnishee, it would seem impossible to do so without exercising the powers and discretions of the Secretary. Effectively, it would seem that the power is rendered futile by the operation of s.1253(4).]

# Power on review to decide method of payment

**WALKER v SECRETARY TO THE DSS**
**(Federal Court)**

**Decided:** 4 February 1997 by Spender J.

Walker made a claim for sickness allowance which was rejected by a delegate of the Secretary on the basis that he had not provided bank account details for the payment of his allowance. The decision was affirmed by the SSAT and the AAT. Walker appealed to the Federal Court.

**The legislation**

At the relevant time, s.677(1)(m) of the *Social Security Act 1991* provided that sickness allowance is not payable to a person for a period during which the person is qualified if, during that period, 'the person has not nominated a bank, credit union or building society account for payment of the allowance'. Under s.720(2) a person's sickness allowance 'is to be paid at intervals that the Secretary specifies to a bank, credit union or building society account nominated or maintained by the person'. Section 720(4) further provided that 'an instalment is not to be paid where the person has not nominated an account for payment'. There is, however, a discretion under s.720(6) of the Act for the Secretary to direct payment in a different way.

**The approach of the SSAT**

The SSAT considered whether the discretion under s.720(6) should be exercised in Walker's favour. In doing so it referred to the procedural guidelines of the Department, considered submissions by Walker concerning his religious beliefs as a Buddhist and took into account his medical problems, which Walker claimed created difficulties using banks. The SSAT determined that the reasons advanced by Walker did not justify the exercise of the discretion in his favour.

**Is discretion whether to direct alternative method of payment reviewable?**

On review, the AAT took the view that the discretion was to be exercised by the Secretary, and that neither the AAT nor the SSAT had power to review the matter because s.1253(4) provides that the SSAT cannot exercise powers and discretions vested in the Secretary by virtue of 'a provision dealing with the manner of payment of a social security payment'.

The AAT did, however, express the view that Walker's application had no merit and came close to being frivolous.

The Court accepted that the AAT had fallen into error, being the same error which the Court had identified in the related decision of Walker decided on the same date (see above), but again concluded that the matter would not be remitted back to the AAT, as this would be an exercise in futility.

**Formal decision**

The application was dismissed with no order as to costs.

**[A.T.]**

**[Editor's note:** the above cases would appear to be the last in a long running dispute, involving a number of appeals, between Walker and the DSS.]

# 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.

## *Unreasonable delay entering CMAA — breach of the existing agreement?*

**C and Secretary to the DEETYA**

**Decided:** 26 September 1996

C signed a Case Management Activity Agreement (CMAA) on 15 February 1996. A term of this Agreement required him to contact or attend his case manager when required to do so.

On 14 June 1996, his case manager wrote to him requiring him to attend an interview on 28 June to discuss his progress, and if necessary enter a new CMAA. He did not do so. On 4 and 17 July 1996, his case manager wrote to him requiring him to attend an interview on 24 July to review his CMAA, and enter a new CMAA. He did not attend this interview either. On 26 July, an officer of DEETYA issued C with a 'Notice of Failure to Enter into Activity Agreement — Unreasonable Delay' and cancelled his newstart allowance.

The SSAT noted that C's failure to attend interviews was originally dealt with as an unreasonable delay in negotiating a new CMAA. However, on internal review, the authorised review officer had instead treated it as a failure to take reasonable steps to comply with a term of the existing Agreement (the term requiring C to attend upon his case manager when required to do so). Since the letter required C to attend an interview with his case manager in order to enter a new Agreement, failure to comply could be argued to fall within both categories.

The SSAT noted that unreasonable delay in entering a CMAA led to loss of qualification under ss.45(5)(a) [or 45(5)(c)], 44 and 38 of the *Employment Services Act.* In contrast, failure to take reasonable steps to comply with a term of the current Agreement, led to loss of qualification under ss.45(5)(b) and 45(6) of the Act. While these requirements exist side by side, they are separate requirements, with different tests for compliance.

The procedural steps leading up to re-negotiation of an agreement — which would inevitably require a meeting with the case manager at some stage — should not be seen as involving a term of the existing Agreement. Since the requirement to attend on the Case Manager when required is a standard term of all Agreements, to do so would render the statutory provisions irrelevant. Therefore, a requirement to attend can either operate as a requirement to enter a new Agreement, or a requirement imposed under a term of the existing Agreement, but not both. If attendance was required to negotiate a new Agreement, it could not be treated as having been required under a term of the existing Agreement.

In this case, since the purpose of the interview was to enter into a new CMAA, C's actions should be considered in the light of whether he had 'unreasonably delayed entering into a CMAA, rather than whether he had 'failed to take reasonable steps to comply' with the terms of his current Agreement. The SSAT accepted that the letters sent to C required him to enter into a new Agreement.

The SSAT spoke to a treating doctor whom C had seen (in August and September 1996) with regard to his heroin abuse. The doctor was satisfied that he had been using heroin for the past several months, and that the level of his habit would be enough to adversely affect his memory. The SSAT accepted (on the basis of this evidence and C's presentation before the Tribunal), that he was 'unwell' during the period concerned, and as a result was unaware of his obligations. It concluded that the effect of C's heroin use was sufficient to leave him unaware of his obligation to attend the interviews. Given this, his delay in entering a new agreement was not 'unreasonable', and newstart allowance should not have been cancelled.

## *Job search allowance — newly arrived resident's waiting period*

**D and Secretary to the DSS**

**Decided:** 4 September 1996

D was granted an independent (Migrant) (Class AT) Sub Class 126 visa on 2 November 1995. However, due to the death of his father, he delayed coming to Australia and only arrived on 25 June 1996. He applied for job search allowance the following day.

The DSS refused to grant the allowance, arguing that D was subject to the newly arrived resident's waiting period, and was not entitled to job search allowance for 26 weeks from the date of his arrival in Australia. D appealed to the SSAT.

The SSAT held that under s.541 B(1) of the *Social Security Act,* D (having entered Australia after 1 January 1993 and holding a permanent visa) was subject to a newly arrived resident's waiting period. Under s.541C(1) and (3), this period started when D's permanent visa came into effect and ended 26 weeks after the day on which D was granted the visa.