

Waiver

The AAT heard evidence of Santa Ana's financial circumstances and decided that he could afford to repay the debt at the rate of \$50 a week.

Formal decision

The AAT varied the decision so that Santa Ana was liable to repay social security payments made to his mother until 20 October 1988, and the debt was to be repaid at the rate of \$50 a week.

[C.H.]

Debt: full-time/ part-time student

JIANG and SECRETARY TO THE DSS
(No. 11943)

Decided: 16 May 1997 by D.W. Muller and M.M. McGovern.

Jiang requested review of the decision to cancel payment of his newstart allowance (NSA) in November 1995, and to raise an overpayment of NSA and job search allowance (JSA) of \$2587.89 paid between 13 July 1995 and 16 November 1995.

The facts

Jiang had been granted a 4-year temporary residence visa in 1990, and he was paid a special benefit from 1991. He continued to be paid the special benefit while he studied for and then completed his Masters degree in April 1994. In November 1994 Jiang was granted permanent residency. After finishing his Masters, Jiang had tried to obtain employment in his field. He was unsuccessful. At the end of 1994 Jiang had gone to the DSS and the CES and explained that he was looking for work. He was told that there was no need to transfer from the special benefit to JSA.

In 1995 Jiang enrolled in a PhD course. He told the DSS that he had enrolled in a PhD course, and gave them a letter from the university which advised that Jiang was a full-time student. Jiang told the AAT that he attended university once a week or once a fortnight. In mid 1995 he was visited by an officer of the DSS who advised him to transfer to JSA. Jiang told the AAT that when he completed the form he did not indicate that he was a student on the advice of the DSS officer. The JSA was granted. In November

1995 another officer of the DSS advised Jiang that he was not entitled to JSA or NSA because he was a full-time student, and his payments were cancelled. Jiang had completed a form every fortnight in which he did not reveal that he was a student. He told the AAT that he had completed the first form correctly, but in the later forms he did not reveal he was a student because he did not think he was full-time and he had already told the DSS he was a student. He had attempted to tell his case manager but she was not interested.

The AAT's assessment of the evidence

The AAT found Jiang to be a truthful and reliable witness, who had been co-operative with the DSS in all his dealings. From January 1995 the DSS had been aware that Jiang was a full-time student. He would not have applied for JSA if the DSS officer had not visited him and encouraged him to do so. This DSS officer had been aware of Jiang's status. Jiang had told the DSS that studying was only filling in time while he looked for a job.

Full-time student

The AAT said that it was aware of AAT decisions which had found that the Tribunal should be guided by the student's status as stated by the university when deciding whether a student is full-time or part-time. However other AAT decisions had found that it was necessary to examine each case on its merits. In this matter the AAT preferred to look at the facts 'rather than use a mechanical formula': Reasons, para. 7. The AAT concluded that Jiang was not a full-time student on the evidence.

Waiver

In the alternative the AAT considered whether the overpayment should be waived. The DSS had argued that Jiang had given false information when he failed to advise the DSS that he was a full-time student. The AAT rejected this argument, and found that Jiang had been paid JSA and NSA solely due to administrative error, and that he received the money in good faith. It also found that there were special circumstances in this case.

Formal decision

The AAT set aside the SSAT decision and determined that Jiang did not receive a social security benefit to which he was not entitled. If he did, any debt should be waived.

[C.H.]

[Editor's Note: The AAT did not explain what made the circumstances of this case special. Presumably it was influenced by the

fact that Jiang would have continued to be entitled to special benefit throughout the period in question.]

Mature age allowance: carrying on a business

MILLS and SECRETARY TO THE DSS
(No. 12040)

Decided: 18 July 1997 H.E. Hallows.

The SSAT had varied a DSS decision to raise and seek recovery of a debt of mature age allowance (MAA) paid to Mills so that the period was reduced and ended on 19 October 1996.

The facts

Mills lodged a claim for a MAA on 12 August 1994 when he turned 60. He had not worked since 1987. His claim was accepted and Mills was advised in writing that he must tell the DSS if his income exceeded more than \$45 a week. Mills' annual income was recorded as \$2. In September 1995 the DSS advised Mills that the Tax Office had recorded that he (Mills) was employed. He was asked to supply details of his income. Mills' employer provided the DSS with information about the period of his employment and the lump sum payments made to him. Mills objected to the method used by the DSS to calculate his fortnightly income. He argued that his expenses associated with earning this income were unusually high. He had initially believed that he was to be hired as a consultant. When he was told that this was not possible, he was already committed to the project and so continued the employment.

Mills had approached the DSS for advice when he was attempting to obtain the consultancy. He was told that if he was self employed, he would be able to reduce the income from his business by his expenses. Mills calculated that his expenses were greater than his earnings, and so he did not advise the DSS that he had an income. Mills' employer supported Mills' evidence that he was to be employed as a consultant initially. Mills told the AAT that he had not informed the DSS of his actual employment, but had discussed it in general terms. Because he did not earn more than \$45 a week after deducting expenses he did not advise the DSS that he was earning an income.

Mills told the AAT that he commenced his duties in October 1994 and completed the first part by 22 December 1994. He had incurred expenses associated with obtaining employment between July 1993 and September 1994. He signed an employment form in November 1994 which enabled his employer to deduct tax from his payments. Mills had receipts for expenses of \$732 for the period in question. He explained that a number of papers had gone missing following a break-in at his home. He estimated expenses to be over \$8000.

The law

Section 1072C of the *Social Security Act 1991* provides that if a person carries on a business, then the person's ordinary income from that business can be reduced by losses and outgoings, depreciation and allowable tax deductions.

To receive the MAA, Mills must satisfy the DSS that he was unemployed in the relevant period (see s.660ZBA).

Carrying on a business

The AAT was referred to *Lennen and Secretary to the DSS* (decided 12 May 1995) in which it was decided that 'carrying on a business' meant working under a contract for service to deliver a defined result or product. The person should not be working under the control and direction of the employer. In *Panagis and Secretary to the DSS* (decided 5 March 1997) 'carrying on a business' was referred to as a commercial enterprise, that is, activities engaged for the purpose of profit on a continuous and repetitive basis.

The AAT concluded that Mills was not 'carrying on a business' because 'his activities were not undertaken as a commercial enterprise nor as a going concern for the purpose of profit making': Reasons, para. 17. Mills' relationship with his employer was as an employee, because he worked under direction. Therefore Mills' expenses could not be deducted from his income.

Unemployed

The AAT decided that Mills was unemployed except for the period between 20 October 1994 and 20 December 1994 when his employer provided details of payments. This meant that Mills could be paid the MAA for the rest of the period in question taking into account his income.

The debt

The AAT found that Mills did not earn any income between 20 December 1994 and 9 January 1995 and no debt should be raised for that period. However, he recommenced part-time employment

from 12 January 1995 and this would have to be taken into account when calculating the period of the overpayment. It seemed reasonable to calculate the overpayment by averaging the lump sums paid to Mills as being earned on a fortnightly basis. The AAT found that Mills was paid an amount of MAA because he failed to notify the DSS of his income, and thus he owed a debt to the Commonwealth.

Waiver

The AAT found that Mills did not inform the DSS of his employment but that he acted on advice he had received from the DSS. The AAT concluded that it was not appropriate to waive the debt: 'although he did not knowingly fail to comply with the Act, he could have provided better details to the respondent (DSS)': Reasons, para. 21. However it was appropriate to waive part of the debt because of the advice Mills had received from the DSS and his endeavours to obtain employment at his own expense. This constituted special circumstances.

Formal decision

The AAT set aside the SSAT decision and substituted its decision that the debt be recalculated according to the findings of the AAT, and that half the debt be waived.

[C.H.]

Request for review of decision: the 3-month rule

SECRETARY TO THE DSS and MANGANO
(No. 12078)

Decided: 31 July 1997 by H.E. Hallows and J.A. Hooper.

Background

Mangano applied for an age pension on 18 July 1995. On the claim form, completed with the assistance of a departmental officer, Mangano's business address was recorded. Subsequently this was crossed out and his residential address substituted. By letter dated 24 July 1995, the DSS sought from Mangano his latest personal tax return, and other documents. A file note dated 8 August 1995 stated that Mangano had advised he required another 2 weeks to provide his tax return. On 24 August, a decision was

made rejecting Mangano's claim for age pension because he had not provided the return. He was advised of the decision by letter dated 25 August 1995, a letter Mangano claimed not to have received.

Mangano gave evidence that he knew of the rejection, despite not having received the letter, because he had made numerous enquiries with the DSS about his claim, and had requested a copy of the rejection letter repeatedly. On 14 February 1996 Mangano was given a copy of the letter and on 20 February 1996 he lodged a further claim.

The SSAT set aside the decision of the DSS to reject Mangano's first age pension claim and remitted the matter back to the Secretary with directions that if age pension would have been payable to Mangano from 18 July 1996, pension must be paid from that date. The DSS appealed to the AAT.

The issue

The DSS argued that Mangano was entitled to age pension from 14 February 1996, as he had been sent notification of the decision to reject his first claim for age pension and had not sought review of the decision within 3 months. It relied on s.1302A and s.23(12) of the *Social Security Act 1991* which provided at that time:

'Notice of decisions under this Act

1302A.(1) If notice of a decision under this Act is:

- (a) delivered to a person personally; or
- (b) left at the address of the place of residence or business of the person last known to the Secretary; or
- (c) sent by pre-paid post to the address of the place of residence or business of the person last known to the Secretary;

notice of the decision is taken, for the purposes of this Act, to have been given to the person.

Note 1: compare section 28A of the *Acts Interpretation Act 1901*.

Note 2: Notice of a decision is taken to have been given to a person even if the Secretary is satisfied that the person did not actually receive the notice (see subsection 23(12)).

1302A.(2) Notice of a decision under this Act may be given to a person by properly addressing, prepaying and posting the document as a letter.

Note: compare the first limb of section 29 of the *Acts Interpretation Act 1901*.

1302A.(3) If notice of a decision under this Act is given in accordance with subsection (2), notice of the decision is taken to have been given to the person at the time at which the letter would be delivered in the ordinary course of the post unless the contrary is proved.

Note: compare the second limb of section 29 of the *Acts Interpretation Act 1901*.

Section 23(12) provides:

23.(12) If: