Administrative Appeals Tribunal decisions

Debt: reparation order: the DSS right of recovery

SECRETARY TO THE DSS and WORNES (No. 12395)

Decided: 14 November 1997 by P. Burton.

Background

The DSS sought to recover from Wornes an overpayment relating to sole parent benefit paid to her during the period February 1974 to October 1987, benefit to which she was not entitled as she was, throughout the period, a member of a couple. The amount overpaid during this period was $62,737.20. Wornes was charged and convicted of offences under the *Crimes Act 1914* in relation to payment of benefit amounting to $49,000 paid during the period March 1979 to October 1987. The prosecution did not include the earlier period of the overpayment due to an inability at the time of the prosecution to obtain sufficient evidence of the payments made to Wornes from February 1974 to March 1979.

Prior to sentencing Wornes, the judge adjourned to enable information to be provided as to the correct DSS entitlements of Mr and Mrs Wornes during the period March 1979 and October 1987. The notional entitlement to unemployment benefits and other payments for Mr and Mrs Wornes was assessed at $27,000. After being provided with this information the judge included, as part of his sentencing order, the requirement that Wornes pay compensation to the DSS, pursuant to s.21B(c) of the *Crimes Act 1914*, at the rate of $100 a week for the duration of her 5-year recognisance. In compliance with the reparation order Wornes repaid $21,292.80 to the DSS.

Subsequently the DSS sought to recover the outstanding amount of the overpayment in the sum of $41,444. On review the SSAT determined that the reparation payments of $20,800 expunged the debt for the period March 1979 to 1987, and that Wornes owed a debt to the DSS in the sum of $13,244.40 in respect of the earlier period, less the amount of $492.80 paid to the DSS over and above the requirements of the reparation order.

The DSS sought review of this decision. Prior to the hearing of the matter by the AAT, it was conceded by the DSS that Wornes was not a member of a couple during February 1974 to July 1974 and that there was no overpayment in respect of that period.

The issues

The DSS argued that the reparation order had not extinguished Wornes's liability to repay the whole of the amount of pension overpaid during the period March 1979 to 1987 of $49,000, but merely offset it.

The AAT considered that its task was to ascertain the judge's sentencing intention, to consider whether the judge had the power to make the order he did with those intentions in mind, and the effect of the order on the DSS's statutory powers of recovery.

The judge's sentencing intentions

The AAT examined the transcript of proceedings in order to ascertain the judge's intentions at the time of handing down Wornes's sentence and determined that the judge clearly intended his assessment of the DSS's loss, as represented by the reparation order, to be the amount Wornes was to pay to fully discharge her liability to the Commonwealth in respect of the overpayment which was the subject of the prosecution proceedings, so long as the payments were made in the manner and time prescribed.

The Court's power to make a reparation order

The AAT accepted that s.21B of the *Crimes Act 1914* empowered a court, in exercising its criminal jurisdiction, to make reparation orders in respect of loss as assessed by the court on the evidence before it, rather than the loss as determined by the Commonwealth by the raising of a debt under the *Social Security Act 1991* (the Act). The judge was empowered to offset the notional entitlements of Mr and Mrs Wornes in assessing actual loss to the Commonwealth.

The DSS argued that the Court had no power to expunge the debt, by ordering a reparation payment in an amount less than the debt obligation. It was contended that the power of waiver or write off was exercisable only by the Secretary of the DSS, or delegates, in accordance with the provisions of the Act. If the judge purported to waive the debt he made an error of law and the offending part of the order was not effective at law. These propositions were rejected by the AAT which concluded that the judge was not exercising a discretion under the Act. Further, the Commonwealth's ability to seek a reparation order is an alternative means of recovering a loss, to the taking of civil proceedings, and that its exercise may preclude the Commonwealth from taking further proceedings at civil law is clearly envisaged by the legislature.

The effect of a reparation order on the DSS's statutory right of recovery

The AAT considered that Wornes's compliance with the reparation order meant that there was no power to recover any further amount in respect of that part of the debt which arose in connection with the offence. The AAT distinguished Wornes's situation from previous cases in which recovery had not been effected by payment of a reparation order and therefore a debt to the Commonwealth remained, over which the DSS had powers of recovery under the Act. Had recovery not been achieved by the reparation order, the DSS would have been free to pursue recovery of the debt against Wornes.

The SSAT had considered that pursuit of recovery by the DSS of the balance of the debt placed Wornes in double jeopardy. The AAT indicated that double jeopardy arises only where an accused is in peril of being convicted of the same crime in respect of the same conduct on more than one occasion. However, it was accepted by the AAT in *Green and Secretary to the DSS* (1988) 16 ALD 187, that a person may be faced with double punishment if reparation was ordered and paid and the Commonwealth took proceedings to recover the same loss. Here the DSS sought only to recover the difference between the amount of the debt raised and that paid under the reparation order.

Neither was *res judicata* relevant, a rule which prevents a subsequent suit for the same cause of action. The AAT canvassed a number of issues relating to the application of issue estoppel, which applies where a party is estopped or barred from raising an issue in subsequent proceedings, if it has been determined in earlier proceedings involving the same parties. However, the AAT did not find it necessary to make a determination as to whether an issue estoppel arose on the facts of the case, given its finding that Wornes's obligation to the DSS was dis-

charged on her compliance with the reparation order. Even if the judge had exceeded his powers in making the orders he did, the AAT rejected the DSS submission that the order would be void. It would merely be voidable by a court or appeal body. Wornes's case was not the subject of an appeal.

As a result the DSS had only the power to pursue recovery of the overpayment for the earlier period, which was not the subject of the prosecution, and which, by consent, was reduced to July 1974 to March 1979. From this sum an amount of $492.80 was to be deducted, being the amount paid by Wornes to the Commonwealth in excess of the requirements of the reparation order.

Formal decision

The AAT affirmed the decision under review.

[A.T.]

Newstart allowance: loss of eligibility but not payability

SECRETARY TO THE DSS and FARRELL
(No. 12308)

Decided: 17 October 1997 by H.E. Hallowes.

The SSAT had decided that although Farrell had delayed entering into a case management agreement (CMAA) under the *Employment Services Act* (the ESA), the decision to cancel Farrell's newstart allowance (NSA) should be set aside with the direction that payment should continue until written notice was given to Farrell of the commencement of an activity test deferment period.

The DSS sought review of that decision on the basis that the SSAT had wrongly decided that allowance was still payable despite Farrell's loss of qualification.

Background

Farrell was in case management when he was sent letters asking him to attend for interviews to complete a CMAA. These were notices under s.38(5) of the ESA. Farrell failed to attend the interviews.

Farrell did not attend the hearing either before the SSAT or the AAT. The SSAT found that he had delayed entering into a CMAA. The AAT in this review was also to so find. However, the essential issues before the Tribunal were the complex legislative provisions that coexist in the ESA and *Social Security Act 1991* (the Act), and govern the case management systems through the two Acts — the interpretation of which has been assisted by the recent decisions of the Federal Court in *Secretary to the DEETYA v O'Connell* (1997) 2(10) *SSR* 143 and *Secretary to the DEETYA v Ferguson* (1997) 2(10) *SSR* 144.

The issues

The issues before the AAT were:

- the application of ss.44 and 45 of ESA and s.660I of the Act, under which provision a person's NSA may be cancelled;
- whether s.41 of the Act could apply to the cancellation of the NSA.

The law

In the original decision the DSS delegate had applied s.38 and subsection 45(5) of the ESA, and ss.607(1) and 660I of the Act. The AAT observed that no time had been allowed for Farrell to exercise his rights for review under s.44(1)(b) of the ESA.

As referred to above, the SSAT in their decision had set aside the original decision to cancel newstart allowance, saying that payment should be resumed until the DSS gave written notice of an activity test deferment period (ss.625 and 630B of the Act).

The SSAT was of the view that s.660I of the Act was not available to authorise cancellation of NSA, as that section provides for cancellation where the DSS is satisfied that an allowance is not payable. Section 660I provides:

> 'If the Secretary is satisfied that a newstart allowance is being paid to a person to whom it is not or was not payable under this Act, the Secretary is to determine that the allowance is to be cancelled or suspended.'

Section 45(5) of the ESA, on the other hand addresses 'qualification' not payability. The SSAT considered that s.41 of the Act did not operate to make a link between qualification and payability issues, as s.41, according to the SSAT's interpretation, only applies in relation to the grant of an allowance, not its cancellation.

Section 41 *Social Security Act*

The analysis of the function of s.41 of the Act by the SSAT is set out at some length in the AAT reasons. According to the SSAT, while argument could be put that s.41 could be read to provide for non-payability wherever there is non-qualification (that is whether the circumstances were of granting, continuing or ceasing an allowance), the use of the word 'before' limited s.41 to the grant of an allowance. The SSAT held that the cancellation was unsustainable (even though Farrell was not qualified) without the necessary step of the imposition of a deferment period for breach of the activity test, mandatory under s.630B.

In argument before the AAT it was put by the DSS that the proper section to apply to the facts was s.44 rather than s.45 of the Act, and the Tribunal accepted the correctness of this (applying *O'Connell).* Though no time had been allowed to Farrell to exercise his rights, the AAT found that s.44 had sufficiently been complied with.

On the proper application of s.41 of the Act, the Tribunal found, contrary to the SSAT's expressed view, that 'section 41 has a broader focus than that given to it by the SSAT': Reasons, para. 18.

The AAT found however, that s.41 of the Act provides for:

> 'payment of social security payment to a person who is qualified for the payment when no provision provides it is not payable. There are two hurdles to entitlement. "Before" means in front of or preceding in time. Mr Farrell was not qualified for NSA. His social security payment is not payable to him and under s.660I of the *Social Security Act* his NSA should be cancelled or suspended.'

(Reasons, para. 18)

Formal decision

The AAT set aside the decision under review. The matter was remitted to the DSS to reconsider on the basis that Farrell was not qualified for NSA and that payment should be cancelled or suspended under s.660I of the *Social Security Act.*

[M.C.]

[Contributor's Note: It is unfortunate that the reasoning process of the AAT is not more transparent in reaching this interpretation of the operation of s.41 in the Act. While the changes to s.1223 of the Act that came into effect in October 1997 remove some of the issues that arose in the past in regard to s.41, cases will still arise where the interpretation of the section is important. It will be interesting to see if *Farrell* settles the law on this point.]