

of the decision under s.1240 more than 3 months after notice is given and a determination is then made to grant the claim, the determination takes effect from the day the person sought the review.

Request for review

The decision to pay the pension from February 1996 was based on the fact that Mr Azzopardi had requested a review more than 3 months after the decision to reject his claim was made. The AAT did not accept that the communications from the Maltese official amounted to a request for a review from Mr Azzopardi. At the time of the first communication in January 1996, the officer did not know what the decision was, and the Tribunal found that in May 1996 the officer was discharging his duties as an officer under the Maltese department and pursuant to an International Agreement between Australia and Malta. He was not acting as an agent for the Azzopardis.

Consequently, the AAT found that 'the delegate who made the decision to grant the disability support pension was not exercising the power conferred by s.1240, but was exercising the power conferred by s.1239(1)(a)': Reasons, para. 14. The limitations on backdating in s.115(3) do not apply to decisions reviewed under s.1239; instead the provision in s.115(1) applies.

Mrs Azzopardi's claim for wife pension was rejected on the basis of s.146V of the Act which states that a woman is not to be granted a wife pension unless her claim is lodged and she qualifies before 30 June 1995. The AAT found that as Mr Azzopardi's DSP should take effect from January 1995, Mrs Azzopardi must be regarded as having qualified for wife pension prior to June 1995.

Formal decisions

1. The decision under review concerning Mr Azzopardi dated 11 June 1996 is varied to the extent that the date with effect from which his DSP is granted is changed to the first pension pay day after 9 January 1995.
2. The decision under review concerning Mrs Azzopardi dated 21 August 1995 is set aside. In substitution for that decision, a decision is made granting her a wife pension with effect from the first pension pay day after 9 January 1995.

[M.A.N.]

Age pension: hardship provisions; false statement; debt and write off

SECRETARY TO THE DSS and
WHITE
(No. 12520)

Decided: 23 December 1997 by H.E. Hallowes.

The background

In April 1994, White asked the DSS to consider her entitlement to age pension under the hardship provisions. White asked the Secretary to the DSS to disregard her assets of a property at Seaspray, and claimed that the valuations of property at Settlement Road, Pearsondale and Fisks Lane, Pearsondale were too high. In late April 1994, White advised the DSS she had sold her Settlement Road property to her son for \$70,000, that she lived at Fisks Lane, and she owned land across the road. Also, she had sold a number of properties to support a failed business venture of her son, and she had about 25 head of cattle on one property valued at \$300 each. She explained that two loans to her son and daughter-in-law no longer existed as the business was sold at a loss.

On 5 August 1994, White was granted the age pension under the hardship provisions. Reviews of White's assets and income were carried out in August 1995, February 1996 and August 1996. As part of these reviews White indicated she had either 32 or 30 head of stock. The loans were assessed as irrecoverable.

In April 1996, White's accountant provided some financial details to the DSS. In October 1996, a DSS Complex Assessment Officer noted that on 30 June 1994, White had 185 head of cattle (22 less than her opening stock for the financial year) and the farm had made a profit of \$15,308. As a result a DSS officer decided that the hardship provisions did not apply to White. The DSS cancelled White's pension and raised a debt of \$20,118.60.

The issue

White did not dispute the amount of the overpayment. The issues were whether this overpayment was a debt, and whether the debt should be recovered.

The legislation

Section 1224(1) of the *Social Security Act 1991* (the Act) states that an amount of social security payment paid to a person because the person made a false statement is a debt to the Commonwealth.

Sections 1236 and 1237 provide for writing off or waiving a debt to the Commonwealth in particular circumstances. These sections were amended by the *Social Security Legislation Amendment (Budget and Other Measures) Act No. 84 of 1996* (the amending Act). These amendments were effective from 1 October 1997. Part 4 of the Schedule to the amending Act includes provisions detailing, amongst others, that the amendments are to apply to an application for review that is not finally determined before 1 October 1997.

The hearing commenced on 22 September 1997 but was adjourned and reconvened on 11 December 1997. Consequently, the AAT applied the Act as amended on 1 October 1997.

The debt

The AAT found that White made false statements to the DSS about her cattle numbers. This continued until August 1996. The AAT also found that an amount of age pension was paid to White as she made a false statement, and the amount is a debt to the Commonwealth.

Recovery of the debt

In relation to waiver, the AAT did not accept the debt was solely attributable to administrative error (s.1237A(1)). Although the DSS did have the profit and loss figures on live stock available to it in April 1996, White continued to wrongly advise that she only had 32 head of cattle up until August 1996.

The AAT also considered s.1237AAD which provides for waiver in special circumstances. The AAT noted that White expected to be paid age pension until she could build up her stock numbers, and she purchased a slasher shortly after being granted age pension on this basis.

'The Tribunal was satisfied that Mrs White thought that she had an entitlement to age pension under the hardship provisions. However on the balance of probabilities White must have known that she was not providing the Secretary with correct figures with respect to her cattle numbers. The discrepancy between the figures she provided to the Secretary and to the Commissioner of Taxation are such that the Tribunal finds that it could not exercise the discretion in s.1237AAD as it is not satisfied that the debt did not result wholly or partly from Mrs White knowingly making a false statement.'

(Reasons, para.19)

Consequently waiver was not considered appropriate.

Section 1236 discusses write off of debts. The AAT heard evidence of how:

'after a lifetime of hard work and the accumulation of assets Mrs White now faces a distressing time in drought-ravaged East Gippsland on a reduced acreage with low cattle prices and she is struggling to keep her family home. A number of titles and some cattle were sold by a bank to settle debts.'

(Reasons, para.13)

The AAT decided that White's circumstances did not fall under s.1236(1A)(a) or (1B). The Tribunal was satisfied that White had no capacity to repay the debt at the current time. It decided to write off the debt until 1 July 1998, hoping that by this time the drought would break and White could consider her financial options.

Formal decision

The decision of the SSAT is varied to provide that:

- The payment of age pension to White be cancelled.
- White has been overpaid \$20,118.60 which is a debt to the Commonwealth.
- The debt shall be written off until 1 July 1998.

[M.A.N.]

Practice and procedure: stay order; newly arrived migrant

SECRETARY TO THE DSS and
PRIKHODKO
(No. 12547)

Decided: 20 January 1998 by G. Ettinger.

The DSS sought a stay of a decision of the SSAT that special benefit be paid to Prikhodko from the date of his application to the SSAT. Prikhodko's claim had been rejected by the DSS because he was a recent migrant to Australia. Following the SSAT decision, Prikhodko was paid special benefit until 6 January 1998.

Prikhodko arrived in Australia from Russia in June 1996 with his wife and son. The only payments he had received from the DSS were rent allowance, family payment and \$20 a week each to attend English classes. Support was also provided by friends and charities. The family was receiving \$186 a fortnight and paying \$170 in rent.

The law

Section 739A(1) of the *Social Security Act 1991* provides that a person who enters Australia after a certain date is subject to a newly arrived resident's waiting period. However if the person had suffered a substantial change of circumstances beyond the person's control, then the waiting period does not apply.

Section 41(2) of the *Administrative Appeals Tribunal Act 1975* gave the AAT the power to stay a decision of the SSAT. According to *Dart and Director General of Social Services* (1982) 4 ALD 553, the principles to be taken into account when deciding whether a stay order should be granted are:

- whether the appeal has merit;
- whether the applicant will suffer financial hardship; and
- whether the other party (the DSS) would be prejudiced.

The merits

For Prikhodko to succeed with his substantive claim, he would have to show that his circumstances had changed since coming to Australia. It would be argued on his behalf that he was inadequately advised of his entitlement to social security payments in Australia before he left Russia, and therefore his circumstances had changed. Also the \$1000 he had intended bringing with him to Australia had been stolen. The DSS argued that it was Prikhodko's expectations which had changed, not his circumstances. The AAT noted that the President would shortly hand down decisions on the meaning of 'change of circumstances'.

Financial hardship

The AAT accepted that Prikhodko and his family suffered extreme financial hardship.

Prejudice to the DSS

The AAT found that the DSS would not be prejudiced by paying a benefit to Prikhodko until this matter was heard by the AAT. Before the matter was heard it was likely the President of the AAT would hand down a decision on the meaning of 'change of circumstances'. The AAT found that it would be unlikely that the DSS would be able to recover any benefit paid to Prikhodko if he was unsuccessful before the AAT.

Formal decision

The AAT dismissed the DSS's application for a stay order.

[C.H.]

Newstart allowance: activity test and advertised positions

TYRIKOS and SECRETARY TO
THE DSS
(No. 12497)

Decided: 18 December 1996 by R.C. Gillham

Tyrikos sought review of a decision to defer payment of newstart allowance for 6 weeks because he failed to satisfy the activity test for newstart recipients under the *Social Security Act 1991* (the Act).

The background

Tyrikos had been in receipt of newstart allowance from February 1992 to July 1996 when the 6-week cancellation was imposed. In the period in question before the AAT, namely a fortnightly reporting period in July 1996, he had visited 2 prospective employers but found there was no advertised job available. Tyrikos then realised that in order to comply with the activity test to the DSS's satisfaction, he needed to apply for advertised jobs. He requested a new form from the regional office, but the request was refused.

Tyrikos then hand drafted his own form and approached two further prospective employers who had advertised jobs. His evidence was that he lodged the form at the office of the DSS though the form was not located. The respondent while not conceding that the form was lodged, did concede that a handwritten form in substantial compliance with the DSS's certificate would suffice to comply with the legislative requirements.

The issues

The issues identified by the AAT were whether Tyrikos complied with the activity test (ss.593 (1) and 601(1) of the Act), and in particular if he complied with a provision in relation to advertised job vacancies (s.601(1A)). The advocate for the DSS contended not only that the requirement to provide evidence of applications for advertised jobs was not met, but in the alternative, if it were met in substance, the positions were not genuine positions. Further, the DSS argued that Tyrikos was limiting himself in the range of jobs he was pursuing, which itself was a failure of the activity test.