Job search allowance: debt, waiver

NAGIEB and SECRETARY TO THE DSS (No. 12366)

Decided: 3 November 1997 by M.T. Lewis and A.R. Horton.

Nagieb sought review by the AAT of a decision of the DSS to raise and seek recovery of a debt of $2238.58 plus an administrative charge. Nagieb was paid job search allowance (JSA) from 12 May 1993 to 10 July 1993 whilst he was absent from Australia.

The facts

Nagieb came to Australia in December 1992 with his wife and 2 children under a special humanitarian program. Nagieb had tertiary qualifications, and had run his own import export business in Egypt. He had little understanding of English. He returned to Egypt in 1993 to visit his mother, and resolve some personal matters. Nagieb made three further visits to Egypt in 1994 and 1996, ostensibly to visit his sick mother. According to Nagieb his mother had paid for 2 trips, and he had won the ticket for his third trip in a raffle.

During Nagieb's absence from Australia, his wife lodged his fortnightly claim forms. Nagieb told the AAT that he had signed some forms before he left, and his wife had signed the rest in his name. Nagieb conceded that he may have completed some parts of the forms incorrectly, but that was because he did not use an interpreter. An interpreter was not available. Nagieb stated that he had always believed that he was entitled to the benefit. He had indicated to DSS staff that he was going overseas before he left, and they had taken copies of his documents. Nagieb said that DSS staff had told him that his wife could lodge his completed claim forms in his absence. His wife had confirmed this in evidence, but she had also admitted that a male person had accompanied her to the DSS office. She said that the DSS staff knew she was lodging the forms on her husband's behalf.

Later in his evidence, Nagieb said that a friend had completed his fortnightly forms for him. Another friend had written a letter for him to give to the DSS stating he was going overseas. Nagieb had used the names of employers he had read in the paper to complete his forms. He did not actually contact these employers because he could not speak English. His wife had also used the names of employers from the paper. Nagieb thought she would have rung the employers to inquire about jobs.

The DSS staff gave evidence that they would have copied the relevant travel documents, but then would have advised Nagieb of any entitlement his family in Australia might have to DSS payments whilst he was overseas. The DSS would not have accepted Nagieb's forms lodged by a female, nor would they accept a form when they knew the person was overseas. The telephone interpreter service was available at all times.

At the time of the hearing Nagieb's wife was receiving newstart allowance and he was receiving spouse payments. Their total income was $872.20 less $40.51 withholdings. They pay rent of $180 a week and have no debts except on their old car which they are paying off at $297 a month. Nagieb has performed some short-term casual work in Australia. On behalf of Nagieb it was submitted that his debt should be waived because of his limited knowledge of English, lack of knowledge of the *Social Security Act*, inadequate advice from the DSS, and because the DSS had accepted forms from Nagieb's wife.

The law

The AAT decided there were two issues to be determined. The first issue was whether Nagieb was eligible for JSA during the relevant period, and the second, whether the debt can and should be waived.

Section 513 of the *Social Security Act 1991* requires a person to be in Australia throughout the period of payment of JSA. According to s.1211 JSA is not payable to a person who is outside Australia. Sections 1223 and 1224 set out the requirements to establish if an amount has been overpaid. If an amount has been paid which was not payable, and the person was not qualified to receive that amount, it is a debt (see s.1223(1)). Section 1224(1) states that if an amount has been paid because a person made a false statement or failed or omitted to comply with the Act, then there is a debt.

There have been a number of changes to the sections dealing with waiver. On 24 December 1993 the provisions were amended so that they purported to apply to all debts whenever incurred. A debt could be waived if it was caused solely by administrative error on the part of the DSS, and the person received the payment in good faith. There were other circumstances allowing a debt to be waived which are not relevant to this matter.

On 12 December 1995 there were further amendments which applied to debts raised on and after 1 January 1996, and amounts outstanding on that date. Included amongst those amendments was the ability to waive a debt in the special circumstances of the case (other than financial hardship), if the debt did not arise because of a false statement or non compliance with the Act, and it is not more appropriate to write off the debt.

Further amendments were made on 23 December 1996 requiring a debt to be waived if the payment was made solely because of administrative error, the payment was received in good faith, and the debt was not raised within 6 weeks of the first payment or the end of any notification period the person has complied with. This provision also applies to part of a debt. The transitional provisions of the amending act, state that the amended sections apply from 1 October 1997 and do not extinguish or prevent the recovery of any debt outstanding at that date. If there is an application for review of a decision to recover a debt, then from 1 October 1997 the amended sections apply on review.

The debt

The AAT found that Nagieb was overseas between 12 May and 10 July 1993, and according to s.513 he was not entitled to JSA. With respect to whether the debt should be raised under s.1223 or s.1224, the AAT found that neither Nagieb nor his wife were credible witnesses, because their evidence was inconsistent. It found that Nagieb's wife did not lodge his forms, and these forms did not indicate that Nagieb was overseas. Further Nagieb did not look for work when he was overseas. The AAT did not accept that the DSS had committed all the administrative errors alleged by Nagieb and his wife. It concluded that JSA was paid as a result of a false statement or false representation, and therefore there was debt to the Commonwealth pursuant to s.1224.

Waiver

To determine the relevant law applicable, the AAT first considered the history of this matter. The initial decision to raise a debt was made on 11 August 1993. The request for review occurred on 30 May 1994, but without reference to waiver. Waiver was not considered by the authorised review officer (ARO) at first. The AAT referred to *Lee* v *Secretary to the DSS* (1996) 139 ALR 57, and concluded that it was not clear when a decision had been made on waiver. Was it implied

when the debt was raised, or when it was actually considered by the decision maker? The AAT stated that it was consistent with *Lee* that:

> 'before an accrued right to have the decision reviewed arises by reference to the powers exercised, there must be a decision dealing with waiver, or a decision which should have dealt with waiver and omitted to do so.'

(Reasons, para. 56)

The AAT found that the issue of waiver was not considered until 15 July 1994 by the ARO. There were substantial amendments to the waiver provisions after this date. The amendment from 1 January 1996 applied to all debts outstanding at this date. Similarly the 1997 amendments applied to outstanding debts. Part of this debt was outstanding at both these dates. Therefore, the 1996 and the 1997 amendments applied to the consideration of waiver of this debt. In respect to that part of the debt which had been repaid prior to 1 January 1996, Nagieb had an accrued right to have this amount reviewed under the unamended Act. That is, was there administrative error? The AAT concluded that there was no administrative error in this case and nor were there any special circumstances. The debt was incurred because Nagieb and his wife made false statements to the DSS. Therefore, the debt should not be waived under either the unamended Act, nor under the later two amendments.

Formal decision

The AAT affirmed the decision under review

[C.H.]

Debt: differing pay periods, manner of calculation

NOLAN and SECRETARY TO THE DSS
(No. 12442)

Decided: 27 November 1997 by J. Handley.

Nolan was overpaid job search and newstart allowance during several periods in which she was also in receipt of salary and compensation. The SSAT had affirmed the decision made by an authorised review officer that the amount of the debt was $1822.41. Nolan disputed the manner in which the overpayment was calculated and the amount of the debt.

Differing pay periods of the employer and the DSS

One of the difficulties raised in calculating the amount of the debt was that the pay periods relating to employment did not coincide with the pay periods of the DSS. The AAT accepted that the DSS was entitled, inferentially, to conclude, despite the differing pay periods, that there was an overpayment. The pay periods were not so far apart as to prevent an interpretation or an inference from all surrounding facts that income received was less than actually declared (*Secretary to the DSS* v *Danielson* (1997) 2(7) *SSR* 103).The AAT also agreed that the DSS was entitled to calculate the rate of the overpayment by converting the amounts actually paid to Nolan each fortnight into average daily rates and then calculating the pension entitlement for the nearest corresponding DSS pay period by also converting those entitlements into average daily rates. There was little other alternative to this method of calculation.

Lump sum or arrears of fortnightly payments

Further, the AAT agreed with the manner in which the DSS dealt with a compensation payment paid to Nolan in a lump sum, but representing arrears and covering a prior period of five fortnights in which Nolan was incapacitated for work. Initially this sum had been treated by the DSS as income only for the fortnightly period in which it was actually received by Nolan. The DSS then recalculated the amount of the debt, and determined that the compensation was to be reapportioned as income over the five fortnightly periods during which the incapacity occurred, and for which the compensation payment was calculated and paid. The AAT concluded that the latter was the correct approach and that to treat the payment in any other manner would contravene s.1068-GA of the *Social Security Act 1991*.

The AAT's conclusions

The AAT was satisfied that for one of the periods in question there was a significant discrepancy in the amounts declared by Nolan as having been earned by her on her fortnightly continuation forms and the amounts actually earned. However, in relation to a further subsequent period, Nolan had declared the amount actually received by her in the previous fortnight from her employer, being the fortnightly period closest in time to the DSS fortnight. Although she did state that she was in receipt of Workcover, she had not distinguished between salary and compensation payments, but the fortnightly continuation forms had not asked her to do so. For these reasons the AAT remitted the matter back to the DSS for recalculation of the debt amount.

Formal decision

The decision under review was varied and the application was remitted to the DSS for recalculation of the amount of the overpayment, such sum to be repaid at $10 a fortnight from Nolan's ongoing benefits.

[A.T.]

Family payment: shared payments

HUME and SECRETARY TO THE DSS and PAULINE HUME (joined party)
(No. 121439)

Decided: 27 November 1997 by J. Handley.

Background

Hume, a non-custodial parent, applied for and was paid by the DSS a proportion of the family payment otherwise payable to his former partner in respect of their two children. For a period of time Hume was paid 28% of family payment. On internal review in 1996, that payment was cancelled. When Hume sought review by the SSAT, the cancellation decision was set aside. The SSAT substituted a decision that Hume be paid a proportion of 8% (despite finding that in terms of periods of access, Hume had the care and responsibility of the children of the marriage for 16% of the time each fortnight).

There was a break in the continuity of the access arrangements between November 1996 and March 1997, so the SSAT's decision in respect of the share of family payment was for a fixed period, commencing from when the cancellation had occurred in July 1996 and finishing in November 1996.

The legislation

The *Social Security Act 1991* (the Act), provides for family payment to be paid in respect of children who are family payment children of a person. In part, this