

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 new-start 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 dis-

tinguished 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