February and June 1997. However, the AAT accepted the Department's submission that the legislation gave the decision maker no discretion to take into account factors of a compassionate nature when deciding whether or not to pay arrears.

Was a proper notice of decision given?

McCaughan submitted that the letter of 4 March 1997 should not be regarded as notice of a decision. She stated that the letter did not state that $43,677 was being used as an estimate for 1996/97 nor that s.1069-H18 of the Act was being applied in calculating her rate.

McCaughan suggested that the Department had made an error in not noticing her mistake which would have been obvious if they had compared the information on her payslips (provided with her child care assistance form) with that provided on the form itself.

The Department responded to this issue by undertaking to take these 'good customer service' issues up with the manager of the relevant office. The Department submitted that McCaughan did not challenge the decision transmitted in the letter of 4 March 1997 until November 1997. Consequently she could only be paid the higher rate from the date she sought review.

> 'The letter informs her that the family payment amount has been worked out using her estimated income, which is recorded at the back of the letter as being $43,667.00 for the family payment and $39,169.00 for the child care assistance payment. It advises that on receipt of her Taxation Notice Assessment, pursuant to s.873 of the Act she should tell the Department of the amount of taxable income on the return. Further details relating to her childcare assistance payment follow and the final paragraph invites her to:
>
> "Please read the back of this letter. It will tell you about your future fortnightly payments and the income used to work out how much we can pay you. It will also tell you about your Social Security rights and when you have to contact us".'

(Reasons, para. 11)

The AAT referred to the decision *McAllan & Secretary, Department of Social Security* (reported in this issue) which addressed the same matter. The AAT found that unlike the situation in *McAllan* the Department's letter of 4 March 1997 to McCaughan did inform her of the decision to pay her family payment for Lauren. The AAT found that the letter of 4 March 1997 did provide enough information about the figures upon which the family payment and child care assistance were calculated. In contrast to *McAllan*, where the AAT found that the Department had erred in not referring to a decision to terminate payment for one of the affected children, in McCaughan's situation the AAT found that the Department acted on mistaken information provided by McCaughen.

The AAT concluded that the letter of 4 March 1997 was a notice of a reviewable decision and that s.887(3) of the Act applied.

The AAT recognised that

> 'the Act gives no discretion to the decision-maker to rectify a mistake on the part of the applicant due to personal circumstances and an alleged "customer service" oversight on the part of the Department. Both aspects have disadvantaged payment of an entitlement and, in this Tribunal's view, constitute vital aspects of the administrative process in ensuring that recipients receive their current entitlement.'

(Reasons, para. 22)

The AAT referred to several decisions which have commented on this point: *Lythall & Secretary, Department of Social Security (1997)* AAT 12144; *Secretary, Department of Social Security & Bone-Thompson* (1993) 31 ALD 207; *Secretary, Department of Social Security & Sting* (1995) 2 (1) *SSR* 3 .

Formal decision

The AAT affirmed the decision under review.

[M.A.N.]

Family payment debt: request to be paid on an estimate; form approved by the Secretary; waiver and good faith

SECRETARY TO THE DSS and ABEYRATNE
(No. 13081)

Decided: 10 July 1998 by R.C. Gillham.

The background

Abeyratne and her family were absent from Australia between August 1995 and January 1996. In January 1996 Abeyratne sought to have family payment recommenced. When completing the appropriate form, Abeyratne estimated the family taxable income for 1995/96 would be $28,000. Their taxable income for 1994/95 was $32,656. Family payment recommenced on 1 February 1996 on the basis of the estimated income of $28,000. Their taxable income for 1995/96 was $43,306. Abeyratne advised the DSS of this taxable income in October 1996. In May 1997, the DSS notified Abeyratne that, as her family income for the financial year 1995/96 was not within 110% of the estimate of $28,000, she had been overpaid family payment and owed a debt of $2,270.90. The ARO affirmed the decision to raise and recover the debt, but the SSAT decided that the debt should be waived on the basis of administrative error on the part of the DSS.

The issues

In determining whether a debt existed and should be recovered, the AAT considered whether the form completed by Abeyratne in January 1996 constituted a request to the Secretary to assess her entitlement to family payment on the basis of the estimated income given for the tax year in which the request was made, that is 1995/96, rather than the base tax year. If there was no proper request, did the debt arise as a result of administrative error on the part of the DSS and did Abeyratne receive the payments in good faith?

The legislation

Under ss.1069-H13 and 1069-H14 of the *Social Security Act 1991* (the Act) the base tax year for a family allowance payday is the tax year that ended on 30 June in the calendar year that came immediately before the calendar year in which the payday occurs.The appropriate tax year to be taken into account for the purposes of assessing entitlement to family payment for such a payday is ordinarily the base year for that payday. However, a person can request the Secretary to make a determination under s.1069-H21 that the tax year in which the person makes the request be used as the appropriate tax year, rather than the base year, if their current year income has reduced below that of their base year. The form of the request is provided for in s.1069-H22 which states that the request must be in writing in accordance with a form approved by the Secretary.

Section 855 of the Act sets out what is to happen if estimated income is used as the basis for assessing entitlement to family payment and the estimate varies from actual taxable income. If the taxable income is found to be more than 110% of the estimate, the rate of family payment has to be recalculated on the basis of the actual income. Further, s.1223(3) of the Act states that if an amount of family payment has been paid to a person and the person's rate has been

recalculated under s.885, then the amount overpaid is a debt due to the Commonwealth.

Section 1237A(1) of the Act states that the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth is to be waived if the debtor received in good faith the payments that gave rise to that proportion of the debt.

Was the form a request for payment on the basis of an estimate?

> 'The question is, was the completed and signed form SC162 a specific request made to the Secretary to change the appropriate tax year from 1994/95 to 1995/96 in accordance with s.1069-H21 and, if so, was it made in accordance with a form approved by the Secretary?'

(Reasons, para. 14)

The DSS submitted that the nature of the questions on the form made it clear that payment was going to be made to Abeyratne on the basis of an estimate. The form also made it clear that if an estimate was used and it turned out to be incorrect, an overpayment would be raised. Abeyratne had identified a change in circumstances in that her husband's income was to be reduced. She then made an estimate of what the income might be for 1995/96. By signing such a form, the DSS argued, Abeyratne had requested that payment be made on the basis of the estimate provided.

The AAT considered the case of *Stuart and Secretary, Department of Social Security* (1998) 3(4) *SSR* 42 where the same issue had arisen. The AAT in that case concluded that there was no evidence that the form on which an estimate had been provided had been approved by the Secretary. Further, taking the whole form into account, the AAT was not satisfied that the form could be read as a request to the Secretary to determine the appropriate tax year as the current year.

In the Abeyratne's case the AAT concluded that they:

> 'could not have known that they were making a choice between receiving a greater amount of family payment but with the risk of incurring a debt if the actual income was underestimated by more than 10% and receiving a lesser but more certain amount of family payment based on their 1994/95 taxable income.'

(Reasons, para. 16)

Was there an overpayment of family payment?

The Abeyratne's actual combined income for 1995/96 was more than 110% of the estimate of $28,000. Section 885(1) required the rate of family payment to be recalculated. As a result the AAT determined that Abeyratne was overpaid $2270.90 in excess of her correct entitlement and that the overpayment amounted to a debt in accordance with s.1223(3) of the Act. The more important issue was whether this debt should be recovered.

Was there administrative error?

The AAT concluded that the provisions of ss.1069-H20, 21 and 22 had not been correctly applied by the DSS. The AAT was not satisfied that a request pursuant to s.1069-H21 was made either by intention on the part of Abeyratne or in accordance with s.1069-22.

> 'In the AAT's view, the Departmental officer who filled in the form which was then signed by Mr and Mrs Abeyratne, no doubt with the best of intentions, extended the respondent's desire to recommence family payments to include an increase in family payments having regard to an estimate of current year's income lower than base year income. The applicant should have calculated Mrs Abeyratne's rate of family payments on the basis of Mr and Mrs Abeyratne's assessed taxable income for the 1994/95 financial year. The AAT finds that this mistake amounted to an administrative error made by the Commonwealth.'

(Reasons, para. 20)

Was there good faith?

The AAT found that Abeyratne understood that family payments are income tested and that at the end of June 1996, Mr Abeyratne knew that his income for the period was much higher than the estimated income. Abeyratne took no action in relation to a DSS letter dated 6 February 1996 requiring her to inform the Department if the family's combined income exceeded or was likely to exceed $30,800 in the 1995/96 financial year. The AAT found that, while there was no suggestion of wrongdoing on the part of Abeyratne, she had reason to know that she was not entitled to the rate of family payment she was receiving after the time when the aggregate of Mr Abeyratne's normal weekly earnings plus overtime reached $30,800 during the 1995/96 financial year. The AAT concluded that in these circumstances the overpayment was not received in good faith.

The AAT also considered whether pursuant to s.1237AAD there were any special circumstances other than financial hardship to warrant waiver of the debt. The AAT found that there were no special circumstances.

Formal decision

The AAT set aside the decision under review and in substitution decided that the overpayment of family payment amounting to $2270.90 was a debt which should be recovered.

[M.A.N.]

[Editor's note: The AAT in this case made no firm finding as to what point in time it considered Abeyratne would have been aware that her husband's normal weekly earnings and overtime would have reached $30,800 during the 1995/96 financial year. It seems clear that for a part of the period of the debt, Abeyaratne would have been unaware that her estimate was incorrect and would have believed she was therefore receiving her correct entitlement. Despite this, the AAT made no attempt to consider whether waiver would apply to the proportion of the debt representing that period in which she would have received payments in that belief. Instead the AAT seems to erroneously assume that the lack of good faith applies to the whole of the period of the debt, precluding waiver of any part of the debt.]

Waiver: special circumstances

SECRETARY TO THE DSS and TUNCER
(No. 13043)

Decided: 2 July 1998 by R.P. Handley.

The issue

There was no dispute that Tuncer owed a debt of newstart (NSA) and jobsearch allowance (JSA). The issue was whether recovery of that debt should be waived, given the special circumstances applicable to Tuncer's situation.

The background

Tuncer migrated from Turkey to Australia in 1971, and worked as a labourer at Port Kembla from then until April 1987. In 1990 he was awarded compensation for loss of weekly earnings in respect of an injury occuring in May 1983 to his cervical spine, and for further injury to his spine due to his employment between May 1983 and January 1985. From July 1990 direct deductions of the weekly compensation payments were made from Tuncer's social security payments. In August 1991 Tuncer notified the DSS that he was going overseas, and on his return in October 1991 he lodged a claim for JSA, at that time providing details of the compensation payments he was receiving. This information was ignored by the DSS who paid JSA to Tuncer at the maximum single rate, because his wife was overseas, and then at the maximum married rate after her return to Australia.

On his fortnightly continuation forms Tuncer did not declare his weekly compensation earnings. In April 1993 in an interview (without an interpreter) with a Field Assessor he stated 'no' in response to a question as to whether he was receiving money from 'other sources . . . e.g. worker's compensation'. The assessor however noted on the file 'Compensation c on file' but recommended that payment continue at the same rate. In September 1993 Tuncer lodged a claim for NSA but did not declare his compensation pay-