Administrative Appeals Tribunal Decisions

Parenting allowance: arrears not payable

DI STASIO and SECRETARY TO THE DSS
(No. 13381)

Decided: 16 October 1998 by J.A. Kiosoglous.

Background

In mid-1995 the DSS implemented a change in benefits, abolishing the Home Child Care Allowance and introducing parenting allowance. Recipients of Home Child Care Allowance were sent an abridged claim form for parenting allowance during the first half of 1995 to enable the DSS to commence payments from July 1995. The abridged claim form did not provide a questionnaire in relation to partner income.

On 26 May 1995 Di Stasio lodged an abridged claim form. On the back of her form were included some details of her husband's income for the period February 1995 to May 1995, 'since leaving employment and being self employed'.

On 26 June 1995, the DSS sent a letter to Di Stasio advising her that her rate of parenting allowance would be $61 a fortnight, which was calculated by reference to her income of 'nil' only. The back of the letter included: *you should also tell us . . . if your partner's income goes below $774 per fortnight.* The DSS sent a similar letter, dated 2 August 1995.

On 20 March 1997 Di Stasio lodged a claim for additional parenting allowance. Her rate of payment of parenting allowance was subsequently increased from 27 March 1997.

On 24 May 1997 Di Stasio requested arrears of parenting allowance from 1 July 1995. The DSS decided not to pay arrears.

Issue

Should arrears of parenting allowance be paid? This depended on whether adequate notice of the decision in August 1995 was given.

Legislation

The relevant provisions are ss.910, 911, 927-929, 951M, 951N and 951T of the *Social Security Act 1991*.

Section 951M provides for a redetermination of the rate of parenting allowance if the rate being paid is less than the rate provided for in the Act.

Section 951T details the date of effect of determinations. Subsection 3 states that if a notice is given to the recipient of the making of the previous decision and the recipient applies for a review of the decision more than 3 months after the notice is given, a favourable determination takes effect from the day the recipient sought review. Section 951T(4) addresses the situation where no notice of the previous decision is given. It states that if a favourable decision is made, it takes effect from the day on which the previous decision took effect.

Was adequate notice of decision given?

Di Stasio contended that the crucial matter was the content of the letters sent to her after she lodged the abridged claim form. The presentation of letters from the DSS and the information provided in them was inadequate. She was just told the rate of payment ($61 a fortnight) and not told whether that was at a basic or an additional rate. She argued that in order to understand a departmental decision, additional information to that provided by the DSS was needed.

As Di Stasio was receiving a high rate of family payment, she contended that the DSS had all the information it needed to determine her correct rate of parenting allowance.

The DSS submitted that adequate notice was given to Di Stasio of its decision in the letter dated 2 August 1995. Hence, arrears cannot be paid to her beyond the date of request.

The DSS contended that the letters sent to Di Stasio should have alerted her to the fact that she was eligible for parenting allowance at a higher rate, by virtue of the details on the back of those letters.

The DSS submitted that the terms 'basic' and 'additional' do not appear in the legislation in relation to parenting allowance, where their nominally equivalent terms 'benefit' and 'non-benefit' are used. Therefore the decision under review was not made in relation to 'basic' and 'additional' parenting allowance as such but rather in relation to parenting allowance at a particular rate. The DSS referred to *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 where the High Court held that a decision is the final or cumulative decision, a determination having operative effect, rather than a step leading to a conclusion.

The DSS submitted that the Department's decision to grant parenting allowance at a particular rate was a clear decision and the DSS was under no obligation to notify Di Stasio of any reasoning along the way, such as that she might have been eligible for parenting allowance at the benefit or non-benefit rate.

The DSS relied on the AAT decision in *Sting (1995) 39 ALD 721* in which the AAT found that the respondent was notified of the decision of the DSS when he was advised of the total amount he would be paid and that it was not necessary that he be given notice of the manner in which the rate was calculated.

Notice sufficient

The AAT noted that the decision to pay the increased amount of parenting allowance to Di Stasio was made in March 1997 under s.951M of the Act.

> 'The date of effect of determinations under s.951M is provided for by s.951T and looks to the "previous decision" in which the former rate had been determined. In Mrs Di Stasio's case there were two prior decisions in relation to her parenting allowance, the validity of which has not been challenged, and the AAT is satisfied that they were validly made.'

(Reasons, para. 28)

The first was the decision of grant, of which Di Stasio was notified in the letter dated 26 June 1995. The second decision was a decision not to increase the rate of payment but to continue it at the rate of $61 a fortnight. Di Stasio was notified of this decision in the letter dated 2 August 1995.

The AAT found the notice in August 1995 was inaccurate. Di Stasio's rate of parenting allowance was not reduced but remained unaltered, and also Di Stasio had not supplied the DSS with new income details showing any increase in her or her husband's income. But the AAT found that the notice contained the correct rate of Di Stasio's parenting allowance. 'The AAT is therefore satisfied that the requirements of a notice under s.951T were met in this case, and so finds': Reasons, para. 31.

The AAT was satisfied that sub-section 951T(3) applied and that the correct date of effect of Di Stasio's increased rate of parenting allowance was March 1997. Accordingly, arrears were not payable to Di Stasio with effect from July 1995.

The AAT endorsed the comments made by the AAT in *Sting* in relation to

the presentation of notices by the Department. Nevertheless, the AAT noted that s.927(1), which states 'a person who wants to be granted a parenting allowance must make a proper claim for that allowance', clearly places the onus on eligible members of the public to submit a claim in order to qualify. The AAT commented that this onus was evident in the literature distributed by the DSS to social security recipients.

Formal decision

The AAT, pursuant to s.43 of the *Administrative Appeals Tribunal Act 1975*, affirmed the decision under review.

[M.A.N.]

Parenting allowance debt: failure to comply with notice; waiver; administrative error; special circumstances; write-off

MULFORD and SECRETARY TO THE DSS (No. 13359)

Decided: 9 October 1998 by E. Christie.

The issue

The sole issue for consideration was whether the parenting allowance debt amounting to $6920.40 for the period March 1996 to May 1997 should be waived because of administrative error or due to special circumstances, or should be written off.

Background

Mrs Mulford was receiving parenting allowance (PA) and other family-related payments when in the latter half of 1995 her husband began casual employment, which, from January 1996, became permanent employment. From January 1996 until March 1997 her husband informed the Department of his income through his fortnightly forms. In March 1996 Mrs Mulford attended her local department office to clarify her entitlement, and was advised that she was being correctly paid. She received a letter from the Department dated the same date as her interview, and a further letter in July 1996, but gave evidence that she did not read the backs of these letters as her circumstances had not altered from those discussed at the interview in March 1996. The letters had in fact notified that the Department was calculating her entitlement based on an income of 7 cents a fortnight for her and nil income for her husband.

The law

Section 950 of the *Social Security Act 1991* (the Act) provides that the department may give a PA recipient a notice requiring the person to notify of a change in circumstances or event. Where the person fails to comply with such an obligation, and a payment is made as a result, s.1224 of the Act provides that the amount so paid is a debt to the Commonwealth. Such a debt may be waived if the provisions of s.1237A are met, which provides:

> *'Administrative error*
>
> 1237A.(1) Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.'

Section 1237AAD further provides that waiver may occur if 'special circumstances' apply:

> '1237AAD. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:
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> (a) the debt did not result wholly or partly from the debtor or another person knowingly:
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> (i) making a false statement or false representation; or
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> (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
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> (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
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> (c) it is more appropriate to waive than to write off the debt or part of the debt.'

The write-off provisions are contained in s.1236(1A) of the Act, which provides:

> '1236.(1A) The Secretary may decide to write off a debt under subsection (1) if, and only if:
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> (a) the debt is irrecoverable at law; or
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> (b) the debtor has no capacity to repay the debt; or
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> (c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
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> (d) the debtor is not receiving a social security payment under this Act and it is not cost effective for the Commonwealth to take action to recover the debt.'

The decision

It was agreed by the Department and the Tribunal that Mrs Mulford was a truthful witness and had acted honestly in her dealings with the Department, and had received the PA in good faith. It was conceded by the Department that there was an element of Department error in that Mr Mulford had advised of his income on his newstart allowance forms, but contended that Mrs Mulford had contributed to the error by not notifying the Department in order to correct the incorrect information in letters it had sent to her.

The AAT, noting the suggestion that Mrs Mulford may not have specifically identified the payment about which she was enquiring when she attended the DSS in March 1996, concluded that the DSS officer was under a duty to correctly identify the payment about which advice was sought. The AAT stated that by making such a direct enquiry Mrs Mulford had met her notification obligations under s.950 of the Act, and was entitled to '... proceed on the basis that the correct advice had been given to her [that she was entitled to PA] by the department officer at the interview': Reasons, para. 42. As she received no further notification letter until July 1996, the Tribunal concluded that in the period March 1996 to July 1996 the overpayment was solely due to administrative error. As good faith was not in issue, the Tribunal directed that the debt in respect of this period be waived.

However, although a further notification which continued to incorrectly record the family income was sent to Mrs Mulford in July 1996, she did not respond and therefore contributed to the (continuing) administrative error. The Tribunal concluded that overpayments in respect of the period July 1996 to May 1997 therefore could not be waived.

The Tribunal next considered the waiver discretion in s.1237AAD and affirmed the benchmark criteria of *Beadle and Director-General of Social Security* (1984) 6 ALD 1 that, to amount to 'special circumstances', the situation must be unusual, uncommon or exceptional. The Tribunal concluded that such circumstances did not exist in Mrs Mulford's case. The Tribunal then examined the write-off provisions of s.1236, noting that Mrs Mulford's '... present financial circumstances are not comfortable, [but] neither are they desperate': Reasons, para. 49. The Tribunal concluded that write-off of the debt was inappropriate, but that the rate of recovery should not exceed $20 a fortnight.

The formal decision

The AAT set aside the decisions of the SSAT, and determined that recovery of payments received between March and