

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:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or false representation; or
 - (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (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:

- (a) the debt is irrecoverable at law; or
- (b) the debtor has no capacity to repay the debt; or
- (c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
- (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

July 1996 be waived, but that those from July 1996 to May 1997 be not waived, and that deductions from Mrs Mulford's continuing entitlements not exceed \$20 a fortnight.

[P.A.S.]

Sole parent pension: separately and apart from husband

SECRETARY TO THE DSS and MCNALLY
(No. 13368)

Decided: 12 October 1998 by D.P. Breen.

Background

In January 1997, the DSS cancelled payment of sole parent pension to McNally and raised an overpayment for the period December 1995 to October 1996.

Issues

Was McNally living with her husband during the relevant period?

Legislation

The AAT did not refer to the legislation in the decision.

Section 249 of the *Social Security Act 1991* (the Act) sets out the criteria for qualification for sole parent pension. Amongst other requirements, to qualify for a sole parent pension, a person must not be a 'member of a couple'.

'Member of a couple' is defined in s.4(2) of the Act. The issues that need to be considered when forming an opinion about whether someone is a 'member of a couple' or not are contained in s.4(3) of the Act. These include the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, the sexual relationship between the people and the nature of the people's commitment to each other.

The 'evidence'

The DSS submitted that the SSAT erred in accepting McNally's subjective evidence of her living arrangements rather than the objective evidence supplied from independent sources.

The DSS sought to rely on the fact that McNally had paid a debt owed to the DSS by her husband. McNally justified

this action on the basis that she had received a District Court judgment for damages and:

'a substantial amount of the quantum of that judgment was intended as recompense for the person who had cared for her in her period of incapacity which led to the action. That person was her husband.'

(Reasons, para. 9)

The AAT accepted McNally's explanation of why she paid the debt. The AAT did not accept that McNally's action established the nature of the relationship during the relevant period.

The DSS also called evidence of the McNallys' living arrangements during the relevant period.

The AAT accepted the evidence of McNally's daughter and her husband, the McDonalds, that during the relevant period, McNally remained in a property that she and her husband owned and that Mr McNally resided in a 'drift in, drift out' kind of arrangement with the McDonalds.

The AAT noted that throughout the period there was a measure of contact between McNally and her husband. The AAT commented:

'That is hardly surprising. They were living in a small country town. They retained a common bond in the form of and in the personae of their children. There was also a measure of support by each for the other; he mowing the lawn . . . and doing some maintenance; she apparently, for at least some of the time, doing his washing and discharging other small functions in his favour. This is not surprising either. It is my experience that people who are not well off financially and who are less than bloody-minded towards each other in the face of domestic conflict, maintain the mutually supportive attitudes reflected in the evidence in this case. In addition, the house at 8 Frederick Street was, as I have said, owned by the McNallys, was the subject of a mortgage and would clearly have been their most valuable asset whilst at the same time being their most demanding commitment. There was a clear need and, flowing from it, a motivation, to preserve its value. His contribution to the preservation of the asset, and thus its value, would in itself motivate her to reciprocate in the small way reflected in the evidence.'

(Reasons, para. 18)

The AAT found that McNally had lived separately and apart throughout the relevant period. 'The facts of the matter and the history of the McNally relationship are such that McNally was entitled to the sole parent pension throughout the period she received it': Reasons, para. 20.

The AAT stated:

'I acknowledge that the Administrative Appeals Tribunal does not review the reasons of legal forums and processes below. We decide de novo the issues arising from the decision under review. I would observe, however, having read the reasons for the decision of the Social Security Appeals Tribunal under review in this matter, that whilst on the evidence before that Tribunal I might not have reached the same

conclusion, there is nothing so inherently unacceptable in the Tribunal's reasoning as to call for interference by this Tribunal with its fact-findings.'

(Reasons, para. 20)

Formal decision

The AAT affirmed the decision under review.

[M.A.N.]

Age pension income test: employee or carrying on a business?

DAVIDSON and SECRETARY TO THE DSS
(No. 13236)

Decided: 24 August 1998 by D.W. Muller.

Davidson sought review of a decision to disallow as deductions from his gross income, losses, outgoings and depreciation relating to his activities selling real estate, for the purpose of assessing the rate of age pension to which he was entitled. Davidson was an aged pensioner who, in his spare time, sold real estate for Pine City Properties Pty Ltd. The deductions claimed by Davidson related to his car expenses, licence fees and mobile telephone costs. For the first three months of 1997 his gross income from real estate commissions was \$1720 and his expenses \$1712.68. His expenses had been allowed as deductions by the Australian Taxation Office. The DSS used Davidson's gross income for the purpose of assessing his entitlement to age pension, it having been determined that he was not carrying on a business.

The legislation

Section 1072 of the *Social Security Act 1991* (the Act) requires the calculation of the rate of reduction to pension entitlement to be made on the basis of gross ordinary income from all sources without any reduction, unless a pensioner carries on a business.

If a pensioner carries on a business, the ordinary income from the business is reduced by the factors set out in s.1075 of the Act for the purpose of the income test. Those factors relate to allowable deductions for the purposes of ss.51, 54(1) and 82 AAC(1) of the *Income Tax*