

be so unusual, uncommon or exceptional and of such a nature as to make it desirable to waive the part of the debt which arose from his receipt of the DFRBD pension in full. These circumstances included the Marshalls' financial position, the fact that debt was partly due to administrative error by the DSS and the difficulties the Marshalls had faced, including the threat of prosecution. For the same reasons the AAT found it was more appropriate to waive, rather than write off the debt.

The AAT also considered Marshall's under declarations of his earnings could be characterised as innocent mistakes, but he nevertheless incurred a debt pursuant to s.1224(1) as a result and there were no special circumstances.

#### AAT decision

The AAT decided that there was a debt as a result of the DFRDB pension, but waived it under s.1237AAD. There was also a debt due to the under declaration of earnings which must be repaid in full. The matter was remitted to the Secretary for recalculation.

[K.deH.]

## Newstart allowance: activity test agreement

CASTLEMAN and SECRETARY TO THE DSS  
(No. 13174)

Decided: 14 August 1998 by M.D. Allen.

Castleman requested review of the rejection of his newstart allowance claim because he had refused to sign an Activity Test Agreement requiring him to apply for at least 5 jobs a fortnight.

#### The facts

Castleman was a certified practising accountant who had previously been employed as a lecturer and, before that, by the Australian Tax Office. Just before claiming newstart allowance in January 1998, he had been receiving AUSTUDY while studying for a Graduate Diploma of Teaching. He had not yet completed the course as he still had to do a period of practical teaching, which meant he could not yet be employed as a teacher.

During a pre-grant interview at Centrelink, Castleman refused to commit

himself to making 5 job applications a fortnight. There were many positions for which he could apply as an accountant, but he required time to prepare adequate and fully detailed applications. To make 5 applications a fortnight he would have to make sham applications and he was not prepared to do so. To look for all types of work was impractical and he had to judge those jobs for which he was most likely to receive an offer of employment.

The AAT noted that Castleman considered his experience and qualifications suited him to a range of middle management positions, and had directed his efforts towards such positions within Queensland and interstate.

#### The legislation

To qualify for newstart allowance a person must satisfy the activity test. Subsections 601(1) and (1A) of the *Social Security Act 1991* (the Act) provide:

'601.(1) Subject to subsections (1A) and (3), a person satisfies the activity test in respect of a period if the person satisfies the Secretary that, throughout the period, the person is:

- (a) actively seeking; and
- (b) willing to undertake;

paid work, other than paid work that is unsuitable to be undertaken by the person.

601.(1A) The Secretary may notify a person (other than a person who is not required to satisfy the activity test) who is receiving a newstart allowance that the person must take reasonable steps to apply for a particular number of advertised job vacancies in the period specified in the notice.'

#### The status of policy

The AAT had before it Centrelink's policy guidelines setting out how the number of approaches to employers is calculated. It referred to the following passage from the judgment of Davies J in *Skoljarev v Australian Fisheries Management Authority* 22 AAR 331 at 337:

'Policy does not constitute a binding rule, unless a statute so provides, as does s.17(1) of the 1991 Act. Absent a statutory provision requiring compliance with policy, a decision-maker may depart from policy and, in an appropriate case, should do so. It is impossible to define or delineate the circumstances in which departure from policy is justified. Much depends upon the nature and context of the decision to be made, the nature of the policy to which regard is to be had and the nature of the individual circumstances to which attention is directed. In *Re Drake and Minister for Immigration & Ethnic Affairs* (No 2) (1979) 2 ALD 634, Brennan J said at 645 that, because of the part which policies play in fair administrative decision-making, the Administrative Appeals Tribunal should apply a lawful policy "unless there are cogent reasons to the contrary" such as "injustice in a particular case". In *Re Evans and Secretary, Department of Primary Industry* (1985) 8 ALD 627, Davies J and Mr R A Sinclair spoke of "special or unique circumstances". No term will in itself adequately express the point. The decision must be made having regard to the decision and its context, the

nature and ramifications of the policy and the nature and consequences of the individual circumstances which are relied upon.'

The AAT could see no reason why the policy which provided for 5 applications should not be applied. Castleman had failed to realise that in looking for paid work he could not voluntarily restrict his searches to what was the most appropriate work for him to undertake. He was required to apply for jobs for which he may have been successful, even though he believed himself to be over qualified for the position. By refusing to attempt 5 applications a fortnight he prevented himself from selling his labour on the open market. He had failed to satisfy the Secretary that he was actively seeking and willing to undertake paid work.

#### Decision

The AAT affirmed the decision under review.

[K.deH.]

## Newstart allowance overpayment: debt 'solely' due to administrative error; good faith

MACROW and SECRETARY TO THE DSS  
(No. 13217)

Decided: 26 August 1998 by B. Burns.

#### Background

Macrow was receiving newstart allowance (NSA) when in March 1996 he underwent a knee operation for an injury accepted as arising from his prior employment in the Australian Army. Before the operation Macrow enquired of the DSS as to the effect of any compensation he might receive, and on 28 March 1996 received a letter from DSS advising him to keep them informed about his compensation claim, and informing him that some or all of his NSA payments might have to be repaid should he receive compensation. He later did receive periodic compensation payments together with two lump sum payments whilst still in receipt of NSA, and subsequently an overpayment debt totaling \$3,695.84 for the period March to September 1996 was raised. Macrow sought review of this