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

MACROWand 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

decision but the authorised review officer affirmed it, although reducing the amount of the debt, and the DSS conceded a further reduction to $2646.56.

The law

The sole issue for determination in this matter was whether the debt, or part of it, ought to be waived. The relevant legislative provisions are contained in s.1237A of the *Social Security Act 1991* (the Act) 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.'

The decision

The AAT considered that the question of overpayment and its recovery had to be determined in relation to three periods of time:

- 15 March to 17 April 1996 (the first period) — during which Macrow received the first of two lump sum compensation arrears payments, representing his entitlement to 7 April 1996. The effect of this payment is that Macrow had no NSA entitlement during the first period. After discharge from hospital Macrow had visited the local DSS office to enquire about the effects of any compensation, which at that point he was not yet receiving. The Tribunal found that the overpayment in the first period had arisen because DSS was unaware that Macrow was receiving compensation. Although the DSS had given notice to Macrow of his obligations, it was not until well after the commencement of compensation payments that the DSS was notified of them. The Tribunal concluded that the debt in respect of this period could not be said to be *solely* due to an administrative error, and therefore waiver of it was not appropriate. The Tribunal did not accept that the delay by DSS in raising the debt constituted administrative error, as '[a]ny delay in raising the debt and notifying the applicant of such debt has no relevance whatsoever to the actual cause of the debt in the first period . . .': Reasons, para. 28.
- 18 April to 12 June 1996 (the second period) — in this period Macrow received fortnightly compensation payments which he declared on his fortnightly NSA forms. The DSS incorrectly assessed his rate of payment and continued his NSA but at a reduced rate, when in fact NSA payments to him should have been cancelled. The DSS conceded that that portion of the debt attributable to the second period should be waived on the basis that it arose solely through administrative error and that, having advised DSS of his compensation payments on his fortnightly NSA forms, Macrow had received the payments in this period in good faith.
- 13 June to 4 September 1996 — on 13 June the DSS made a further administrative error by removing compensation payments from Macrow's record altogether, resulting in return of his NSA payments to the maximum rate. In August 1996 Macrow received the second compensation arrears payment. The Tribunal found that the debt in this period was partially attributable to the DSS in that had the error it made in the second period not occurred and had Macrow's NSA payment been cancelled as it should have been, the debt in the third period would not have occurred. The DSS had made a further error in erasing compensation details from Macrow's records.

The Tribunal considered whether the debt in the third period could be said to be solely due to administrative error, concluding that the word 'solely' must be given its ordinary meaning. The tribunal noted the matter of *Gerhardt* (unreported AAT 10941; 17 May 1996) where the term 'solely' in the *Student and Youth Assistance Act 1973* was held to mean '. . . only or to the exclusion of all else . . .' The Tribunal concluded, in Macrow's case, that the DSS was entitled to rely on the accuracy of the information given to it, and that Macrow was under an onus to supply correct and reliable information. As he had not supplied full details of his compensation on his fortnightly NSA forms, Macrow had himself also partially contributed to the debt. As such, the debt was not solely due to administrative error, and so could not be waived.

In passing, the Tribunal considered the question of good faith, concluding that '. . . the very fact that [Macrow] was aware throughout the whole of the time he was receiving compensation that his newstart allowance should be reduced is such as to constitute an absence of good faith': Reasons, para. 35. The Tribunal affirmed the interpretation of 'good faith' in *Secretary, Department of Education, Training and Youth Affairs v Prince* (1997) 152 ALR 127 where it was held that

> '. . . Knowing that, in the relevant period, [the applicant] had no entitlement to receive . . . payment, he was never in a position to be able to assert that any mistaken payment made to him was one to which he had an entitlement . . . .'

and added in relation to Macrow that

> '. . . wilful blindness to one's financial affairs set against a background of awareness that one's entitlement to benefit will change upon certain events in clearly not indicative of good faith . . .'

(Reasons, para. 38)

Formal decision

The Tribunal affirmed the decision to recover the debts arising in the first and third periods in dispute.

[P.A.S.]

FOI: 'dob in' letter

HENRY and SECRETARY TO THE DSS (No. 13271)

Decided: 10 September 1998 by J. Dwyer.

Henry requested review of a DSS decision that had refused her access to information recorded by an officer of the DSS following a telephone call in relation to payment of benefits to Henry.

The facts

Henry was in receipt of a social security benefit in March 1997 when a caller rang the DSS to provide information about her. The officer recorded in the box provided that the caller did not have an objection to their name and address being released under the FOI Act. The original decision maker decided not to release the information on the basis that the information had been provided confidentially. Henry argued that the caller had specifically stated that the information about the caller's identity could be released.

The decision was reviewed and the review officer contacted the informant who asked that their identity remain confidential.

The law

Section 37(1)(b) provides that a document is to be FOI exempt if disclosure could or would reasonably be expected to disclose the identity of a confidential source of information.

Confidential source of information

The AAT adopted the test set out in previous cases of:

> 'A source is confidential if the information was provided under an express or implied pledge of confidentiality.'

(Reasons, p.11)

Thus the relevant time to ascertain whether or not the source was confidential was when the information was given, and not when the informant was con-