

The AAT concluded that such circumstances did not exist in White's case, and therefore waiver under s.1237AAD was also not possible.

In relation to the power to write off a debt, the Tribunal considered the factors enunciated in *Director General of Social Security v Hales* (1983) 47 ALR 281; (1983) 13 SSR 136 and summarised in *Waller and Secretary, Department of Social Security* (1985) 8 ALD 42. In this regard, the AAT noted that White had received moneys to which she was not entitled, but that on the balance of probabilities this had occurred through innocent mistake. The family financial situation indicated a severe negative cash flow sufficient for the Tribunal to conclude that financial hardship would result if recovery were pursued at that time. The Tribunal also noted that there were compassionate considerations (Mr White's psychiatric condition) and that recovery at a later time was possible, and concluded that the preferable decision was to write off recovery of the debt.

#### Formal decision

The AAT varied the decision under review to provide for the debt to be written off, with recovery to be pursued at some future time should the family financial circumstances change.

[P.A.S.]

## Overpayment of family payment: prescribed student child; waiver

**BARTLETT and SECRETARY TO THE DSS**  
(No. 13398)

**Decided:** 26 October 1998 by  
J.T.C. Brassil.

#### Background

Bartlett sought review of a decision to recover an amount of family payment made to her for her son Daniel during 1997. He turned 16 years on 27 March 1997 and became eligible for and was paid AUSTUDY from early April. A debt for the family payment paid between April and November 1997 was raised by the Department. In the course of the review processes, the amount to be recovered was reduced by the Social Security

Appeals Tribunal. The SSAT waived the overpayment after September 1997, as that post-dated a claim for newstart allowance lodged by Bartlett's husband which set out the amount of AUSTUDY being paid to Daniel. After September the SSAT characterised the debt as being attributable solely to administrative error. Bartlett did not dispute that the overpayment had occurred. Her argument was largely directed to issues of recovery. The representative of the Department did not argue that the SSAT's decision to waive the part after September was incorrect.

#### The issues

The AAT characterised the issues as being:

- whether Bartlett had notified a change of circumstances and whether an overpayment had been made;
- whether, if there was an overpayment between April and August 1997, any part of it was caused solely as a result of administrative error;
- whether, if there was a debt, there were any special circumstances such that the whole or part of the debt should be waived or written off.

#### The legislation

The *Social Security Act 1991* (the Act) provides for the issuing of notices in regard to the different types of payments to recipients. In the case of family payment recipients, this is provided for in s.872 of the Act:

'872.(1) The Secretary may give a recipient of family payment a notice that requires the recipient to inform the Department if:

- (a) a specified event or change of circumstances occurs; or
- (b) the recipient becomes aware that a specified event or change of circumstances is likely to occur.'

Failure to respond to notices within specified time limits can result in debts arising under the Act. Not all debts that are found to exist under the Act necessarily are to be recovered. Two provisions that frequently arise in review concerning issues of recovery are where there has been administrative error by the department or where there are special circumstances, as long as the person has not 'knowingly' contributed to the events that gave rise to the debt occurring. These two circumstances of waiver are available under the Act in ss.1237A and 1237AAD respectively. It was these sections that the AAT looked at most closely in the decision:

'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.

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.'

If 1237A is found to apply the debt must be waived. Section 1237AAD is discretionary.

#### The requirement of notice

The evidence before the AAT was that a notice was issued to Bartlett on 26 March 1997 which required her to notify if a dependant 'claims or is granted AUSTUDY or other Commonwealth Student Assistance Scheme payment'. That notice also referred to the existence of data-matching as a check to detect or prevent incorrect payments.

Bartlett's evidence was that on 13 March she had lodged a claim for parenting allowance, where she listed her children's dates of birth and notated in parenthesis beside Daniel's birth date '16- AUSTUDY ??' On that same date her husband lodged a claim for sickness allowance in which he notified that Daniel was going to claim AUSTUDY.

These two claims were lodged immediately after Bartlett was released from hospital following a mastectomy. The evidence before the AAT was Bartlett spent 5 days in hospital, followed by home nursing and then an ongoing course of chemotherapy. She was reliant totally on her husband during her recovery phase. The evidence in regard to his health was that he too was unwell. A period of Workcover and personal income insurance had predated his March claim for sickness allowance. By the time of the AAT hearing he was in receipt of disability support pension primarily for an anxiety depressive state for which the department accepted a rating of 30-40 points under the relevant Tables, which signifies the presence of serious to major psychiatric illness.

Bartlett had no specific recall of the notice that was issued on 26 March 1997. Her argument was that as they had already told the Department prior to the notice issuing that AUSTUDY was going to be claimed, they had in fact complied with the notice. The advocate for the Department argued, on the other

hand, that specific notification by Bartlett of actual receipt of AUSTUDY was required after the notice issued. Bartlett's husband submitted that having advised of the likely claim for AUSTUDY in March, the necessary action should then have been taken by the Department to follow up the outcome of the claim. He pointed to the Department's own indication in the letter of 26 March that there were cross-matching procedures in place for checks to be made.

The AAT held that the existence of data-matching programs did not relieve Bartlett of the responsibility to notify in accordance with the provisions of the Act. As to the requirements of the notice itself, the AAT held that if a claim for AUSTUDY was made after 26 March 1997 or AUSTUDY was granted after 26 March 1997, either event would need to be notified to comply with the statutory responsibility. In this instance the claim predated the notice on 26 March but the grant of AUSTUDY postdated it. The 'specified event or change of circumstance' that the applicant was required to notify was the grant of AUSTUDY. That notification did not occur until 1 September 1997 when the information was provided on the newstart claim.

#### Special circumstances

The AAT said that though the failure to advise the grant was not intentional it meant that the debt which arose could not be waived on any basis that it was caused solely by administrative error (s.1237A). The AAT then turned to s.1237AAD, which could be considered because the Bartletts genuinely believed that they had fulfilled the requirements under the Act by telling the Department about the claim for AUSTUDY.

The AAT looked at the relevant authorities dealing with the issue of 'special circumstances' including *Beadle and Director General of Social Services* (1984) 20 SSR 210, *Director General of Social Services v Hales* (1983) 13 SSR 136, and *Secretary Department of Social Security v Coralie Hales* (1998) 3(3) SSR 37. The Tribunal found that financial hardship was present and that the real health difficulties of the applicant in regard to trauma associated with the mastectomy operation, her dependence on her husband during that year, and the psychiatric illness of her husband were matters relevant to both 1237AAD(a) and (b). These were matters 'unusual, uncommon and, in all probability, exceptional even among recipients of social security benefits': Reasons: para. 48.

The Tribunal further found that for reasons of financial hardship it was more

appropriate to waive than write off the debt.

#### Formal decision

The AAT set aside the decision under review and substituted the decision that the whole of the debt should be waived.

[M.C.]

## Family payment: notifiable event

SECRETARY TO THE DFaCS and  
DAY  
(No. 990009)

Decided: 12 January 1999 by D.P. Breen.

#### Background

Day had for some years been receiving family payment and child care allowance. Until August 1997 she worked as an administrative officer in the Department of Defence. Due to her taking maternity leave during the 1995/96 financial year, Day and her husband's combined income for that year was only \$31,665.

'During 1997, Day was paid family payment and child care allowance on the basis of a 1996/1997 estimated income of \$57,947 when in fact she ought to have been paid on the basis of their actual 1995/96 income of \$31,665. This was due to the fact that whilst their combined income in the 1996/97 financial year was greater than in the 1995/96 financial year, the rate of payment can only be changed when a notifiable event has occurred, and returning to work after maternity leave is not classified as a notifiable event.

... She received payment of arrears ...'

(Reasons, paras. 6 & 7)

However, following this, the Department re-assessed Day's entitlement, on the basis that she had changed jobs — the change in jobs being a transfer at the same level from Department of Defence to Centrelink. The SSAT decided that the inter-departmental transfer was not a notifiable event for the purposes of the Act.

#### The issue

Day should have been paid on the basis of the 1997/98 estimated income only if there had been a 'notifiable event'. The question for the AAT, therefore, was whether a transfer from one Department to another was a notifiable event.

#### The legislation

The AAT looked at s.872(1) of the Act, which requires a person to give notice of a 'specified' event.

#### The discussion

The AAT held that while the transfer involved some alteration of duties and a different working environment, Day's salary was identical and she maintained the same public service ranking and employee number. She continued to work for the same employer, the Commonwealth of Australia.

The AAT referred to *Secretary to the DSS and Hoy* 1998, unreported, No.13078, where it was held that:

'[T]he expression 'change jobs' in the notice, strictly construed, is not synonymous with the expression 'changed employment circumstances' but instead, has a narrower meaning.'

#### Formal decision

The AAT affirmed the SSAT decision.

[K.deH.]

## Family payment cancelled while overseas, wrongful cancellation

FADEL and SECRETARY TO THE  
DSS  
(No. 13530)

Decided: 11 December 1998 by R.P. Handley.

Fadel sought arrears of Family Payment (FP) from 4 August 1994 to 2 July 1997. An authorised review officer (ARO) and the SSAT decided that she had no entitlement to arrears of FP. Fadel sought review of this decision by the AAT.

On 8 August 1994, Fadel notified the DSS that she, her husband, and her children were travelling to Lebanon for family reasons. Fadel could not read or write English. She signed a form which was completed by a DSS employee, nominating her older sister's address in Lakemba as her address for correspondence whilst absent from Australia. On 11 August 1994, the DSS wrote to her sister's address notifying her that her FP was cancelled. Her sister could not read or write English. Fadel's niece opened the letter, read it and decided it was not important. It was placed with Fadel's bankbook and given to her when she returned to Australia.

Fadel told the AAT she did not understand the significance of the form nominating her sister's address as her address