

would be raised, different arrangements could and would have been made.

Andreeva was granted job search allowance, and it was paid to her first at the home she continued to share with Nehma and her husband, and then at the rental premises she occupied after the total breakdown in family relationships.

On 16 May 1997 the Department informed Nehma that the bond held by the bank in relation to the assurance of support could not be released. This was the first indication from the Department to Nehma that there may be a problem with the assurance of support. Nehma was so worried about the debt and the possible accrual of interest that she borrowed money from friends to pay the Department. The friends expect Nehma to repay the amounts borrowed.

The Department has guidelines in place, which require that both the assurer and the client be made aware at the time of claim for social security benefit, that a debt may be raised should the benefit be granted. Moreover, 3-monthly reviews should be conducted, and the assurer notified of the amount of debt outstanding. These guidelines had not been followed.

The AAT could not see the relevant departmental files, as they had been lost.

Waiver

The AAT concluded that a debt to the Commonwealth existed, arising out of the payment of job search allowance to Andreeva at the time when a valid assurance of support existed. The debt, of \$8147.20 had been repaid by way of the bond lodged by Nehma and money borrowed by her from friends. Write-off was therefore not a possibility.

Section 1237A refers to debts occurring solely because of administrative error.

'This section has no application in the circumstances of Mrs Nehma's case as the debt arising out of an Assurance of Support does not allow for the application of this section because the receipt of a Social Security benefit by the debtor is an essential element.'

(Reasons, para. 64).

However, the AAT said that s.1237AAD did apply. Nehma did not knowingly make a false statement nor did she knowingly fail or omit to comply with a provision of the Act. Indeed, she made direct enquiries as to the consequences of making a claim with respect to the assurance of support. The existence of the assurance of support was stated on the application form. Nehma could not have been expected to make any further enquiry than she had in fact made.

The AAT found that special circumstances existed, as a result of departmental administrative error. First and foremost was the Department's failure to

provide correct advice to Nehma and Andreeva. Second, the Department failed to follow the provisions of s.517A and its own practices and procedures in relation to review of assurances of support. The consequence of these errors was that Andreeva received job search allowance in good faith. Nehma and Andreeva were robbed of the opportunity to make different financial arrangements by the Department's actions and inaction.

The family disharmony, while not a special circumstance, provided a backdrop against which the need for income support was required.

Formal decision

The decision under review was set aside, and a decision substituted that the debt of \$8147.20 be waived in its entirety.

[A.B.]

Age pension: failure to comply with notice; waiver

SMITH and SECRETARY TO THE
DFaCS
(No. 19990152)

Decided: 16 March 1999 by J. Shead.

Background

In August 1992 Smith lodged a claim for age pension that was granted from 24 September 1992. By letter dated 16 September 1992 the Department advised of the grant of age pension and notified of certain obligations, including the requirement to advise the Department of changes in income or employment. Smith's husband lodged a claim for newstart allowance in October 1992 but he resumed work in September 1993, and confirmation of the cancellation of his newstart allowance was sent to him in October 1993.

The Department in September 1995 raised an overpayment of age pension totalling \$6165 against Smith. Both the authorised review officer in November 1995 and the SSAT in May 1997 affirmed the debt. Smith argued that the debt, if any, was solely due to administrative error in that by letter dated October 1993 to Mr Smith the Department was on notice of Mr Smith's return to work. It was further argued that there were special circumstances sufficient to

justify waiver of the debt due to the administrative error involved in the accrual of the overpayment, Mr and Mrs Smith's poor health, and their difficult financial circumstances.

The issue

The critical issue in this matter was whether the notification obligations placed upon an age pensioner had been sufficiently met by her husband's notification for newstart allowance purposes, of his changed circumstances.

The law

The *Social Security Act 1991* (the Act) provides that an age pensioner may be required to inform the Department of certain events or changes in circumstances.

'68.(1) The Secretary may give a person to whom an age pension is being paid a notice that requires the person to inform the Department if:

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

Where such a notice is given, and the person omits or fails to provide the required information, any amount incorrectly paid as a result may be recovered as a debt (s.1224). However, a debt may be waived in the circumstances set out in s.1237 of the Act, and in particular:

'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.'

The decision

The AAT found that Smith had received the letter from the Department dated September 1992 informing her of the grant of age pension, and that this letter had put her on notice as to her notification obligations. It was conceded by the Department that it was aware of Mr Smith's return to work through Mr Smith's advice to the Department (via his newstart allowance continuation form lodged at the Commonwealth Employment Serv-

ice) and that '... this was sufficient for [Smith] to have complied with her obligation to the Department': Reasons, para. 27.

Responding to the contention by the Department that Smith was also obliged to notify of the details of her husband's earnings, the AAT referred to *Vitalone and Secretary, Department of Social Security* (1995) 38 ALD 169 and in particular the comment in that case (at para. 31) that:

'... Non compliance... is potentially punishable by imprisonment. Accordingly, it needs to be interpreted in a manner which is favourable to the individual concerned. It should certainly not be construed so as to impose strict liability ...'

The AAT concluded that Smith had not failed or omitted to comply with an obligation under the Act, and hence that no debt under s.1224 existed. In this event, there was no need to consider waiver but, in passing, the Tribunal concluded that waiver would have in any case been appropriate. Her husband having enquired of the Department as to the effect of his wages upon his wife's age pension payments, the Tribunal determined that Smith had no reason to doubt her entitlement to the payments she continued to receive and, as such, received them in good faith (*Secretary, Department of Employment, Education, Training and Youth Affairs v Prince* (1997) 152 ALR 127), whilst the debt was solely due to administrative error by the Department in failing to act upon the advice given to it by Mr Smith.

In addition, the Tribunal noted the health conditions suffered by Smith and the circumstances under which the debt arose. Applying *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1 and *Re Krzywak and Director-General of Social Security* (1988) 15 ALD 690, the Tribunal concluded that there were special circumstances sufficient to require the waiver of any debt pursuant to s.1237AAD.

Formal decision

The AAT set aside the decision under review and substituted the decision that there was no debt owing by Smith.

[P.A.S.]

Debt: notification obligations

BRUNEAU and SECRETARY TO THE DFaCS
(No. 19990048)

Decided : 28 January 1999 by
Dr J. Campbell.

The issue

The question before the AAT was whether debts in relation to home child care allowance (for the period September 1994 to April 1995), family payment and parenting allowance (for the period February 1996 to May 1997) should be recovered.

Background

Bruneau worked for Telecom for 20 years before she and her husband purchased a newsagency in 1991. In her application for continuing family payment (FP) lodged in October 1993 she described her occupation as 'home duties' and advised that her partner was self-employed. In a later claim for home child care allowance (HCCA) lodged in August 1994 she indicated that she received no salary or wages, and did not indicate that she was self-employed and the part-owner of a business. Following the FP application, Bruneau in May 1994 provided Taxation Notices of Assessment for herself and her partner for the 1992/93 year (disclosing a family income above the relevant threshold for HCCA), and in the HCCA application itself Bruneau and her partner authorised the Department to seek information from the Australian Taxation Office regarding her claim and income details. In April 1995 Bruneau applied for parenting allowance (PA) at which point she did advise of her income from wages, and that she and her partner were part-owners of a business. Bruneau, following these claims, was sent notification letters by the Department in September 1994 and July 1995, in both cases requiring her to notify of changes in income or the commencement of employment, and advising her of the income basis on which the respective payments of HCCA and PA were based.

Bruneau agreed that the notification letter in September 1994 had advised her of the obligation to notify changes in income or employment, but argued that she was not receiving a wage notwithstanding the income position disclosed in her taxation returns. She contended that she had met the notification obligations through provision of her income tax assessments and authorisation to the De-

partment to access family tax information.

The legislation

Section 872 of the *Social Security Act 1991* (the Act) provides that a notice may be given to a recipient of FP requiring notification to the Department of certain events or changes in circumstances.

Similar provisions were at the time in question contained in s.943 (regarding HCCA) and s.950 (regarding PA). Section 1069-H11 of the Act at that time provided for FP to be paid free of the income test to a recipient of PA.

Section 1224 of the Act enables a debt to be raised where a person has been overpaid because they failed to comply with a provision of the Act or made a false statement.

The debts

The AAT considered separately each of the three payments in respect of which a debt was raised.

In relation to HCCA, the AAT concluded that, even though the claim had been incorrectly completed, by provision of taxation assessment details in May 1994 Bruneau had made available the necessary material upon which the Department could have made a correct decision as to entitlement. The AAT added that:

'... if a more diligent approach had been taken to harness and assess the available information [by the Department] at the time of the decision, a correct decision would have been made'

(Reasons, para. 30).

Thus, although a debt of HCCA had arisen the AAT concluded that the debt was solely due to administrative error by the Department, and as Bruneau had received the HCCA payments in good faith and had not knowingly made a false statement or representation, this debt should be waived.

Regarding PA, the AAT agreed with the parties that Bruneau's application and the decision to grant PA were correct. The AAT noted the assertion by Bruneau that details of the 1994/95 taxation returns were sent to the Department by fax, but that the Department's files indicated their receipt on 5 June 1997. Bruneau was unable to produce additional evidence as to any earlier date when these details might have been supplied, and in these circumstances the AAT determined that no advice as to family income for 1994/95 was tendered by Bruneau between February 1996 and June 1997. The AAT noted that Bruneau would have been aware of the change in family taxable income by February 1996 when taxation returns for the 1994/95 year were completed, but did not advise the