

Centrelink and the SSAT advised VZG he could review both decisions.

The AAT decision

The SSAT decision was affirmed. The decision as to VZG's gender was not a reviewable decision. The SSAT had no jurisdiction.

[H.B.]

[Writer's note: I refer to VGZ as a male as 'he' argues in his submission that he should be regarded as a male. This seems contradictory at first. However, although he identifies as female, he argues he is a male.]

Overpayment and waiver: special circumstances, 'knowingly' making a false statement, wrong advice

JAZAZIEVSKA and SECRETARY TO THE DFACS
(No. 19990296)

Decided: 23 April 1999 by E.K. Christie.

The background: three overpayments

Jazazievska was overpaid 3 separate amounts by Centrelink:

- She was overpaid \$1124 in additional family payments for the period 5 January to 17 August 1995.
- On 27 March, she was overpaid \$2065 in basic family payments which was a duplicate payment for 3 April 1994 to 21 December 1995.
- Jazazievska was overpaid \$2039 in family payments for the period from 17 July to 18 December 1997.

On 31 January 1995, Jazazievska received a redundancy payout for \$20,944 having accepted a redundancy package after working for the Commonwealth government for 15 years. It included amounts for sick leave and long service leave as well as a redundancy payment. At around this time, she also gave birth to a daughter. Medical complications following the birth left her unable to work for 4 months, as she required frequent check-ups and medical care.

Jazazievska told the AAT of her frustrations with Centrelink, particularly her difficulties in dealing with uncooperative staff.

The issue

The issue to be determined by the AAT was whether the 3 debts could be waived due to either administrative error or the existence of special circumstances.

The legislation

Section 1237A(1) of the *Social Security Act 1991* (the Act) provided that the Secretary must waive the recovery of a debt that is attributable solely to an administrative error of the Commonwealth, if the debtor received the amount in good faith. However, this does not apply where there is a combination of factors such as administrative error together with an error by the debtor.

Section 1237AAD of the Act provides that the Secretary may waive a debt

- if satisfied that the debt did not wholly or partly arise from the debtor or another knowingly making a false statement or representation, or failing to comply with the Act, and
- there were special circumstances (other than financial hardship alone) which warrant a waiver rather than a write-off of the debt.

The first overpayment

The AAT affirmed the findings of fact made by the SSAT. In late 1994, Jazazievska provided an estimate of her taxable income for 1994/95 at \$23,544. On this basis, she was paid additional family payment. Her actual taxable income for 1994/95 was \$35,784. On 20 January, 28 April and 2 June 1995, she received notices requiring her to notify Centrelink if her combined taxable income was likely to exceed \$27,905.

The AAT found that this overpayment could not be waived. It was not due solely to an administrative error by Centrelink. Jazazievska had contributed to the error by not complying with her clear obligation under the Act to notify the Department of any change in her circumstances. The AAT held that Jazazievska had contributed to the administrative error that led to the overpayment. The AAT said it would not have been unreasonable for her to query the effect of her redundancy package with Centrelink. The AAT has consistently found that redundancy packages form part of taxable income.

There were no special circumstances warranting a waiver of the debt as there was no evidence of any circumstances that were 'uncommon' 'unusual' or

'exceptional' as required by *Beadle* (1985) 26 SSR 321.

The second overpayment

The AAT made the following findings of fact: on 27 March 1996, due to an error by Centrelink, Jazazievska's account was credited with \$2650.60. There was no letter of explanation from Centrelink. She queried the payment with her bank but not Centrelink. The amount duplicated her basic family payments for the period from 3 April 1994 to 21 December 1995.

The AAT found that this duplicate payment could not be waived due to administrative error as the payment was not received in 'good faith'. The AAT expressly said this finding was no reflection on Jazazievska's honesty, as it found her to be 'an honest, truthful witness': Reasons, para. 19.

The AAT referred to *Secretary, Department of Education, Employment, Training and Youth Affairs and Prince* (1998) 3(3) SSR 37. In relation to the meaning of 'good faith', Finn J said:

'Its concern is with the state of mind concerning the receipt: if that person knows or has reason to know they are not entitled to the money.'

In this case, the AAT found that the receipt of such a large sum without any explanation warranted some query on her part to Centrelink. However, she only queried the matter with her bank. There were no special circumstances warranting a waiver of the debt.

The third overpayment

The AAT adopted the findings of fact made by the SSAT. On 17 July 1997, Jazazievska lodged details of her income and assets in which she indicated that her 1995/96 taxable income as \$23,730. Her actual taxable income for 1995/96 was \$33,437. On 22 July 1997, she was sent a notice showing that her rate of family payment was based on her reported taxable income of \$23,730.

The AAT accepted Jazazievska's evidence that she had provided extensive documentation to Centrelink in June and July 1997. It also accepted that she had relied on the advice of Centrelink staff and that there was confusion surrounding this advice.

'Knowingly' making a false statement

The AAT decided that this overpayment should be waived, as there were special circumstances within the criteria of the Act. It found that the overpayment did not arise from Jazazievska 'knowingly' making a false statement or representation. The AAT relied on the case of

Callaghan 2(9) SSR 125 which said 'knowingly' should be construed as meaning

'that a person has actual knowledge, rather than constructive knowledge, that he or she is making a false statement or representation or that he or she is failing or omitting to comply with a provision of the Act. That actual knowledge is to be ascertained by reference to the statements of the person as to his or her actual state of knowledge at the time and to events surrounding the false statement or the act or omission.'

Incorrect advice from Centrelink staff

In relation to the misinformation given to Jazazievaska by Centrelink staff, the Tribunal referred to the previous AAT decision of *McAvoy (1997) 2(7) SSR 95*, which held that the giving of wrong advice was a special circumstance within the terms of the Act. In that case, the AAT said:

'Citizens are entitled to act upon the advice given to them by representatives of government through its departments and agencies. Citizens are also entitled to have confidence in the advice that they are given by persons in authority and who represent government departments and agencies. Citizens should be entitled to expect nothing less.'

The AAT held that the incorrect advice from Centrelink did constitute 'special circumstances' which warranted a waiver of the debt.

The decision of the AAT

The AAT varied the decision of the SSAT. The first 2 payments were debts to be recovered by the Commonwealth. However, the third payment was waived due to the existence of special circumstances.

The AAT recommended that the overpayments be recovered in a way that did not cause financial hardship to Jazazievaska. The AAT said that the installments should not initially exceed \$10 a fortnight.

[H.B.]

Can Centrelink back pay family tax payment?

STEVENS and SECRETARY TO THE DFaCS
(No. 19990270)

Decided: 28 April 1999 by W.G. McLean.

The AAT found that s.900 of the *Social Security Act 1991* (the Act) precluded backpayment.

The facts

Ms Stevens had elected to receive family tax payment (FTP) for the 1997/98 tax year via lodgment of her income tax assessment with the Australian Taxation Office (ATO) by the tax concession known as family tax assistance (FTA). Whilst she was eligible for the support having two small children on a low income (gross taxable income for 1997/98 being \$17,702) due to the circumstances of her taxation for that year she would not receive the payment through the tax system. A Senior Officer of the ATO gave evidence that even if Ms Stevens requested an amended assessment, because total tax and other credits could not exceed tax payable, then Ms Steven's total amended tax refund would only increase by \$85.40, that is, she would be refunded all the tax she had paid, but could not be refunded more. This was substantially less than the \$400 FTP which she could have received if she had elected to claim from Centrelink.

Because of the stress of her marital breakdown she did not realise the negative impact of the additional health insurance rebate which she was required to claim in her 1997/98 tax return on her ability to receive the full FTA entitlement via the ATO. She contended that in such circumstances Centrelink should make the payment. Ms Stevens conceded in her appeal that the law had been correctly applied by the SSAT. In a written statement before the SSAT she requested that commonsense apply and that she be paid her entitlement.

The AAT found that s.900 of the Act precluded payment of FTP before a claim was lodged and there could be no backpayment of FTP in Ms Steven's circumstances.

Stevens wrote to Centrelink seeking an 'Act of Grace' payment. The AAT did not comment, as such, on this request.

Formal decision

The decision under review was affirmed.

[Ca.H.]

Recipient notification notices: 'event or change in circumstances'

ELLIOT and SECRETARY TO THE DFaCS
(No. 19990261)

Decided: 23 April 1999 by J.A. Kiosoglous.

Background

Elliot applied for age pension on 16 November 1995. On 7 December 1995 she was notified that she would be paid pension based on income of \$19,627, and that she was required to notify the Department if her and her husband's combined income exceeded \$377.44 a week. On 6 January 1996 Mr Elliot advised he would be returning to work. His sickness allowance was cancelled but his wife's age pension continued. Mrs Elliot said that on 6 January 1996 and April 1996 she had asked and been advised by a departmental officer that she continued to be eligible for the pension.

Two further notices were sent to Elliot on 18 July 1996 and 2 July 1997 stating that her pension was based on income of \$20,353 and \$29,702 respectively. The letters required her to tell the Department if the income as shown on the letters was incorrect. The income recorded was Elliot's superannuation income and did not include her husband's wages. Elliot did not respond to those notices and a debt was raised. The SSAT determined that there was a recoverable debt owed by Elliot for the period 25 July 1996 to 4 September 1997. There was no debt before this period as Elliot had complied with the first notice sent on 7 December 1995 when she and her husband notified of his return to work on 6 January 1996.

The SSAT stated that the authority for the sending of the notice was to be found in s.68 and s.69 of the *Social Security Act 1991* (the Act). As Elliot did not fail to notify of an event or change of circumstance she had not failed to meet her obligations under s.68 of the Act. However, the SSAT considered that her failure to advise that the income figure maintained was incorrect amounted to a breach of s.69 of the Act, giving rise to a debt under s.1224(1). It was agreed by both parties, and the AAT concurred, that the SSAT had erred in considering the applicant's failure to comply with a provision or requirement in relation to s.69 of the Act, because that section relates only to the