telephoned the Department on 24 November 1997, and given the operator details of his wife's employment. He was then told that he was completing the forms correctly.

The Department argued that a debt was correctly raised under s.1224, as Stewart had made a false statement regarding his wife's income. The Department accepted that the false statement was neither deliberate nor intentional.

Findings

The AAT found, agreeing with the SSAT and the authorised review officer, that there was no deliberate attempt by the applicant to mislead the respondent, and that the provision of the incorrect information arose simply as a misunderstanding of the form.

The AAT was concerned that question 6, which required information about a partner's earnings, did not, in the question itself, indicate clearly that the period referred to was a fortnight. Both the form of the question and the layout of the form could lead to a belief that a weekly amount was required. The AAT suggested that the form be amended to specify the period in question.

However the AAT accepted that objectively incorrect statements had been made, and that therefore the debt was correctly raised under s.1224.

Administrative error and waiver

The AAT further found that there were no 'special circumstances' as that phrase has been explained in *Beadle* 26 *SSR* 321 which would justify waiver pursuant to s.1237AAD.

With regard to waiver on the ground of administrative error, the AAT followed *Gerhardt v Department of Employment, Education and Training,* Federal Court, 20 August 1997, QG80/1996, and the earlier decision of the AAT *Gerhardt and Secretary, Department of Employment, Education and Training* (AAT 10941, 17 May 1996), which looked at the situation where there were errors by both the recipient and the Department. The AAT stated:

> In the present application, it is clear that there have been errors made by both the applicant and the respondent. The question before the Tribunal is whether or not the errors of the respondent were such that they constituted a breach in the chain of causation, so as to mean that the applicant's subsequent errors can be said to be directly as a result of the respondent's errors, and thereby constitute the sole cause of the overpayment as from the time the errors were made by the respondent. This is a question of fact.

(Reasons, para. 30)

The Department received information from the wife's employer on or about 5 December 1997. The Department had a duty to assess that information and act on it in a timely manner. A period of two or three months in checking and collating such information should not be acceptable practice.

The AAT accepted that Stewart had contacted the Department and made the necessary inquiries to satisfy himself that he was supplying the correct information on the forms. The Department's advice, that he was supplying the correct information, was a Departmental error, on which Stewart relied.

The AAT also stated:

> ... that there is an increased reliance by the Department on the Computer Record Access Monitor Reports (CRAM reports) as a record of events. The Tribunal considers that where a discrepancy arises between a customer's version of events and the CRAM details, preference should not automatically be given to the CRAM report over the evidence of a customer. The nature of the Department's Call Centre, and the volume of the enquiries it deals with create a large number of variables which must be taken into account. Whilst it may be possible to give evidence as to what is supposed to be said to customers, it is not possible in most cases to say what was actually said. In such cases, the Tribunal considers that it should base its findings on an assessment of the credibility of the customer. If the customer is found to be a credible witness, then this should take preference over the computer records. If, however, there are some discrepancies which the Tribunal is satisfied, on all the evidence, cast doubt on the accuracy of the customer's version, then preference should be given to the Department.

(Reasons, para. 37)

The Tribunal found that Stewart's error in filling in the forms after December 1997 was due to his reliance on the incorrect advice given him by the Department, that is, the overpayments made after that date were due solely to administrative error. As Stewart relied on and accepted the Department's statement about his entitlement, he did not know, nor ought he to have known, that he was receiving a higher rate of NSA than he was entitled to.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that Stewart was not liable for the portion of the debt arising after 5 December 1997.

[A.B.]

Family payment debt: notional entitlement waiver and special circumstances waiver

MORGAN and SECRETARY TO THE DFaCS (No. 19990390)

Decided: 8 June 1999 by S.D. Hotop.

Background

Morgan received family payment in 1996 and 1997. She provided an estimate of $25,700 on 10 October 1996 and was paid on the basis of the estimate from this date. She provided a further estimate on 5 March 1997 of $45,980 and was paid on the basis of this from 24 April 1997.

Two events of relevance occurred during the period in question. Her husband started a job on 25 September 1996 and then commenced a new job on 18 November 1996. This second job was offered on a probationary basis until Christmas. On 23 December 1996, Mr Morgan was advised that the job would be permanent. Mr Morgan was due to return to work on 4 January 1997, but due to a strike, he did not return until 31 January 1997.

Morgan did not advise about this second change of jobs until February 1997. When she did advise, she gave the date for change of jobs as 31 January 1997.

Morgan's rate of family payment reduced from 24 April 1997 when she was paid on the basis of her second estimate ($45,980). Morgan's combined income for 1996/97 was $41,027.

The DSS raised a debt of $4148.70 for the period 10 October 1996 to 10 April 1997 on the basis that Morgan's actual combined income exceeded the first estimate provided by her by more than 10%.

Morgan appealed to the SSAT which affirmed the decision in relation to the debt, but waived recovery of the amount that would have been Morgan's notional entitlement to parenting allowance under s.1237AAC(4) and (5) of the *Social Security Act 1991* (the Act).

The debt

The first issue to be addressed by the AAT was whether there was a debt for the period.

The Tribunal concluded that Morgan provided an estimate of $25,700 on 10 October 1996 and that her combined

income for 1996/97 exceeded 10% of this estimate, consequently s.885 of the Act required a recalculation of her entitlement and there was a debt, being the difference between what Morgan was entitled to and what she was paid.

Since the DSS raised the debt using a combination of s.885 and 886 of the Act, the Tribunal also considered the application of s.886.

It concluded that Mr Morgan's change of jobs on 18 November 1996 was a notifiable event and that s.886 could also be used to recalculate entitlement since Morgan did not notify the DSS within the required 14 days (an issue not disputed).

Waiver

Section 1237AAC(4) allows for waiver where there is an unclaimed entitlement to parenting allowance. The subsection states as follows:

> **1237AAC(4)** If:
>
> (a) a debt arises from overpayments to the debtor; and
>
> (b) the Secretary is satisfied that the overpayments 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
>
> (c) the debtor or the debtor's partner did not claim parenting allowance or parenting payment for the period (the overpayment period) when the overpayments were made; and
>
> (d) an amount of parenting allowance or parenting payment would have been payable for that period if the debtor or the debtor's partner had lodged a claim;
>
> the Secretary must waive the right to recover the debt to the extent set out in subsection (5).

It was submitted by the Department that this subsection could not apply since Morgan failed to comply with a provision of the Act in that she did not advise of a change of jobs within 14 days as required.

The AAT agreed that Morgan failed to advise about the change of jobs and that she did this knowingly. However it did not agree that the overpayment resulted from her failing to comply with the Act as required by subsection (b).

The AAT concluded that the overpayment resulted from the variance between Morgan's actual 1996/97 income and the estimate of this income. Mrs Morgan's failure to comply therefore did not affect the overpayment. Consequently waiver under s.1237AAC(4) was required.

Special circumstances

The AAT found that there were no special circumstances that would justify waiver of the debt from 10 October 1996 until the date that the new estimate of $45,980 was provided on 5 March 1997.

However after this date, there had been a delay in acting on the information provided. The Tribunal found that:

> There seems to the Tribunal no good reason why the DSS in the present case, upon receipt of the new income estimate from Mrs Morgan on 5 March 1997, did not take immediate steps to effect the appropriate family payment rate reduction on the basis of that information or, if that was not practicable, at least to notify Mrs Morgan that her present state of family payment was higher than she was entitled to and that action would be taken as soon as possible to calculate her appropriate family payment rate and recover from her the amount of the overpayment.

(Reasons, para. 33)

This constituted special circumstances justifying waiver of the overpayment for the period 5 March 1997 to 10 April 1997.

Conclusion

The AAT concluded that there was a debt for the period, but that part of the debt be waived under s.1237AAC(4) and that a further amount be waived in relation to the overpayment for the period from 5 March 1997 to 10 April 1997 under s.1237AAD of the Act.

Formal decision

The AAT set aside the decision of the SSAT with directions that there was a debt, but that the Commonwealth's right to recover:

(a) that part of the debt, equal to the amount of parenting allowance that would have been payable to Mrs Morgan or Mr Morgan during the overpayment period if the overpayments had not been made to Mrs Morgan, and Mrs Morgan or Mr Morgan had lodged a claim for parenting allowance, was to be waived under s.1237AAC(4) and (5) of the Act; and

(b) that part of the debt, consisting of the amount of overpayments of family payment made to Mrs Morgan during the period from 5 March 1997 to 10 April 1997, was to be waived under s.1237AAD of the Act.

[R.P.]

[Contributor's note: Unfortunately the AAT did not indicate whether the basis for payment of family payment in 1996 was s.1069 H18 (notifiable event) or H20–22 (request). Nor did it investigate the basis for payment in 1997, that is whether the estimate was used in 1997 under the authority of s.1069 H15 or H18.]

Notices: compensation affected payment; 'requiring'

SECRETARY TO THE DFaCS and GRAY & WITCHARD (No. 19990541)

Decided: 23 July 1999 by S.A. Forgie, I.R.W. Brumfield and A.M. Brennan.

Background

A delegate of the Secretary decided to raise and recover an overpayment of wife pension of $7947.40 from Gray, and an overpayment of an identical amount of disability support payment from Witchard. The SSAT substituted a decision that the Commonwealth's right to recover both overpayments be waived.

Witchard suffered severe head injuries as a result of a motor bike accident in 1986. He regained his motor skills but has significant psychological deficits as well as cognitive deficits. Testing of Gray indicated that she has 'low-end borderline range Verbal IQ ... just above the Mentally Retarded classification'.

From 22 September 1994 Gray and Witchard were, after a break, paid pensions of $65.70 a fortnight, the amount being affected by compensation payments Witchard was receiving.

A letter dated 30 September 1994 was sent to each. The letter sent to Gray concerned her claim for a wife pension and advised her that her pension would be $270.80 beginning from 6 October 1994. Her wife pension started from pension payday on 22 September 1994. Gray was advised that her payment was made up of a wife pension of $268.20 and a pharmaceutical allowance of $2.60. On the back of the letter, the letter contained the following statement:

> WHAT YOU MUST TELL US
>
> Under sections 172 and 173 of the Social Security Act 1991 you must tell us within 14 days ... if any of these things happen, or may happen. You can tell us by writing to us, by phoning or you can come in and talk to us at any one of our offices.
>
> Income
>
> If your combined income, not including maintenance, becomes more than $90.00 per week;
>
> ...
>
> If you or your partner claim or receive compensation;
>
> you may get more pension if your income goes down, so tell us of any changes;