

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;

A similar letter was sent to Witchard at an address in Ballina about his disability support pension. He was paid an amount of \$270.80 starting from pension payday 22 September 1994. The Secretary's representative accepted that these letters were written in error, Witchard's compensation payments were ongoing, and the Department knew about the payments. Gray stated that she had queried the amount of payment by going in person to the DSS office in Ballina.

The law

The Act defines compensation payments, and sets out how a person's social security payments, or the payments made to the person's partner, are affected by compensation payments. There is no dispute that Witchard received compensation payments during the relevant periods. There were legislative amendments in September 1995, but the sections relating to compensation remained substantially unchanged.

Subsection 132(1) provides:

The Secretary may give a person to whom disability support 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.

The notice may only specify an event or change of circumstances if the occurrence of the event or change may affect the payment of the pension (s.17(2)). Certain formalities are required by s.132(3). The AAT stated that there was no question that these formalities were complied with in the notice sent to Witchard on 24 September 1994. Section 172 sets out similar requirements for wife's pension, and again they were complied with in relation to the notice sent to Gray.

If a person does not comply with a notice sent under either s.132 or s.172, s.1224(1) becomes relevant. It provides:

If:

- (a) an amount has been paid by a recipient by way of social security payment; and
- (b) the amount was paid because the recipient or another person:
 - (i) made a false statement or a false representation; or
 - (ii) failed or omitted to comply with a provision of this Act or the 1947 Act;

the amount so paid is a debt due by the recipient to the Commonwealth.

Section 1170 provides for the situation where compensation affected payments were made and the amount of the pay-

ment was not reduced during the period that periodic compensation payments were received.

Of these, only s.1170(4A) is relevant. It provides:

- (4) If:
 - (a) the person is a member of a couple; and
 - (b) the person's partner receives a compensation affected payment ...
- the recoverable amount is equal to the smaller of the following amounts:
- (c) the sum of the periodic compensation affected payments made to the person for the periodic payments period; and
 - (d) the payments of the compensation affected payment ... made to the person's partner for the periodic payments period.

Where a debt is due to the Commonwealth, the Secretary may write off or waive the debt in the circumstances set out in ss.1236 and 1237-1237AAD. The relevant sections are:

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 a 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.

Facts

It was accepted that at all times between 6 October 1994 and 7 March 1997 Witchard received payments of compensation payments from MMI Insurance. Those payments were 'compensation' within the meaning of s.17(2) of the Act at all relevant times.

Findings

The AAT found that there an overpayment for the period 6 October 1994 and 24 September 1995 of disability support payment to Witchard.

Whether or not Mr Witchard complied with the notice sent to him pursuant to s.132 has no relevance for s.1170 permits recovery whether or not he complied with that notice. As to Gray, s.1170 makes no provision for recovery from her. Indeed, it is apparent

from Item 4 that Mr Witchard is responsible to repay the whole of the amount which would have been withheld from their combined compensation affected payments had s.1168 been properly applied at the appropriate time:

(Reasons, paras 79-80)

Section 1168(1) and meaning of 'received'

As to the period between 25 September 1995 and 7 March 1997 the AAT said:

While the substantive provisions of s.1168(1) remained the same after 25 September 1995, there was a significant change in the definition of a 'compensation affected payment'. That was to the effect that it now includes 'a former payment' which, in turn, includes an unemployment benefit paid under the *Social Security Act 1947* (1947 Act). Witchard was in receipt of such a benefit at the time that he was involved in the accident which gave rise to his entitlement to the compensation he received ... there is a question whether or not Mr Witchard was entitled to receive an unemployment benefit at the time of the accident because there is evidence to suggest that he may have been working at the time. This raises an initial question as to whether para. 1168(1)(c) is referring to his 'not ... receiving' a compensation affected payment in the sense of his 'not ... receiving and entitled to receive' that compensation affected payment or in the sense of his 'receiving regardless of his entitlement to receive'.

(Reasons, paras 81-82)

The AAT decided that 'received' in para. 1168(1)(c) means 'received and entitled to receive'.

The AAT decided to look at the situation both on the basis that Witchard was entitled to receive unemployment benefit at the time of the accident and on the basis that he was not so entitled.

If Witchard were not entitled to unemployment benefit at the time of the accident, both his and Gray's payments should have been reduced in accordance with s.1168. As they were not so reduced, he would have to repay an amount calculated in accordance with s.1170, and his compliance with notices sent under s.132 would not be relevant. Moreover, Witchard would be liable to repay the amount paid to Gray during that period as well.

If he were entitled to receive unemployment benefit, then s.1168 did not apply to him, and the compensation payments should be treated as ordinary income in calculating his rate of disability support pension. This was so even though the compensation-affected payment he was receiving at the time was not the same compensation-affected payment he received during the periodic payment period. The amounts overpaid,

however, could only be recovered if Witchard and Gray failed to comply with the notices sent to them, requiring them to inform the DSS when their income exceeded \$90 a fortnight.

Was there a failure to comply with recipient notification notices? Meaning of 'requiring' to notify

The AAT referred to the judgment of Forster CJ in *Sherwill v Shearer* (1979) 26 ALR 454 in the context of the *Traffic Act 1949* (NT), as to the meaning of 'required'. The AAT stated:

If notices are sent by DSS or Centrelink in the honest and reasonable belief that they will be understood, then they can be said to be notices 'requiring' certain things even if the recipients of those notices do not understand the notices. Conversely, if they are not sent with that honest and reasonable belief and the person does not understand them, they cannot be said to be notices 'requiring' certain action and cannot be notices under those sections.

It is not an answer to our interpretation to say that administrative expediency requires that a standard notice be sent to all of those who have dealings with Centrelink or its predecessor, DSS. Administrative expediency requires that course of action when Centrelink has no knowledge that a recipient of its notices is likely to have difficulty understanding them. Centrelink is not, however, simply a conduit for the payment of money in circumstances stipulated by Parliament. As the Tribunal said in *Re Van Brummelen and Secretary, Department of Social Security* (1995) 37 ALD 729 (Deputy President McDonald, Senior Member Barnett and Dr Billings, Member):

'That ... is altogether too bland a statement, because it ignores the administrative reality of how the function determined by parliament is to be achieved: bearing in mind the reason for having such legislation in the first place is to make provision for those who cannot, for a variety of reasons, make provisions for themselves. ...' (page 734)

When it does have knowledge of a person's intellectual impairment and that he or she is likely to have a limited understanding of notices sent by Centrelink, good administration may require that particular arrangements be made for him or her. It may be, as recommended by the Tribunal in *Re Van Brummelen*, that some provision should be made in the claim form for notification of a third person to whom information may be sent on those persons' behalf.

(Reasons, paras 94-96)

The AAT held that Centrelink's knowledge includes information in reports on clients and information known to social workers, whether that information is known to particular client service officers or not. Therefore, neither Gray nor Witchard were sent notices under s.132 or 172. Therefore, there were no recoverable debts against them for the

period 25 September 1995 to 7 March 1997.

The AAT also accepted that Gray and Witchard had attempted to inform the DSS that their income was above the \$90 a fortnight limit in the letters sent to them, albeit that their efforts were not understood or acted on by DSS staff in Ballina.

Waiver

The AAT considered the issue of waiver for the entire period of 6 October 1994 to 7 March 1997. It held that the whole of the debts were attributable solely to administrative error and should be waived under s.1237A of the Act. The DSS knew of the ongoing compensation payments to Witchard. The errors were then compounded by the failure to issue proper notices to Witchard or Gray. Neither Witchard or Gray contributed to the errors, indeed they drew the attention of the DSS to them. The AAT referred to *Secretary to the DEETYA v Prince* 3(3) SSR 37, and held that after their visit to Ballina, that is after the first payment, both Witchard and Gray received the payments in 'good faith', as that is defined in *Prince*.

The AAT also held that any overpayment should be waived under s.1237 AAD. The debts did not arise as a result of any failure or omission in complying with any obligation under the Act. The circumstances were 'special' as that term has been explained in *Groth v Secretary to the DSS* 2(1) SSR 10. The intellectual impairment of both Gray and Witchard, and their attempts to deal with Centrelink were 'special circumstances'.

Formal decision

The SSAT's decision was affirmed.

[A.B.]

Compensation: date of commencement of lump sum preclusion period

ROBINSON and SECRETARY TO THE DFaCS
(No. 19990398)

Decided: 9 June 1999 by P. Burton.

Background

The applicant was injured as a result of a chemical spill on 31 March 1980. The applicant continued to work despite various symptoms associated with the accident. He changed to other duties with his employer and last worked in March 1994. He remained on sick leave until his retirement on 24 August 1994.

As the symptoms worsened, he sought legal advice and damages were claimed against his employer. The link between his illness and the chemical spill was an issue, however the potential damages were substantial. On 2 March 1998 Robinson received a lump sum settlement for damages.

Prior to accepting the settlement moneys Robinson's solicitor received from Centrelink conflicting advice concerning the commencement date of any preclusion period. The first advice was that the date would run from when Robinson stopped work, the second advice, which, on the date of the hearing, was that '... it was likely that the preclusion period in Mr Robinson's case, commenced on the date of the chemical spill incident'. This was consistent with the solicitor's view and meant that Robinson could expect to receive the settlement moneys without any deductions.

After the settlement was finalised, a preclusion period was imposed from 26 August 1994 to 15 May 1997 and a debt raised of \$20,039 in respect of disability support pension paid from September 1994.

Robinson said that he would not have accepted the settlement if he had been aware of the amount of the payback, but would have 'hung out' for more.

The applicant appealed to the SSAT which affirmed the Department's decision.

The argument put to the AAT was that:

- the preclusion period should commence at the time that Robinson suffered his illness (31 March 1980), not