fore the AAT well sufficient to justify its conclusion.

(Reasons, para. 10)

Other complaints

Mrs Kajzer had raised a number of complaints before the AAT and the Federal Court. These complaints related to her dealings with Centrelink which she said were unprofessional, the fact that migrants to Australia must live without assistance regardless of their qualifications, and the lack of assistance she received from employment agencies. The Court noted that it did not have the power to deal with any of these matters.

Finally the Court noted that Mrs Kajzer had subsequently obtained a dissolution of her marriage in the Family Court on the basis that she had been living separately and apart from her husband in the family home. Drummond J pointed out that this may lead to Centrelink changing its decision if Mrs Kajzer lodged a new claim.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

Waiver: special circumstances

CONDREN v SECRETARY TO THE DFaCS
(Federal Court of Australia)

Decided: 14 March 2000 by Lehane J.

Condren appealed against a decision of the AAT not to waive a debt he owed to the Commonwealth. The debt was incurred pursuant to s.1224(1) of the *Social Security Act 1991* (the Act).

The facts

Condren suffers from cerebral palsy and has an intellectual disability. In 1997 he received the disability support pension. Between 10 March 1997 and 18 July 1997 Condren was in prison.

On 24 February 1997 Condren was sent a letter by the DSS which required him to notify the Department if, amongst other things, he was in jail after having been convicted of an offence. The Department realised that Condren had been imprisoned after it conducted a data match. A debt was raised for the disability support pension paid to Condren while he was in jail.

The law

Section 1158(1) of the Act provides that a pension is not payable to a person who is otherwise qualified during a period of imprisonment. Under s.132 of the Act the Department is authorised to give persons who are receiving a disability support pension a notice requiring them to notify the Department if certain events occur. According to s.1224(1) if a person fails to comply with a section of the Act and as a result is paid more pension than their entitlement, the difference between what they were entitled to receive and what they were paid, is a debt to the Commonwealth.

If there is a debt then the Secretary must waive that debt if any part of it is attributable solely to an administrative error made by the Commonwealth, and if Condren received the money in good faith (s.1237A(1)). The Secretary may also waive a debt pursuant to s.1237AAD which provides:

> **Waiver in special circumstances**
>
> **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 AAT decision

Condren told the AAT that while he was in jail he had attempted to tell the Department on two occasions. He asked two different officers to notify the Department on his behalf. Both officers gave evidence that they could not recall any request. There was no evidence that anyone had notified the Department that Condren was in jail.

The AAT decided that, even if Condren's evidence was correct, there was still a debt under s.1224 because Condren was obliged to notify the Department of his imprisonment and he had not done so. The AAT also decided that there was no administrative error because it could not be said that the Department should have conducted a data match earlier.

However, the AAT accepted that Condren had believed that the prison officers would notify the Department of his imprisonment. Therefore it could not be said that the debt resulted wholly or partly from Condren knowingly failing or omitting to comply with a provision of the Act. The AAT considered whether special circumstances (other than financial hardship alone) applied. Condren argued that he had been imprisoned longer than he had expected to be and that he did not know when he would be released. He had had limited access in prison to a telephone. He also claimed that the amounts he had been paid had been fraudulently taken from his account by a third person. Condren also referred to his medical condition.

The AAT quoted from the AAT decision of *Beadle and Director General of Social Security* (1984) 6 ALD 1 stating that special circumstances meant that:

> The Tribunal must be satisfied that the circumstances of this case are unusual, uncommon or exceptional to such an extent that it would be unjust, unreasonable or otherwise inappropriate to recover the debt.

(Reasons, para. 9)

Special circumstances

The Federal Court noted that the words 'unjust, unreasonable or otherwise inappropriate' are not found in the AAT's decision. The words 'unusual, uncommon or exceptional' are. The Court then warned that it was dangerous to place a gloss on or at least paraphrase words when quoting from a case. Lehane J did note, however, that the words 'unfair or inappropriate' do appear in a slightly different context in the Full Court's discussion of *Beadle*.

Lehane J referred to the recent decision of Merkel J in *Kertland v Secretary to the DFaCS* (1999) 4(1) SSR 11 for discussion on the meaning of special circumstances. The Court could find no error of law in the Tribunal's findings that there was no evidence of alleged fraudulent withdrawal from Condren's account, that Condren had been in a position to twice repay the debt but had not, and that although Condren's financial circumstances were straitened they were not exceptionally so. He (Condren) was aware of his obligation to notify the Department because he had done so previously when he was in jail. Condren was able to live independently. The Court found that there was no error of law in the AAT finding that there were no special circumstances. It noted:

> Whether particular circumstances are 'special' involves questions of fact and degree, peculiarly matters for the Tribunal [the AAT].

(Reasons, para. 11)

An adjournment

Condren was not represented at the hearing but he was assisted by two people who were helping him manage his affairs. Condren requested an adjournment to obtain legal advice and representation. This was refused by Lehane J. The judge noted that Condren had represented himself before the AAT, and at all the interlocutory stages before the Court. He was not entitled as a matter of right to legal representation. Lehane J considered what was the appropriate course in the interests of justice, not only to Condren, but also to the Department and the public interest. He found that the case was clear and the question involved was one of law. Condren had the right to appeal if he wished.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

SSAT decisions

Important note: *Decisions of the Social Security Appeals Tribual, unlike decisions of the Administrative Appeals Tribunal and other courts, are subject to stringent confidentiality requirements. The decisions and the reasons for decisions are not public documents. In the following summaries, names and other identifying details have been altered. Further details of these decisions are not available from either the Social Security Appeals Tribunal or the Social Security Reporter.*

Parenting payment debt: qualification or rate

TC

Decided: 29 February 2000

TC lodged a claim for parenting payment in July 1988. She indicated on the claim form that she did not have a partner. She was paid parenting payment at the single rate. In May 1999 Centrelink became aware that TC had a partner. A debt of nearly $8000 was raised being parenting payment single paid to TC between July 1998 and May 1999. TC's solicitors conceded that TC had been living with a partner throughout the period.

It was argued on behalf of TC that the amount of the debt should be the difference between parenting payment paid at the single rate and parenting payment paid at the married rate taking into account TC's partner's income. The Tribunal referred to s.500 which sets out the qualifications for parenting payment. Other than the residential requirements the person has to have at least one PP child, that is a dependent child. TC had a dependent child. The Tribunal found that TC was qualified for parenting payment throughout the period. The parenting payment was also payable to her according to s.500I. The Tribunal went on to find that TC had been paid parenting payment but at the incorrect rate because she had made a false statement about living with a partner. Therefore there was a debt pursuant to s.1224 and that debt was the difference between the rate of parenting payment single and the partnered rate taking into account TC's partner's income. It was only this amount that had been paid to TC as a result of her false statement.

Comment

I have seen a number of cases where this has occurred. It arises out of the amendment making the old sole parent pension part of parenting payment. The qualification and payability criteria are the same for parenting payment single and parenting payment partnered. There is a particular problem with Centrelink raising a debt for the whole of the amount paid to the person during the period rather than taking into account that they were in fact entitled to be paid parenting payment at a certain rate.

Carer allowance: savings provisions

NL

Decided: 19 January 2000

NL's wife had been in receipt of carer allowance in respect of their daughter A. NL's wife died in August 1999. She had been paid carer allowance under the five-year savings provision which came into force on 1 July 1998. Following his wife's death NL lodged a claim for carer allowance in respect of A. His claim was assessed under the CDA tool and rejected. A suffers from attention deficit hyperactivity disorder. Her score under the tool was less than 1. The evidence showed that A's conduct had deteriorated since her mother's death and there was a possibility she would be diagnosed with reactive conduct disorder.

The Tribunal was satisfied that the treating doctor had correctly completed the questionnaire in relation to A's condition. A's score under the tool was –2.41. Her condition was not an accepted condition and therefore A did not satisfy the qualification criteria. The Tribunal then looked at the savings provisions and found that there were no provisions relating to the transfer of Mrs L's entitlement to her husband. The Tribunal made a suggestion for further action. It noted that A's needs over the period have not reduced but may actually have increased following the death of her mother. If Mrs L had not died, carer allowance would have continued to be paid for A for five years. The Tribunal concluded that the intention of the savings provisions was that carer allowance would continue to be paid in respect of a child like A for five years. It would be appropriate for Centrelink to give consideration to an Act of Grace payment of carer allowance that would have been paid to Mrs L if she had not died.

Parenting payment: Income from a business

IE

Decided: 28 January 2000

IE was paid parenting payment from November 1997 at the maximum rate. On review it was revealed that IE received half the profits from a plumbing partnership with her husband, and thus Centrelink decided that she was not entitled to receive parenting payment from December 1998 to June 1999. A debt of over $3000 was raised. IE was in partnership with her husband in two separate businesses, the plumbing business and a primary production business of ostrich farming. The plumbing business made a profit and the primary production business a loss. Centrelink stated that IE could not offset one against the other. The authorised review officer noted, however, that for the financial year 1997/98 IE had an income of over $6000 or $244 a fortnight. In notices to her, IE had been required to notify if her income exceeded $167. Therefore IE had failed to notify of an increase in her income. IE argued that Centrelink should have used her taxable income for 1998/99, which was nil. She said she ran a small business agisting horses and providing riding lessons. Her partnership with her husband had been disbanded in June 1999 and it