

Administrative Appeals Tribunal Decisions

Debt recovery: fraud by third party; administrative error; special circumstances

SECRETARY TO THE DfaCS and ELLIS

(No. 2000/350)

Decided: 4 May 2000 by J.A. Kiosogoulos.

Ellis was in gaol from 18 September 1998 to mid November 1998. A number of forms containing false statements about Ellis were lodged with Centrelink during this period leading to amounts of newstart or youth allowance, totalling \$1284.28, being paid into an account in Ellis' name. It was not in dispute that another person had fraudulently lodged the forms and withdrawn the money from the account.

Also, arrears of \$1201.82 were paid on 12 November 1998 due solely to administrative error [which was also withdrawn from the account by the third person].

When Centrelink asked Ellis to repay those amounts he appealed to the Social Security Appeals Tribunal which waived the total amount of \$2486.10 under s.1237AAD of the *Social Security Act 1991* (the Act). It provided:

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 Secretary sought a review of that decision by the AAT.

The debt arising as a result of fraud

The AAT concluded that Ellis was not entitled to receive benefit during the period of his incarceration, and he had been paid \$1284.28 as a direct result of

false statements made by whoever completed the forms. As a result a debt arose pursuant to s.1224 of the Act. The person completing and signing the forms must have known they contained false statements. This meant that s.1237AAD(a) could not be satisfied and the AAT could not waive the debt under that section.

The debt arising as a result of Centrelink error

The AAT agreed with the Secretary's submission that the debt due to the erroneous payment of arrears could not be waived under s.1237A(1), which enables a debt to be waived if it has arisen solely as a result of administrative error, and the debtor has received the payment in good faith. Ellis did not attend the AAT hearing but he had told the SSAT that he 'did not expect to receive social security payments after entering prison' (Reasons, para. 20). This meant that he did not receive the payment in good faith as Ellis knew he was not entitled to the arrears, and good faith does not require actual knowledge that the money has been received (*Secretary DEETYA v Prince* (1997) 3(3) SSR 37).

Turning to waiver under s.1237AAD, the AAT identified a number of circumstances that could be considered special. Relying on *Maurits & Secretary DfaCS* (1998) AAT 12967 and *Swaffer & Secretary DfaCS* 1999 ATAA 812 it considered the fact that Ellis personally made no use of the monies to be relevant.

Furthermore, it would be unreasonable to penalise Ellis with a debt due to another person perpetrating a crime to which Ellis had no association. As it would be difficult to prove who actually committed the fraud it would be extremely difficult for Ellis to pursue civil remedies.

On behalf of the Secretary it had been submitted that administrative error cannot be considered as a special circumstance as it would render useless Parliament's express provision for such situations in s.1237A(1). The AAT disagreed citing *Brittain & Secretary DfaCS* (2000) 4(2) SSR 16, *Nehma & Secretary DfaCS* (1999) 3(9) SSR 132, *Brown & Secretary DfaCS* 1999 ATAA 113, *Secretary DfaCS & Morgan* (1999) 3(11) SSR 165, *Secretary DfaCS & McAvoy* (1996) 2(7) SSR 95, *Gale &*

Secretary DEET (1996) 42 ALD 477 and *Jamieson & Secretary, DSS* (1997) AAT 11612, to hold that error can form part of the factual matrix which gives rise to special circumstances.

Taking those factors together the AAT concluded there were clearly circumstances that would make it unjust or unreasonable to seek to recover from Ellis the amount paid in error. As there had been no argument that this part of the debt arose from a false representation or statement, it was waived pursuant to s.1237AAD.

Formal decision

The SSAT's decision was set aside, and in substitution it was decided that \$1284.28 was recoverable and the remaining \$1201.82 was to be waived.

[K.deH.]

[Contributor's note: The written reasons were brief so some of the background details had to be inferred. The AAT did not explain how the amount overpaid by administrative error became a debt, but presumably this was due to s.1223(1) of the Act.]



Family payment: failure to notify change in circumstances; overpayment; administrative error

SECRETARY TO THE DfaCS and GEORGIU

(No. 2000/218)

Decided: 16 March 2000 by J. Handley.

Background

Georgiou was in receipt of family payment (FP) when in December 1997 she was sent a Recipient Notification Notice (RNN) requiring her to advise the Department if her 1996/97 combined taxable income exceeded \$69,239, the entitlement limit for FP. Mrs Georgiou argued that she did not receive this letter,