Family payment: notifiable event; family payment period

SECRETARY TO THE DFaCS and GALE

(No. 2000/193)

Decided: 10 March 2000 by G.L.McDonald.

Background

Gale received family payment in 1996 and 1997. She provided an estimate of $73,000 on 26 May 1997 after advising the Department that her husband had commenced work on 28 October 1996.

The Department raised a debt of $1180.80 for the period 10 October 1996 to 22 May 1997 on the basis that her actual income exceeded the estimate provided by her by more than 10%.

Gale appealed to the SSAT which set aside the Department's decision on the basis that there was a debt only for the period 7 November 1996 to 19 December 1996. The debt was $272.40.

The legislation

The relevant legislation is referred to in the summary of Dyson (above). In addition, the Tribunal considered s.872 of the *Social Security Act 1991* (the Act) which sets out the requirements for a recipient notification notice. Pursuant to s.1069-H6 a 'notifiable event' is an event specified in a notice issued under s.872 of the Act.

Was Gale sent a valid notice requiring her to advise of a notifiable event?

The first issue addressed by the AAT was whether there was a notifiable event in 1996. It was submitted that the letters sent to Gale requiring her to advise of specified events were not 'proper notices' because:

- the period specified in which the recipient was to notify the Department of various events did not end at least 14 days after:
  - (i) the day on which the event or change of circumstances occured; or
  - (ii) the day on which the recipient became aware that the event or change of circumstances was likely to occur.
- the notices did not specify that they were recipient notification notice given under the Act: and
- the letters did not specify that any particular event was a notifiable event for the purpose of s.1069-H6 of the Act.

(Reasons, para. 16)

The Tribunal concluded that the notices were valid.

> The fact letters to Mrs Gale do not specify themselves to be 'recipient notification notice(s)' is not fatally defective to the applicant's case. If for no other reason than s.872(3A) provides lack of compliance will not lead to invalidity (see also *Stuart and Secretary, Department of Social Security* (Deputy President Forgie, AAT 12626, 17 February 1998 at paragraph 43). In the view of the Tribunal an ordinary reading of the letters leads to a conclusion that each specifies a particular event, namely whether Mrs Gale or her partner started or recommenced work, or changed jobs, or started self-employment and consequently satisfies s.1069-H6. In the opinion of the Tribunal it is evident from the context of the letters that notification is to be within 14 days of any of the specified events occurring - this is sufficient to satisfy the requirement that the notice 'specify the period within which the recipient is to give the information to the Department' (s.872(3)(d)).

(Reasons, para. 17)

What was the effect of the notifiable event?

The Tribunal concluded that Gale's change of jobs on 28 October 1996 was a notifiable event and that s.886 could be used to recalculate entitlement, giving rise to a debt under s.1223(3) of the Act.

The Tribunal then considered whether the recalculation was ' ... limited to the remainder of the calendar in which the notifiable event occurred (ie to the end of the calendar year 1996) or whether the period extends to the next calendar year' (Reasons, para. 18).

It had been argued on behalf of Gale that where s.1069-H18 provided for a current year estimate to be used that this was to be used only for the remainder of the family payment period, ie until the end of the calender year.

The Tribunal disagreed. While not specifically addressing the issue of the definition of 'family payment period' the Tribunal concluded that:

> Once the re-calculation occurs, that re-calculation should be the basis of the payment of family payment until another notifiable event occurs or if the person becomes disentitled to receive family payment until a fresh application is made following a change of circumstances.

(Reasons, para. 19)

The Tribunal also considered waiver, but found that s.1237AAD did not apply.

Conclusion

The AAT concluded that there was a debt for the full period — 10 October 1996 to 22 May 1997.

Formal decision

The AAT set aside the decision of the SSAT and the matter was remitted to the Department with a direction that the debt of $1108.80 was recoverable from Gale.

[R.P.]

[**Contributors note:** Given the diverse views of the effect of s.1069 H18, it is a pity that there was not a more detailed explanation of the conclusion drawn by the AAT. There was no reference in the Tribunal's analysis to the submission made by Gale, that the phrase 'family payment period' in this section limits the effect of the section to the end of a calendar year. Equally there was no analysis of the legislative support for its conclusion. See, in the alternative, the decision of *Dyson* (summarised above).]

Family allowance: annual rate of maintenance income

SECRETARY TO THE DFaCS and BLUNDEN

(No. 2000/273)

Decided: 7 April 2000 by von Doussa J.

Background

Blunden was in receipt of family payment and parenting payment for two children.

She was also from time to time getting maintenance from her former partner paid through the Child Support Agency, though payment by him was erratic and maintenance was owed. In 1998, the Child Support Agency paid to Blunden a sum in excess of $5000, the result of a garnishee order imposed on superannuation that her former partner was trying to realise prior to leaving the country. The sum paid by the Child Support Agency to Blunden in part consisted of an amount of child support currently owing to her, but the greater proportion of the sum represented arrears of maintenance owed to her from 1994 and 1995.

As a result of the receipt of the child support moneys, Blunden's entitlement to family allowance was reduced to the minimum rate over three paydays (fortnights). Blunden considered this was unfair as she had waited for years for the

arrears of maintenance to be paid. The difference between the minimum rate of family allowance and her usual rate was some hundreds of dollars.

The SSAT in reviewing the matter decided by majority that the parts of the sum received by Blunden that consisted of arrears of maintenance were not to be taken into account now in calculating a rate of family allowance. The majority considered that as the arrears represented money owing in 1994 and 1995 they were not to be 'categorised as moneys which form part of a current and ongoing source of maintenance income to Ms Blunden in 1998' (Reasons, citing the SSAT decision, para. 24). The majority therefore remitted the matter with the direction that the lump sum arrears be ignored.

The Department sought review of the decision of the SSAT.

The legislation

Essentially what was in issue in the case was the meaning of *'annual rate'* of maintenance income in the *Social Security Act 1991* (the Act), in particular in this case, where that expression is used in Module J of the family allowance Rate Calculator. Module J provides the formula for working out the maintenance income to be applied to calculate the family allowance to be paid. The method statement in Module J states:

> *Step 1 Work out the 'annual rate' of the person's maintenance income...*

(The Rate Calculator then goes on to provide for other calculations. These were not in dispute on the facts here.)

The AAT looked also at the definition of 'maintenance income' which is provided for in s.10(1) of the Act in the following terms:

> **'maintenance income'**, in relation to a person, means:
>
> (a) child maintenance — that is, the amount of a payment or the value of a benefit that is received by the person for the maintenance of a dependent child of the person and is received from:
>
> (i) a parent of the child; or
>
> (ii) the partner or former partner of a parent of the child;

Working out a rate

The family allowance Rate Calculator provides the method for working out a 'fortnightly rate' for an instalment of family allowance. Family allowance is paid fortnightly. In order to work out a fortnightly rate it is necessary to establish the 'annual rate' of income (including maintenance income) received by a person.

The Department's manual, called the Guide, provides that any current, regular payments of child support (which is paid monthly) are multiplied by 12 to produce an annual rate. Arrears payments of child support however are multiplied by 8 to get an annual rate, so as to compensate for the impact of the delayed receipt.

Using the method provided for in the Guide, that is applying these multipliers respectively to the sums of ongoing maintenance and to the sum of arrears received by Blunden, produced an annual rate of maintenance income for Blunden in excess of $42,000.

That sum when then divided by 52 (to give a weekly amount) produced an entitlement for Blunden at only the minimum rate of family payment.

The Guide requires also that where there is an arrears payment of child support, a reconciliation of entitlement is undertaken to ascertain if the administrative adjustments have disadvantaged the person. This entails, essentially, comparing the effect on family allowance payment of receipt of maintenance now, with receipt had it occurred at the time the maintenance was due. When that comparison was done, Blunden was advised that she was not disadvantaged by the method of assessment of family allowance and no retrospective adjustment was required.

'Annual rate'

Von Doussa J made a telling comment about the method of calculation that would result in a sum in excess of $42,000 being held as the 'annual rate' of maintenance:

> My first reaction upon hearing the oral arguments of counsel was to think that a calculation in the circumstances of this case based on a notional annual rate of maintenance income of $42,588.48 was so far removed from the reality of the situation that it could not be correct.

(Reasons, para. 28)

For the Department it was submitted that the definition of maintenance income in the Act meant that all the payment, arrears and ongoing, had to be taken into account at the time received. To determine otherwise, the Department submitted would mean that arrears of maintenance would be 'windfalls', simply because they were paid late. This would leave the child maintenance regime open to substantial abuse. The Department also submitted (relying on *Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634) that in the absence of a statutory definition of 'annual rate', policy should be developed and applied to maintain consistency in the administration of the Act.

For Blunden it was submitted, consistent with the majority reasoning of the SSAT, that arrears of maintenance income could only reflect an annual rate of income for the years 1994 and 1995 and not the year 1998 when it was received.

The AAT decided that the payment received by Blunden was in its entirety maintenance income within the meaning of the Act:

> By defining **maintenance income** as a benefit or payment 'that is received by' a person, without limitation as to when the recipient became entitled to receive the benefit or payment, the definition is cast in terms which takes account of the likelihood that many payments of child maintenance will be made late.

(Reasons, para. 29)

The AAT therefore rejected the approach taken by the SSAT:

> Once it is accepted that 'maintenance income' is by definition descriptive of payments actually received, the 'annual rate' in the phrase 'annual rate of ... maintenance income' must reflect the payments actually received. It is immaterial that the payments actually received relate to liabilities that arose in the past.

(Reasons, para. 30)

As to working out the annual rate the AAT considered that guidance was available through the High Court in *Harris v Director-General of Social Security* (1985) 57 ALR 729.

That case is authority for the point that 'annual rate' is the current rate of income expressed as so much per annum. The pointed out that in the reasoning in *Harris* the High Court stressed that in every case the ascertainment of the annual rate of income is a question of fact and the circumstances of the case will determine what is a fair method of ascertaining the annual rate of income at a particular time. On the facts in this case the AAT considered that there was no error in applying the annual rate of maintenance income for the period of the month. Here the child support payments were monthly and it was in accordance with sensible and fair administration of the Act (Reasons, para. 38).

The AAT reasoned that it would be a practical impossibility to match exactly the period in respect of which a payment is made with payments actually received in the same period.

The AAT noted that since the Blunden case was heard, the Federal Court had decided a case concerning

maintenance income in *King v Secretary to the DFaCS* (decided 16 February 2000). Whilst *King* was not concerned with arrears of maintenance, the AAT noted that King supported the approach taken in Blunden, namely, applying a multiplier of 12 to the payment received in the month preceding the month in which the family allowance payments are to be made.

Formal decision

The decision of the SSAT was set aside and in its place the AAT substituted the decision that Blunden was entitled to the minimum rate of family allowance in three fortnights.

[M.C.]

Compensation: drafting error; special circumstances

SECRETARY TO THE DFaCS and DUJMOVIC

(No. 2000/208)

Decided: 17 March 2000 by S.D. Hotop.

Background

Dujmovic was injured as a result of a car accident on 23 January 1998. He sought legal advice and damages were claimed with a final settlement payment of $21,500 (including costs) made on 3 June 1999.

A recovery notice was issued to the insurer requiring repayment of the $4,292.80 disability support pension (DSP) payments made to Dujmovic between 5 February 1998 to 9 July 1998.

This decision was reviewed and in turn appealed to the SSAT.

The applicant argued:

- that his solicitor advised him that none of the settlement related to loss of earnings; and
- that Centrelink had advised him prior to accepting the settlement that any compensation payment up to $85,000 would not affect his DSP.

The SSAT set aside the original decision, concluding that no preclusion period applied and that the amount recovered from the insurance company was to be repaid to the applicant.

The issues

There were three issues considered by the AAT:

- whether part of the compensation payment was for loss of earnings;
- what was the 'recoverable amount' for the purposes of s.1179 of the *Social Security Act 1991* (the Act);
- whether there were grounds to apply s.1184 of the Act which enables the Secretary to disregard a compensation payment in 'special circumstances'.

Did the settlement include an amount for 'loss of earnings'?

Evidence from Dujmovic and his solicitor was that the $21,500 did not comprise an amount for loss of earnings. However, a fax from the insurer provided a breakdown of the amount, stating that $3000 related to past loss of earnings and $5000 related to future loss of earnings.

The AAT accepted Dujmovic's understanding that none of the compensation related to loss of earnings but found that this was not the case on the basis of the evidence from the insurer. Consequently, the $21,500 was 'compensation' for the purpose of s.17(2).

What was the recoverable amount?

The second issue involved interpretation of s.1179(4) which states as follows:

> If the person claiming compensation is not a member of a couple, the recoverable amount is equal to the smallest of the following amounts:
>
> (a) the sum of the payments of the compensation affected payments payable to the person for:
>
> (i) the periodic payments period; or
>
> (ii) if a lump sum compensation payment is received before 20 March 1997 — the old lump sum preclusion period; or
>
> (iii) if a lump sum compensation affected payment is received before 20 March 1997 — the new lump sum preclusion period;
>
> (b) the compensation part of the lump sum payment or the sum of the amounts of the periodic compensation payments;
>
> (c) the maximum amount for which the insurer is liable to indemnify the compensation payer in relation to the matter at any time after receiving:
>
> (i) a preliminary notice under section 1177 in relation to the matter; or
>
> (ii) if the insurer has not received a preliminary notice — the recovery notice under this section in relation to the matter.

The AAT found that there were two apparent drafting errors in subpara (a)(iii). First, the words 'lump sum compensation affected payment' should read 'lump sum compensation payment', and secondly, the words 'before 20 March 1997' should read 'on or after 20 March 1997',

The Tribunal considered the cases of *Lawrie and Secretary, Department of Family and Community Services* (1998) 54 ALD 483, *Krpan and Veness and Secretary, Department of Family and Community Services* [2000] AATA 6 and concluded that it had to apply the literal words despite the apparent drafting errors.

This led to the conclusion that 'the recoverable amount' was $10,750, ie being the amount calculated using s.1179(4)(b). Consequently the notice issued by the Department was invalid as it specified an amount of $4292.80.

Given the invalidity of this notice, the Tribunal then went on to consider other possible legislative avenues for recovery. It proposed an alternative course whereby the Department refunded the $4292.80 to Dujmovic and then recovered this amount under ss.1166(1) and (2).

Special circumstances

Finally, the Tribunal addressed the issue of special circumstances. It considered the submission that incorrect information was given by the Department, but concluded that this did not occur. It also considered Dujmovic's financial situation and the claim that the settlement did not include an amount for loss of earnings.

In conclusion the Tribunal found that there were not sufficient grounds to warrant the exercise of the discretion under s.1184(1).

Formal decision

The AAT set aside the decision of the SSAT with directions that:

- the amount of $4292.80 (being the total amount of DSP received by the respondent between 23 January 1998 to 16 July 1998) was not payable under s.1165(1);
- the Recovery Notice issued by the Department on 18 June 1999, in relation to the amount of $4292.80 was not in accordance with s.1179 and was invalid;
- the amount of $4292.80 could lawfully and properly be recovered by the Department pursuant to ss.1166(1), 1225(1) and 1230C(1) of the Act.

[R.P.]