

Formal decision

The AAT set aside the decision under review, and substituted a decision that the debt of the period 3 July to 18 December 1997 be waived.

[R.P.]

Family payment debt; request to pay on an estimate; administrative error; special circumstances

SECRETARY TO THE DFaCS and
AGRESTI
(No. 2000/383)

Decided: 19 May 2000 by
R.P. Handley.

The Department sought review of a decision of the SSAT which had affirmed the raising of family payment debts of \$1216.80 for the period 2 January 1997 to 18 December 1997 and \$517 for the period 1 January 1998 to 21 May 1998, and waived recovery of the debt of \$1216.80.

The issue

The issue in dispute before Tribunal was the recovery of the debts.

The facts

On 18 December 1996, Agresti lodged a claim for family payment in respect of her four-year-old son and her second son who was born on 12 December 1996. She estimated that her combined taxable income in 1996/97 would be \$56,543, which was less than her combined taxable income of \$84,135 in 1995/96, because she had commenced maternity leave and her husband had become self-employed in November 1996. By letter dated 1 May 1997, the Department advised her that the income used to work out her rate of family payment was her estimate of \$56,543. By letter dated 1 December 1997, the Department advised her that she must notify the Department if her combined income for 1996/97 exceeded the applicable income limit for two children of \$69,239. Agresti did not reply to this letter and family payment continued to be paid to her on the basis of her estimate of \$56,543 for 1996/97. A data matching exercise subsequently revealed that her

combined taxable income for 1996/97 was \$70,930. On 21 May 1998, the Department cancelled her family allowance, as family payment was renamed. On 28 July 1998, the Department raised debts against Agresti of \$1216.80 for the period 2 January 1997 to 18 December 1997 and \$517 for the period 1 January 1998 to 21 May 1998.

The evidence

Agresti said 1996/97 was a difficult year for her. Her mother died, she and her husband had been evicted from their rental accommodation in November 1996, and her husband resigned from his job to care for her and their children because she suffered ongoing pain as a result of spinal injuries received in a motor vehicle accident in 1994. Her husband had hoped to obtain contract work but none had eventuated. Their new baby born in December 1996 had health complications.

Her estimate of \$56,543 was based on the rental income she expected to receive from a property she inherited from her mother, income she received from the investment of a lump sum compensation settlement arising from the motor vehicle accident, and her income and her husband's income from 1 July to November 1996. She said actual combined income for 1996/97 exceeded her estimate because she received more rental income than she had expected as a result of a proposed sale of the property falling through. Her ATO assessment for 1996/97 was not issued until November 1997 because the inheritance of the rental property had complicated preparation of her return.

Agresti said she generally reads forms she signs but had no understanding of the consequences of under-estimating her income on the family payment claim form and did not realise she had a choice as to whether to provide an estimate. Her main objective in lodging the claim in December 1996 had been to obtain the maternity allowance. She had no specific recollection of the Department's letters of 1 May 1997 and 1 December 1997. In December 1997, they had moved into a new house and their records were in some disarray.

At the time of hearing in February 2000, her husband remained full time carer of the children and she worked full-time as an office worker. The family's income consisted of her wages and income from a rental property.

The Department's submissions

The Department noted that Agresti's combined taxable income in 1995/96 exceeded the applicable threshold for payment of family payment. Regard was had to her estimate for 1996/97 and it was considered to be a request to assess her entitlement to family payment on the basis of the estimate. It was noted that the claim form did warn of the risk of providing an estimate which was not within 10% of actual income.

The Department submitted that it was empowered by s.885 to recalculate the family payment to which Agresti was entitled. As she had not replied to the Department's letter of 1 December 1997 by providing details of actual income in 1996/97, the Department had no choice but to continue family payment in 1998 on the basis of her estimate for 1996/97 and had the power to do so under s.1069-H18. Agresti had the responsibility, having been notified of her obligations, to notify of events or circumstances which might affect her payments, an obligation accepted by the Tribunal in *Secretary, DFaCS and Delia* [1999] AATA 799. The Department relied on the reasoning in *Delia*.

Agresti's submissions

Agresti's representative referred to the analysis of the relevant legislation in *Stuart* (1998) 3(4) SSR 42 and argued that Agresti had not made a request in accordance with s.1069-H21 as there was no provision to make a request on the claim form which she had lodged. Agresti's primary intention in lodging her claim in December 1996 was to obtain maternity allowance. Unfortunately, the form provided for that allowance was a composite form which also included family payment and childcare assistance. Section 885 permits the Department to recalculate the family payment payable but does not empower it to make a determination.

As there had been no request to be paid on the basis of an estimate on the claim form lodged by Agresti, the decision to do so was an administrative error and was the sole cause of the overpayment for the period 2 January 1997 to 18 December 1997 and, accordingly, that debt must be waived under s.1237A(1).

In relation to the second debt of \$517 for the period 1 January 1998 to 21 May 1998, s.1069-H15 did not apply and the Department did not have the power to continue paying Agresti in 1998 on the basis of her 1996/97 estimate. The Department's letter to her dated 1 December 1997 did not ask her to provide

details of her income for 1996/97 (which was the base year for payment in 1998). Thus this debt also arose solely as a consequence of administrative error and must be waived under s.1237A(1). In the alternative, waiver under s.1237AAD should apply, because of Agresti's special circumstances, including the extent of the Department's administrative error, and Agresti's circumstances at the relevant time including her mother's death, her ill-health, and the eviction from her home in November 1996 prior to the birth of her second child who also had health problems.

Administrative error/special circumstances?

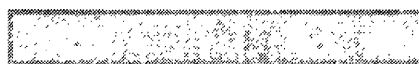
In relation to the debt of \$1216.80 for the period 2 January 1997 to 18 December 1997, the Tribunal referred to the general income test set out in s.1069, noting that s.1069-H21 makes provision for changing the appropriate tax year at the person's request. The Tribunal referred to the decisions in *Stuart* and *Delia*. It noted that the claim form completed by Agresti requested her to provide an estimate of income for 1996/97 because she had ticked a box indicating a particular change in circumstances. The Tribunal noted the presence of the warning on the bottom of the page containing the question requesting Agresti to provide an estimate of her income in 1996/97 but could not see how the question could be interpreted as a request in the context of s.1069-H21 and therefore decided that the section could not apply. In the Tribunal's opinion, the Secretary was only under a duty to apply the legislation beneficially where empowered to do so. The Tribunal agreed with the approach adopted in *Stuart*, namely that in the absence of a request, the Secretary has no power to pay family payment on the basis of an estimate of income. The Secretary should have assessed Agresti's eligibility for family payment on the basis of her income in the base year (1995/96); as her income in that year exceeded the relevant threshold, no family payment was payable to her and the overpayment for the period 2 January 1997 to 18 December 1997 arose solely as a result of administrative error. The Tribunal accepted Agresti's evidence that she did not have any understanding of how the Act operated and was not aware that she was receiving family payments to which she was not entitled. The Tribunal was satisfied that the debt of \$1216.80 for that period must be waived under s.1237A(1).

In relation to the debt of \$517 for the period 1 January 1998 to 21 May 1998, the Tribunal was of the view that Agresti should have responded to the Department's letter of 1 December 1997 by providing details of her 1996/97 income, noting that had she done so, her eligibility for family allowance in 1998 would have been reassessed on her base year for that year (1996/97) and, on that basis, she would not have been paid family payment. Therefore, the Tribunal could not make a finding of sole administrative error and the debt could not be waived under s.1237A(1). The Tribunal then considered waiver of this debt under s.1237AAD. The Tribunal agreed with *Callaghan and Secretary, DSS* (1996) 45 ALD 435, where it was held that the word 'knowingly' in that section aligned with actual knowledge. In the present case, the Tribunal was satisfied that Agresti had no actual knowledge of her omission to comply with the Act because, at the time the letter should have been received by her she was preoccupied with the family's move into a new home. In relation to the meaning of 'special circumstances' the Tribunal referred to the leading case of *Beadle v Director-General of Social Security* (1985) 7 ALD 670. The Tribunal was not satisfied that the requirement of special circumstances was met as, by the end of December 1997, most of the most difficult issues facing Agresti and her family had largely been resolved.

Formal decision

The AAT affirmed the decision of the SSAT.

[S.L.]



Family payment; overpayment; rate; 'with regard to'; notifiable event; write-off, waiver; special circumstances

COUCH and SECRETARY TO THE DFACS (No. 2000/1)

Decided: 5 January 2000 by B.G. Gibbs.

The DFACS applied to the AAT for review of an SSAT decision. The SSAT set

aside a decision to raise and recover \$3484.80. Couch received family payment (FP) from 10 April 1997 to 6 November 1999. The DFACS decided to recover the money as she provided an incorrect estimate of her predicted income for the 1996/97 financial year.

The issues

The AAT considered whether the rate of FP was calculated having 'regard to' the estimated predicted income when her FP rate was actually based on her income from the previous year. If so, was her income more than 110% of the estimated income? Was Couch overpaid FP for the 1996/97 financial year? If so, should the debt be waived or written off?

Background

Couch received FP. She and her partner owned a trucking business, which they sold in October 1996. Prior to selling the business, her partner was driving six days a week and sleeping on the seventh. He was driving return trips to Sydney and Brisbane with little rest. His work hours put considerable strain on the family as Couch had the sole care of a baby, a toddler and a school-aged child. Following the sale of the business, her partner received newstart allowance (NA) and she was exempt from the FP income test.

On 30 December 1996, Couch was sent a notice listing a number of 'notifiable events'. The form advised that she had to notify the DFACS within 14 days of her partner returning to work. In March 1997, her partner returned to salaried employment as a truck driver. The DFACS was notified and NA was cancelled. A request for details was sent to Couch, to allow an assessment of her eligibility for FP. Couch and her partner signed an income review form on 8 April 1997, returning it to the DFACS. They declared their taxable income for the 1995/96 financial year at \$7814. They advised that Mr Couch returned to work on 11 March 1997 and estimated their taxable income for the 1996/97 financial year at \$17,500. The form advised that, should their actual income be 110% more than their estimate, they may have to repay any resulting overpayment.

The DFACS decided to assess Couch for FP on for the 1995/96 year, not her estimate for the coming financial year. She was advised in writing.

A data match with the Australian Tax Office indicated that her combined 1996/97 taxable income was \$58,260.