income of $77,254. This exceeded the income ceiling for qualification for family allowance during the relevant period, which was $72,537. Nemer was asked to refund family allowance totaling $987 paid from 23 April 1998 to 22 October 1998, and further payments were cancelled.

On review the SSAT found that Nemer and her partner had reimbursed $6539 to their employer for the private use of the cars. It held such contributions to have the effect of reducing the value of the car fringe benefits in calculating entitlement to family allowance. This meant that Nemer's income was below the threshold.

AAT review

The AAT reviewed the relevant provisions of the *Social Security Act 1991* (the Act), noting that income for a period includes the person's adjusted fringe benefit value for the period (s.838(4)); that an adjusted fringe benefit is the fringe benefits value less $1,000 (s.1069-H25); and that an assessable fringe benefit includes a car benefit (s.10A). It was apparently not in dispute that Nemer and her partner had received a car benefit within the meaning of s.1157C(1), and that it was not an exempt car benefit pursuant to s.1157D.

Section 1157K of the Act prescribed that the value of car fringe benefits was to be worked out using a method statement contained in s.1157L unless the Minister had determined an alternative valuation method under s.1157M. As no such determination had been made s.1157L had to be applied. The AAT could find nothing in s.1157L to allow employee contributions to be offset.

On the additional information before it the AAT found that Nemer's taxable income for 1997/98 was $35,539 and her partner's was $36,946. Applying s.1157L the adjusted fringe benefits value was worked out to be $6563. These amounts totalled $79,048 which exceeded the threshold figure so Nemer was not entitled to receive family allowance during the relevant period.

Formal decision

The AAT set aside the SSAT's decision and decided that family allowance was properly cancelled and that a recoverable debt of $987 was properly raised.

[K.deH.]

Family payment: request to pay on an estimate

SECRETARY TO THE DFaCS and BUTT
(No. 2000/623)

Decided: 20 July 2000 by D.F. O'Connor, H.E. Hallowes, J.D. Campbell.

Background

A delegate of Centrelink raised two debts. The first debt of $3697.50 related to the period 1 August 1996 to 28 August 1997. The second debt of $3298.40 related to period 11 September 1997 to 10 September 1998. The amount of the first debt was varied by an authorised review officer to $1132.95.

Butt had four children, born between July 1989 and February 1996. She had undertaken casual employment, on and off, during the past eight years. She returned to casual employment in January 1997. Her husband became self-employed, having bought a business in early 1997. Butt filled in a range of Centrelink forms estimating her income. She had to anticipate the number of shifts she may work as a midwife and she obtained figures from her husband's accountant before completing forms. She provided six different estimates during the period 1 January 1996 to 1 July 1998. There was an unanticipated increase in Butt's income during the financial year ending 30 June 1997, when she discovered an error in her level of wages. She received a back payment of a few thousand dollars.

Butt was paid family payment on the basis of her estimates during the period August 1996 to September 1998. During these periods her combined taxable income was more than 10% greater than the estimates provided.

Issues

Generally the issues were whether Butt was overpaid family payment and family allowance (the Tribunal referred to both payments as family payment); and if so, whether there was a debt. Further, it looked at whether part or all of the debt should be waived. Specifically the Tribunal looked at the issue of whether, when an estimate of income is provided, there needs to be a request made to use the estimate in calculating the rate of family payment.

Legislation

Section 885 of the *Social Security Act 1991* (the Act) provides for a recalculation in the event of an overestimate of income, with s.891 of the Act setting the date of effect. Section 1069-H (as it was with effect from 1 January 1996) sets the appropriate tax year on which to calculate the rate of family payment. Section 1223 of the Act outlines when a debt arises in respect of family payments and s.1237A contains the relevant waiver provisions.

The Tribunal noted:

> The appropriate tax year to be considered when determining a claimant's income in order to determine the rate of family payment payable for a calendar year is the income for the tax year ending on 30 June the year before. It is referred to as the 'base tax year' (defined in s.1069-H13, later defined in s.1069-H14). However, if a 'notifiable event' occurs, and income in the calendar year in which the notifiable event occurs exceeds 110 per cent of the base tax year income or is likely to exceed that amount, the base tax year changes to the notifiable event year (s.1069-H18 or s.1069-H19). When the notifiable event occurs, actual taxable income may not be known, preventing an assessment under s.1069-H18. A person may give the Secretary an estimate of income for a tax year and in writing request the Secretary to use the estimate in order to calculate a rate of family payment. However, if a person anticipates a decrease in income, they can ask the Secretary to use an estimate of future income to increase the rate of family payment payable. On the other hand, if an event occurs which means that their income exceeds or is likely to exceed their base tax year income, the Secretary wants to know so that the rate of family payment payable can be reduced and recipients are not faced with a debt to repay to the Commonwealth.

(Reasons, para. 13)

Relevant cases

The Tribunal reviewed two conflicting cases that have addressed the issue of estimates; *Stuart and Secretary DSS* (1998) 3(4) *SSR* 42, and *Secretary, DSS and Jones* (1998) 3(4) *SSR* 44. More recently the issue of whether estimates should be used to calculate the rate of family payment was addressed in *Secretary, DFCS and Dyson* (2000) 4(3) *SSR* 34. Similar calendar years were at issue in that case.

Department's submission

The Department submitted that the information provided by Butt could be characterised as a request and even if no request was made by Butt that her estimate be used, ss.885 and 1223(3) must apply.

The Department also referred to the recipient notification notices sent to Butt on 5 March 1997, 5 September 1997 and 15 December 1998 and the events Butt was obliged to tell the Secretary about, including whether she or her partner were

self-employed or, if she was paid on an estimate, whether their combined taxable income was likely to be more than $35,697.20 for the 1995/96 tax year or, in the second notice $36,403.40 for the 1996/97 or 1997/98 tax years. On 23 June 1998 Butt was notified that she must advise the Secretary if her income would be more than $41,140.00 in the 1997/98 tax year.

In determining any overpayment the Department submitted that it is the difference between family payment calculated on the basis of an estimate and what should have been paid based on actual figures which provides the amount of the overpayment.

Butt's submissions

Butt submitted that she was diligent in advising Centrelink about variations in her income. She was aware that the estimates were used to calculate her income. She was not aware that the calculation of family payment could be done on any other basis.

Butt referred to a Centrelink Question Guide and Butt's answer sheet, completed on 1 November 1997 in which question 7 asks:

> Have any of the changes listed below happened to you ... since 30 June 1997 that you have NOT ALREADY TOLD US about? ...
>
> - you ... are self employed and your combined taxable income is likely to go up
> - your income in 1997/98 will be less than your income in 1996/97 and you wish to have your Family payment and/or Childcare Assistance assessed on your 1997/98 income
>
> (This may have happened because you stopped work, reduced your hours of work, took leave without pay or separated)

Butt did not respond to this question on her answer sheet because the notifiable event occurred in March 1997. Butt submitted that the Secretary, in advising Butt when she needed to contact the Secretary in various notification letters, had provided figures to Ms Butt, which were 10 per cent above her estimate. Butt understood that it was not until the figure provided was reached, that she was required to notify the Secretary.

Butt argued that there was no basis on which her base tax year should have changed during the relevant periods. She argued that s.885 of the Act did not stand alone to empower the Secretary to recalculate the rate of family payment without reference to s.1069 because, if that was so, it would make s.1069-H21 otiose. Section 885 only applied when there was a request in writing for an estimate to be used under s.1069-H21. Additionally, if Butt had been overpaid family payment, she had received those payments in good faith.

Request to use estimate must be made

The Tribunal found that the meaning of s.1069-H21 was clear:

> A recipient must request in writing that a determination be made recalculating entitlement to family payment using an estimate provided. The person must agree that the person's rate of family payment for that tax year is to be recalculated if the person's actual income for that tax year exceeds 110 per cent of the amount estimated by the person (s.1069-H21(d)), that is, the person agrees to a recalculation being done in the future when actual figures are known. If the above request is made, and agreement is given, the base tax year changes to the tax year in which the request is made. However, the recalculation only has effect if the actual income exceeds 110 per cent of the amount estimated.

(Reasons, para. 25)

The Tribunal found that Butt did not make a written request that the Secretary use her estimate. She was doing no more than providing estimates as requested by the Secretary. Butt did not know that she had a choice about how her family payment was calculated.

Effect of notifiable event

The Tribunal found in March 1997 a notifiable event occurred and that until that time Butt's family payment should have been calculated using her base tax year income, that is, her income for the year ending 30 June 1996 ($39,068).

> The Tribunal found that Ms Butt was entitled to be paid family payment at a rate based on her base tax year income as she did not ask the Secretary in writing to use her estimate in order to determine a rate applying s.1069-H21. Although notifiable events occurred during the relevant period, Ms Butt's income for the tax year in which the notifiable event occurred was then not available to the Secretary to decide if it exceeded the tolerance allowed, nor, on her estimates, was it likely to exceed 110 per cent of her income for the base tax year. Section 1069-H18 can now be applied but not s.1069-H19. That provision cannot be revisited (see *Dyson*). If the base tax year changes in order to calculate a rate, it only changes until the end of the family payment period, the calendar year (*Dyson*).

(Reasons, para. 28)

The Tribunal found that the Department had incorrectly calculated Butt's rate of payment from August 1996. Estimates were used but without a request being made under s.1069-H21. Consequently the Tribunal found that s.885 was not applicable. That section had no role to play.

Amount of debt

The Tribunal concluded that Butt had underestimated her income but the rate of family payment was not worked out in accordance with s.1069. The Tribunal therefore sent the matter back to the Department for recalculation of Butt's entitlement using base year income. This might mean there would still be an overpayment.

Any such debt which may arise was the difference between what should have been paid to Butt using her base tax year income and what she had already been paid. The recalculations, however, were not being done under ss.1223(3)(b)(ii), regard no longer being had to an estimate. Section 1223(3) did not apply. Turning to ss.1223(1) and (5) the Tribunal determined that it was only the amount overpaid after 1 October 1997 which was a debt due to the Commonwealth.

Waiver of debt

The Tribunal concluded that pursuant to s.1237A(1) any debt arising following recalculation of entitlement should be waived.

> Subsection 1237A(1) provides that the Secretary, and on review this Tribunal, must waive the right of the Commonwealth to recover the debt attributable solely to administrative error if the payment is received in good faith ... The payments were received by Ms Butt in good faith. The Tribunal finds that Ms Butt thought that the legislation was being correctly applied to her, that she complied with the Secretary's notices and that she provided estimates to the Secretary when asked. Recipients in those circumstances, understanding their payments to be correct, budget for and spend those payments accordingly. ... those estimates should not have been used. Ms Butt did not contribute to the administrative error. She did not ask for her estimates to be used. She estimated her income to the best of her ability when asked to do so. She received the payments of family payment in good faith not being aware that the Act provided for her family payment to be calculated on a different basis.

(Reasons, para. 32)

Formal decision

The decision under review was set aside and the Tribunal remitted the matter to the applicant with directions that:

- the rate of family payment payable to Ms Butt was be recalculated from 1 August 1996 in accordance with the Tribunal's reasons;
- the amount of family payment since 1 October 1997 to which Ms Butt was not entitled was a debt due to the Commonwealth; and
- recovery of the debt should be waived under s.1237A(1) of the *Social Security Act 1991*.

[M.A.N.]