

occurred ... [then] there must be some feature out of the ordinary' (at 545).

The Tribunal considered the line of cases which deal with application of the 50% rule to compensation amounts, including *Secretary, Department of Social Security v Banks* (1990) 23 FCR 41 and *Secretary, Department of Social Security v Smith* (1991) 30 FCR 56, concluding that s.1184(1) can be used to address an injustice arising from the application of the usual 50% rule. Although dissection of the lump sum amount into components should not be encouraged (*re Fowles and Secretary, Department of Social Security* (1995) 38 ALD 152), such dissection was possible where a clear designation of an amount within the total settlement moneys as compensation for economic loss, had been made (*Secretary, Department of Social Security and Beel* (1995) 38 ALD 736).

The decision

In this matter the Tribunal concluded that the operation of the 50% formula gives rise to such an 'unreasonable and unjust result' — when considered in the light of the applicant's medical and financial situation — that the discretion contained in s.1184(1) should be exercised.

Formal decision

The Tribunal set aside the decision and substituted a decision that the portion of the lump sum settlement be treated as not having been made such that the compensation part of the lump sum is \$15,000.

[P.A.S.]

Overpayment: policy guidelines and special circumstances

SORIANO AND SECRETARY TO
THE DFaCS
(No. 2000/842)

Decided: 20 September by
E.K. Christie.

Background

Soriano decided to bring his parents to Australia. He and his wife signed an assurance of support agreement. Twelve months after his parents arrived they moved out of Soriano's house without advising him. His parents were subsequently granted special benefit. Soriano

was not told about this as was required by departmental policy.

An assurance of support debt of \$18,213.47 was raised. This decision was affirmed by an authorised review officer and in turn by the SSAT.

The issue

The issues in this appeal were:

- whether there was a debt to the Commonwealth;
- whether the debt should be waived under the 'special circumstances' provisions of the Social Security Act.

The evidence

Soriano's evidence was that shortly after his parents arrived there were disagreements over small domestic issues. Ultimately his parents moved out although he did not know where they had moved until approximately four to six months later. He had no contact with his parents, nor did he know what they were doing. He also had no contact with Centrelink until he was asked whether his \$5000 bond could be used. He agreed to this but was still not told where his parents lived.

Soriano conceded he knew that if his parents were paid special benefits that he may have to pay the money back. However, he thought that the \$5000 bond would cover the debt. Soriano said that if he had been told that the debt was accruing then he would have taken action for dealing with this, for example, seeking assistance for his parents for alternative accommodation through friends.

The submissions

The first submission put on behalf of Soriano was that he was not liable for the debts as special benefits were not payable to his parents. It was submitted that there had not been 'a substantial change in circumstances beyond the assured's control' as referred to in the department policy guidelines.

It was also submitted that if a debt exists, then it should be waived on the grounds of special circumstances. It was submitted that policy guidelines specified the need for both parties to understand their potential obligations and that there was no attempt to ensure that Soriano understood his obligations and the possibility of an overpayment. It was submitted that if the guidelines had been complied with then Soriano may have continued to provide support, counselling or mediation may have been used to prevent a breakdown and special benefits would not have been necessary. It was also submitted that there was no

change in Soriano's parent's circumstances that warranted payment of special benefits and any change that occurred was beyond Soriano's control.

On behalf of the Department it was argued that there was a very clear case of family breakdown and a sound basis to pay special benefits. It was argued that when Soriano signed the assurance of support that he gave a declaration to repay any special benefits paid to his parents during the relevant period. A failure to comply with policy guidelines did not relieve Soriano of his legal obligations. It was also submitted that Soriano had a capacity to repay the debt and that financial hardship, alone, did not make it desirable to waive the debt.

Should special benefits have been paid? The Tribunal concluded that there was a significant change in circumstances and that this warranted payment of special benefits to Soriano's parents.

Waiver

The Tribunal referred to the failure to comply with departmental policy guidelines, specifically:

- a failure to interview Soriano at the time that his parents claimed special benefits;
- a failure to refer Soriano and his parents to social work staff in order to resolve family conflict; and
- an omission to provide three-monthly reviews of the assurance of support and notify Soriano of the outstanding debt.

The Tribunal also noted that if the policy had been complied with Soriano would have had an opportunity to resolve family conflict through counselling or mediation. This opportunity was denied and was exacerbated by the Department's failure to advise him of his parent's location.

The Tribunal also concluded that Soriano may not have understood the implications of the overpayment.

The Tribunal found that there were special circumstances which were uncommon or unusual. The Tribunal therefore waived the amount of the debt.

Formal decision

The AAT set aside the decision under review, and substituted a decision that the whole of the debt accrued between 1 May 1998 and 30 May 1999 be waived under the special circumstances provision of the Act.

[R.P.]