or a conviction, this did not preclude a finding that Pardo was 'in gaol';

- that under the *Sentencing Act*, a hospital security order cannot be made without recording a conviction.
- that if Pardo is not 'in gaol' then he was 'undergoing psychiatric confinement because he had been charged with an offence'. Pardo was not undergoing a course of 'rehabilitation' until 22 February 1999 when he started a structured course in ward M5.

'In gaol'

The AAT was not satisfied that Pardo was convicted. It relied on the order made by the magistrate and, contrary to the approach taken by the SSAT, concluded that:

> It is obvious from the Order made by the Magistrate and by the certified extract ... that all the provisions of s.93 in so far as they apply to the applicant have been satisfied (excepting Sub-Section (d)). It is clear from this Section that a person may be found guilty and may be sentenced but not convicted. Because the applicant was not 'convicted', he is not 'in gaol' for the purposes of s.23(5) of the Social Security Act.

(Reasons, para. 35)

The AAT also referred to a discretion that exists under ss.7 and 8 of the *Sentencing Act 1991* which contain the words 'may' and 'whether or not'. The AAT concluded that the order made by the magistrate was within his power and by implication a hospital security order can be made without registering a conviction.

> The magistrate did not impose a conviction. He was entitled not to impose a conviction as a matter of law.

(Reasons, para. 44)

The AAT found that the SSAT had made an error of law by not observing the order made by the magistrate.

'Rehabilitation'

The AAT considered the meaning of this term within the Act and other legislation. Considerable evidence was taken from the social worker at the hospital concerning rehabilitation undertaken by Pardo.

The AAT also considered the meaning of the term 'a period' referred to in s.23(9) of the Act. In the case of *Secretary, Department of Family & Community Services & Fairbrother (1999) AATA 580* the AAT concluded that:

> I think the use of the word 'period' in conjunction with the use of the term 'course of rehabilitation' makes it clear that Parliament had in mind a formal course of rehabilitation with a finite duration, a structure, a beginning and an end.

The AAT took a different view. It concluded that rehabilitation is not capable of definition in relation to duration as this will vary depending on a person, the rehabilitation provider, the methods used etc. The AAT felt that on the basis of the social worker's evidence, all the programs undertaken at the hospital fell within the concept of 'rehabilitation', consequently Pardo was 'undertaking a course of rehabilitation ... during a period' while he was in hospital.

Formal decision

The AAT set aside the decision under review, and substituted a decision that at all relevant times Pardo qualified for receipt of disability support pension.

[R.P.]

Waiver of a debt: special circumstances while imprisoned

NEIVANDT and SECRETARY TO THE DFaCS (No. 2000/1115)

Decided: 24 November 2000 by E.K. Christie.

Background

Neivandt was receiving disability support pension (DSP), and had been sent a notice on 3 November 1999 requiring him to advise Centrelink within 14 days if he was sent to gaol after being convicted of an offence. He was so gaoled on 18 November 1999, and was released on bail on 24 December 1999. Centrelink was not informed and discovered the incarceration by a data match. It then asked Neivandt to refund DSP $1151.74 paid for the period he was in gaol.

The only issue for the AAT to decide was whether the debt could be waived. The relevant provisions of the *Social Security Act 1991* (the Act) are:

> 1237A.(1) Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.
>
> Note: Subsection (1) does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).
>
> 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.

Neivandt argued that he was not personally responsible for the debt as he had taken steps to advise Centrelink of his imprisonment. He was at Maroochydore Watchhouse from 18 to 22 November 1999, and 'watchhouse rules' applied so he could not make phone calls and the police were too busy to care about personal problems of prisoners. He said he asked about advising Centrelink and the police had said they would sort it out, but that proved not to be the case.

For the next week Neivandt was at the Arthur Gorrie Correctional Centre. He said that on induction he had asked a social worker about advising Centrelink. He was told they would look after it and believed it would be done.

Neivandt was at Woodford Prison Farm for the rest of the time. He said that on arriving he asked to see a social worker so he could check on the status of his DSP, but his enquiry was considered low priority and he never saw a social worker. Prison policy was that he could only contact a government department through the Official Visitor or Ombudsman which could take several weeks.

The AAT had evidence from the Arthur Gorrie Correctional Centre that it had in place a process whereby counselling staff assisted inmates by supplying them with Centrelink forms, and then faxing completed forms to Centrelink.

In reaching its decision, the AAT appears to have agreed with the Secretary that the obligation to notify Centrelink was a personal obligation attaching to Neivandt (*Re Junor & SDSS* (1997) 48 ALD 326) which was not discharged by seeking to have another person discharge it or accepting another person's offer to discharge it.

The AAT agreed that the debt could not be waived under s.1237A(1) because Neivandt knew he was not entitled to be paid during imprisonment, so he did not receive it in good faith: Secretary, *DEETYA v Prince* 3(3) *SSR* 37.

(The DFaCS had also argued that s.1237A(1) could not apply because there was no administrative error.)

The AAT noted that in *Re Beadle & DGSS* 1(20) *SSR* 210 it was stated that the phrase 'special circumstances' was 'incapable of precise definition' and that 'circumstances must have a particular quality of unusualness that permits them to be described as special'.

The AAT was satisfied that the 'watchhouse rules' applied while Neivandt was at the Maroochydore Watchhouse. He had done the only thing possible and asked the police to notify Centrelink but that was not acted upon. The AAT held the 'watchhouse rules' to be unusual and so warranted the description of 'special circumstances'. Also, it agreed with the SSAT (without reiterating its reasoning) that Neivandt did not knowingly or deliberately contravene the Act. On this basis it waived, pursuant to s.1237AAD, the debt accrued during that period.

The Arthur Gorrie Correctional Centre and the Woodford Prison Farm, however, provided Neivandt with an opportunity to notify Centrelink. The circumstances that applied for the debt that accrued after 23 November 1999 could not be described as special, and that debt could not be waived under s.1237AAD.

Formal decision

The AAT set aside the decision under review and decided to waive the DSP overpaid from 18 to 22 November 1999.

[K.deH.]

Overpayment: data matching and special circumstances

SECRETARY TO THE DFaCS and MARIA & CARLOS DUARTE (No. 2000/927)

Decided: 25 October 2000 by J.D. Campbell.

Background

Mrs Duarte worked at a nursing home between 27 August 1996 and 7 August 1997. During this time Mrs Duarte received parenting allowance and Mr Duarte received disability support pension.

They were sent various notices requiring them to advise of income changes. Following employment verification reports, debts were raised for the period 16 February 1996 to 14 August 1997. On review, part of Mr Duarte's debt was waived due to administrative error — the remaining debt was for the period 13 May 1996 to 7 August 1997. It was found that although there was administrative error, there was no good faith.

The SSAT set aside both decisions. It decided that the overpayment was raised, at least partly, on the basis of information obtained through a data-matching exercise under the *Data Matching Program (Assistance and Tax) Act 1990* (DMP Act). This required commencement of recovery within 12 months of obtaining the relevant data, and this did not occur.

The issue

The Tribunal identified three key issues:

- whether the employment declaration form match conducted by Centrelink is subject to the requirements of the DMP Act;
- if this Act does not apply, whether there were debts for the period 27 August 1996 to 7 August 1997, ie the period relating to employment with Camden Nursing Home;
- whether administrative error or special circumstances waiver should apply.

The evidence

Mr and Mrs Duarte's evidence was that Mrs Duarte started work at Camden Nursing Home in late August 1996. She spoke with a Centrelink officer on 16 September 1996 and advised about casual employment, providing a copy of her first pay slip. She said that her and her husband's payment remained the same, but they did not think that anything was wrong.

The submissions

The Department argued that data matching was governed by the information principles in the *Privacy Act 1988* and not the DMP Act.

It was also argued that there was a breach of the *Social Security Act 1991*, by virtue of the failure to advise of employment within 14 days, that administrative error was not the sole cause of the debt and that the payments were not received in good faith. Further, because the failure to comply was done 'knowingly', then special circumstances waiver did not apply.

Data matching

The AAT concluded that the *Social Security Act 1991* requires disclosure of certain information and that paragraph 16(4)(e) of the *Income Tax Assessment Act 1997* allows the Australian Taxation Office to pass information to the Department:

> ... for the purpose of administering any Commonwealth law relating to pensions, allowances or benefits. As such disclosures are authorised by law, the Tribunal finds that they are governed by section 14 of the Privacy Act, and more particularly by the information privacy principle 11 within section 14.

(Reasons, para. 36)

The Tribunal concluded that the 'data matching program as nominated is not governed by the DMP Act'.

Waiver

The AAT accepted that because the notification of employment did not occur within the required 14 days there was a debt under s.1224 of the *Social Security Act 1991*.

It concluded that both Mr and Mrs Duarte believed that their payments would decrease after notification on 16 September 1996, but they actively decided to take no further action.

Consequently, although the overpayments after 16 September 1996 arose solely from administrative error there was no good faith.

The Tribunal did not dismiss special circumstances waiver on the grounds that Mr and Mrs Duarte 'knowingly' breached the Act. It considered the administrative error of Centrelink, Mr Duarte's back condition and their financial situation, but found that these circumstances were not 'special'.

Formal decision

The AAT set aside the decision under review, and substituted a decision that:

- Mrs Duarte received an overpayment of parenting allowance during the period 28 August 1996 to 7 August 1997 and that a debt of $6041.80 was owed to the Commonwealth; and
- Mr Duarte received an overpayment of income support payments during the period 28 August 1996 to 7 August 1997 and there was a debt of $4547.30.

[R.P.]