

The Tribunal then considered the intention of Parliament in the repealing legislation and found that by retaining a reference to s.885 in the amended s.1223(3) that this showed that Parliament had intended the obligation imposed under s.885 should continue and not be affected by its repeal.

Consequently, there was no contrary intention apparent in the legislation to suggest that the liability should not continue.

Formal decision

The AAT decided to set aside the decision of the SSAT and substitute a decision that Rowe was liable to pay an overpayment of Family Allowance totalling \$1726.50 for the period 25 August 1999 to 2 May 2000.

[R.P.]

[Editors Note: Refer to (2001) 4(10) SSR 114 for alternative arguments in relation to this issue.]

Parenting payment: incorrect claim; deemed claim

SECRETARY TO THE DFaCS and
VILORI
(No. 2002/252)

Decided: 12 April 2002 by
M.J. Carstairs.

Background

Vilori claimed family tax benefit on 27 July 2000. On 15 March 2001 Vilori contacted Centrelink and discussed parenting payment. She was advised that a claim was required which was returned on 26 March 2001. Parenting payment was paid from 15 March 2001.

Vilori requested a review of this decision which was affirmed, but later set aside by the Social Security Appeals Tribunal, which decided that the claim for parenting payment should be backdated to July 2000 based on the claim for family tax benefit and maternity allowance made at that time.

The law

Section 15 of the *Social Security Administration Act 1999* (the Administration Act) deals with incorrect claims. The relevant subsections state as follows:

15.(1) For the purposes of the social security law, if:

- (a) a person makes a claim for a social security payment; and

- (b) the claim is an incorrect claim; and
- (c) the person subsequently makes a claim for another social security payment for which the person is qualified; and
- (d) the Secretary is satisfied that it is reasonable that this subsection be applied;

the person is taken to have made a claim for that other social security payment on the day on which he or she made the incorrect claim.

15.(4) For the purposes of this section, a claim made by a person is an incorrect claim if:

- (a) the claim is for a pension, allowance, benefit or other payment under a law of the Commonwealth, other than this Act or the 1991 Act, or under a program administered by the Commonwealth, that is similar in character to a social security payment, other than a supplementary payment; and
- (b) when the claim was made, the person was qualified for a social security payment, other than a supplementary payment.

Submissions

The legal argument relied on by Vilori was that s.15(4) applied in this case as she had earlier claimed family tax benefit. While this was not a social security payment as defined, it was a claim for payment under a law of the Commonwealth 'other than this Act or the 1991 Act'. It was also argued that family tax benefit was 'similar in character to' parenting payment in that both payments were payable to people with dependent children and both were subject to means testing.

The submission of the Department was that these were not similar payments in that parenting payment is an income support payment which is paid because a person is caring for a child and is less able to work, whereas family tax benefit is a payment to assist families with the cost of raising children.

It was argued that this interpretation was supported by Centrelink policy guidelines which included family tax benefit under the heading Supplementary Benefit and Assistance for Parenting Payment Recipients. It was submitted that the level of payment for these supplementary payments was lower than income support payments.

Conclusion

In reaching its decision the AAT considered the similar provisions that applied prior to the Administration Act. Section 500K(3) of the *Social Security Act 1991* formerly stated as follows:

500K.(3) If:

- (a) a person makes a claim (in this subsection called the initial claim) for:

- (i) a social security or service pension or a social security benefit; or
- (ii) a pension, allowance, benefit or other payment under another Act, or under a program administered by the Commonwealth, that is similar in character to parenting payment; and

(b) on the day on which the person makes the initial claim, the person is qualified for parenting payment; and

(c) the person subsequently makes a claim for parenting payment; and

(d) the Secretary is satisfied that it is reasonable for this subsection to apply to the person;

the person's provisional commencement day is the day on which the person made the initial claim.

The AAT noted that this subsection refers to the wording 'initial claim' rather than the wording in the Administration Act of 'incorrect claim'. The Tribunal concluded that:

The absence of a clear requirement in s.15(4) for the person not to be qualified for the first payment claimed must be taken to mean that the deeming provision establishes incorrectness in the fact that the person has not applied under the 1991 Act or the Administration Act, where he or she is qualified (as required by s.15(1)(c)) on the subsequent claim made under the social security law.

(Reasons, para. 34)

The AAT found no inconsistency between s.15(1) and (4) and found that the first arm of s.15(4) was satisfied.

However, it did not believe that family tax benefit and parenting payment are payments that are similar in character. The Tribunal referred to the cases of *Calderaro v Secretary Department of Social Security* (1991) 24 ALD 556 and *Favara and Department of Social Security* (1988) 16 ALD 64. It noted that:

In Favara the Tribunal observed that throughout the Act there was a distinction between mainstream payments, those that provide income support and supplementary payments, those that assist with other needs or are one-off payments. In that case the Tribunal decided that a family payment in existence at that time (family income supplement) was not similar in character to an invalid pension.

(Reasons, para. 37)

In conclusion, the Tribunal identified many differences in the way that each of the payments was calculated. Some of these included:

- That family tax benefit and other payments such as childcare payments are payments paid to low and middle income people to help them with the cost of raising dependent children, whereas parenting payment is an income support payment.

- Parenting payment can be paid fortnightly to a person and is paid to only one person (whereas family tax benefit can be shared).
- Family tax benefit is not assets tested and the rate of payment depends on the age of the child.
- Family tax benefit is not affected by compensation payments as they are payments for children, whereas parenting payment is.

Given this conclusion, the Tribunal found that family tax benefit was not similar in character to parenting payment. Therefore the claim for family tax benefit made in July 2000 was not an 'incorrect claim' for the purposes of s.15 of the Administration Act.

Formal decision

The AAT set aside the decision under review and substituted a decision that parenting payment was not payable prior to 15 March 2001.

[R.P.]

Overpayment: recipient notification notices; whether failure to comply

**DERRIMAN and SECRETARY TO
THE DFaCS**
(No. 2002/215)

Decided: 4 April 2002 by N. Bell.

Mr Derriman variously received invalid, disability and age pension from August 1991 until April 1998. An authorised review officer found that a debt of \$8608 in relation to disability pension payments existed for the period March 1992 to October 1996.

Mrs Derriman also variously received wife and age pension from August 1991 until April 1998. An authorised review officer similarly found that a debt of \$8608 in relation to wife pension payments existed for the period March 1992 to October 1996.

Background

Mr Derriman was in receipt of income by way of superannuation from the Defence Forces Retirement Fund, arising out of his military service over some 20 years. He applied for invalid pension in July 1991 and disclosed his superannuation entitlement, but this was not taken into account by the Department of So-

cial Security which thus paid him at a higher rate than his entitlement, an error which continued when he later transferred to disability support and then age pension.

A series of letters was sent to Mr Derriman from March 1992 requiring him to notify the Department if his and his wife's combined income 'goes above \$74.00 a week'. Neither Mr nor Mrs Derriman responded to these letters.

The law

Section 132 of the *Social Security Act 1991* (the Act) provided that a notice may be given to a recipient of disability support pension requiring the person to inform the Department if '... a specified event or change in circumstances occurs'. A person who receives such a notice '... must not, without reasonable excuse, refuse or fail to comply with a notice ... to the extent that the person is capable of complying with the notice' (s.132(5)). A similar obligation existed in respect of recipients of wife pension under s.172 of the Act.

Section 1224 of the Act provided that a debt arises where a person fails to comply with a provision of the Act, and where an amount of social security is paid as a result.

In summary, therefore, the issues before the Tribunal were whether notices requiring the giving of information had been issued to Mr and Mrs Derriman, whether or not they had complied with those notices, and whether any overpayments arising through such non-compliance ought to be recovered or waived.

The evidence before the Tribunal

It was not disputed that Mr Derriman had advised the Department of his superannuation entitlement at the time he first applied for invalid pension. He agreed that he had thereafter received a series of letters from the Department, and had not responded to them, as his belief was that he had provided the relevant income details on his original claim form. Mrs Derriman confirmed that, even though her husband had on-going health difficulties, he had always taken responsibility for all financial matters in the family, including dealings with the Department and (later) Centrelink. Neither she nor her husband at any point considered that the payments being made to them were other than their correct entitlements.

Consideration by the Tribunal

The Tribunal accepted that the Derrimans were honest witnesses, that

Mr Derriman considered he had met his obligations by disclosing his superannuation entitlement at the time he first applied for invalid pension, and that they believed that the two Commonwealth departments were in communication with each other.

The Tribunal noted the decision in *Vitalone and Secretary, Department of Social Security* (1995) 38 ALD 169 that a provision such as those in ss.132 and 172 of the Act was a penal provision and so:

... [needed] to be interpreted in a manner which is favourable to the individual concerned. It should certainly not be construed so as to impose a strict liability. An element of fault on the part of the individual concerned is thus inherent in the concept of 'refusing or failing' to comply ...

The Tribunal concluded that such an element of fault did not exist in the Derrimans' case. The Tribunal also noted the decision in *Secretary for Department of Social Security and Hoy* (1998) 52 ALD 477 that:

... [it is] the responsibility of the DSS to ensure that the notification obligations imposed by recipient notification notices ... are expressed with sufficient certainty as to leave a recipient in no reasonable doubt as to the content of the relevant obligation ...

In this matter, the notices sent to Mr and Mrs Derriman required notification in the event that income 'goes above' a figure which was always well below their weekly combined income. The stated threshold for notification was never crossed because their income exceeded it at the time of first application, hence the eventuality anticipated by the notification notice never occurred. As such there was no failure to comply with any of the notices sent to the Derrimans, nor with a provision of the Act. There was thus no debt owed by either Mr or Mrs Derriman.

The formal decision

The Tribunal set aside the decisions under review.

[P.A.S.]