SSAT Decision

Debts: statutory time limit for recovery

PP

Background

Mr and Mrs PP had debts raised against them in respect of unemployment benefit and newstart allowance paid to Mr PP of $29,865.24 and partner allowance paid to Mrs PP of $2353.26, over the period 12 October 1990 to 21 June 1995 because Mr PP had not correctly declared his wife's earnings from employment in his fortnightly continuation forms.

The Tribunal made the following relevant findings in respect of Centrelink's actions in recovering the overpayments:

- On 23 October 1990, Centrelink obtained information from Mrs PP's employer that her gross fortnightly earnings were $640.
- On 30 October 1991 Centrelink contacted Mrs PP's employer regarding her wages and was advised that Mrs PP's gross wage was $371.60 a fortnight. Centrelink did not code Mrs PP's income on Mr PP's file.
- On 7 August 1992 Centrelink was provided with a copy of Mrs PP's 1991/1992 group certificate, with gross earnings of $14,814.36.
- On 26 May 1993 Centrelink became aware that Mr PP had been declaring amounts representing weekly rather than fortnightly earnings for Mrs PP. A file note was made to investigate a possible overpayment.
- No action was taken by Centrelink relating to recovery of the debts between 26 May 1993 and 2 January 2002, when the decisions under review were made.
- A payment of $10,000 was made on 17 April 2002 for Mr PP's newstart allowance debt.

The issue was whether the debts were recoverable given that there had been considerable delay in raising the overpayments.

Decision

The relevant statutory limitations with regard to the recovery of debts are set out in Part 5.3 (Chapter 5) of the *Social Security Act 1991* (the Act). The Full Federal Court in *Walker v Secretary, Department of Social Security* (1995) 56 FCR 354, held that Chapter 5 of the *Social Security Act 1991* (the Act) comprises:

> ... a code which prescribes the exclusive methods whereby recovery can be lawfully effected of those social security and other benefits listed in s.1222(1).

In summary, these exclusive methods include recovery by deduction from social security payments (s.1231 and 1231A), legal action (s.1232), or garnishee notice (s.1233). Section 1231 of the Act places a limitation period of six years on the commencement of recovery of debts by deductions to a person's social security payments. Subsections 1231(2A), (2B), (2C), (2D) and (2E) set out different commencement points for the six-year period according to the circumstances. In general, ss.1231,1232 and 1233 provide that recovery cannot be commenced:

> ... after the end of the period of 6 years starting on the first day on which an officer becomes aware, or could reasonably be expected to have become aware, of the circumstances that gave rise to the debt.

The Tribunal found that there were several occasions during the period in question when Centrelink had information about Mrs PP's actual earnings or problems with the amounts declared by Mr PP. It was clear that on 26 May 1993, Centrelink had information that Mr PP had been under-declaring his wife's income for some time, giving rise to an overpayment. Given that no action was taken at that time and Mr PP continued to record similar amounts for his wife's earnings until the end of the period in question, the Tribunal was satisfied that Centrelink could reasonably be expected to be aware that both Mr and Mrs PP's rate of payments were being calculated on incorrect income figures.

In determining the application of the six-year limitation period on the recovery of Mr and Mrs PP's debt, the Tribunal also considered the exceptions set out in the legislation. Sections 1231, 1232 and 1233 all contain the following three exceptions to the six-year limitation period:

- there has been part-payment of the debt during the six year period (recovery must then be commenced within 6 years of the date of part-payment);
- there has been acknowledgement by the debtor of his or her debt during the six year period (recovery must then be commenced within 6 years starting on the date of acknowledgement); or,
- within the 6 year period there has been either: action taken under one of the other sections dealing with methods of recovery; or a review of a file relating to action for the recovery of the debt; or other internal Departmental activity relating to action for the recovery of the debt (recovery must then be commenced within the period of 6 years after the end of such activity) (ss.1231(2E)(iii), 1232(6) and 1233(7E)).

The first two exceptions did not apply in Mr and Mrs PP's cases. The Tribunal therefore considered the meaning of 'Review of a file relating to action for the recovery of the debt; or other internal Departmental activity relating to action for the recovery of the debt ...'

The Tribunal was satisfied that the file note on Mr PP's file dated 23 May 1993 referring to the need to follow up a possible overpayment, came within the meaning of 'internal Departmental activity for recovery of the debt'. There was however no evidence on either Mr or Mrs PP's file of any subsequent action or review of their files relating to the recovery of the debts under review. The Tribunal noted that while the wording of s.1231(2E)(iii), 1232(6) and 1233(7E) is imprecise, the sections appeared to place an obligation on Centrelink to demonstrate that the required events had occurred, if the limitation period is to be traced from a date later than the receipt of the alleged overpayment.

The SSAT noted that this issue, in the context of s.1231, was considered by the AAT in *Kidd and Secretary, Department of Social Security* (1996) 42 ALD 429. In that case, the AAT held that recovery of the debt in question should not have been commenced later than six years after the date of an unsent letter to the applicant regarding her outstanding debt. The AAT held that the unsent letter constituted the last internal departmental activity relating to action for the recovery of the debt or overpayment and that later file notes and memos relating to aspects of the applicant's payments did not come within the meaning of 'activity relating to action for the recovery of the debt or overpayment'. The AAT also held that s.1231 applied to the debt and rejected the Department's argument that s.1231 applied only to the commencement of recovery action and not to its re-commencement:

> ... Section 1231(2E) is meaningless unless the term 'commenced' also means 're-commenced'. Recovery of the total

> overpayment by way of deductions from Mrs Kidd's pension should not have been commenced later than six years after 28 April 1987 [the date of the unsent letter to the applicant re her outstanding debt] when the last internal Departmental activity relating to action for the recovery of the debt or overpayment occurred ...

While the case of Kidd, refers to recovery by deductions from social security payments under s.1231, the Tribunal took the view that these considerations were equally applicable to the other methods of recovery set out in Part 5.3 (with the exception of recovery under s.1231A), since these contain virtually identical wording (see s.1232(6) and 1233(7E) in relation to recovery by legal proceedings and garnishee notice respectively). The Tribunal also referred to the policy guidelines for debt recovery set out in Centrelink's *Guide to the Social Security Law* in support of its view.

The Tribunal found that Centrelink did not raise the debts in question until 2 January 2002, which is more than six years after the last internal activity by the Department on 26 May 1993 relating to the overpayment. The debt was also raised more than six years after the last payments were made. The Tribunal was satisfied that Centrelink could reasonably be expected to be aware that both Mr and Mrs PP's rate of payments were being calculated on incorrect income figures from 26 May 1993 to the end of the period in question, 21 June 1995. There was also no evidence that Centrelink took action or activity relating to the overpayments in question between 26 May 1993 and 2 January 2002. Therefore the Tribunal concluded that the six-year statutory limitation had expired and the debts were not recoverable by Centrelink.

The Tribunal noted that the application of the statutory limitation did not mean that the debts no longer existed and consequently there was no limitation on Centrelink accepting voluntary repayments of the debt such as the payment of $10,000 made in respect to Mr PP's debt on 17 April 2002. The Tribunal therefore considered whether the legislative provisions for waiving recovery of debts should apply to the amount already paid by Mr PP, but decided that there was no basis for waiving that portion of the debt.

[A.T.]

INDEX: Vol 5, Nos 1- 6, 2002

AAT and Federal Court Review of decisions

Actual means test

Actual means test: reduction in liquid assets of partnership
Green (Fed Ct): 8

Age pension

Age pension: assets test; valuation of shares
Fong: 14
Age pension: portability; rate of payment
Thi Nhu Thai: 40
Age pension: portability; short residence
Yeomans: 40
Age pension: income test and life assurance
Davies: 71

Assets test

Age pension: assets test; valuation of shares
Fong: 14
Assets test: definition of homeowner; 'reasonable security of tenure'
Georgas: 43
Assets test: definition of homeowner; 'reasonable security of tenure'
Koch: 42
Assets test: principal home
Hewitt: 50
Assets test: principal home; value of land
Reid: 51
Assets test: unrealisable asset
Maher: 7
Assets test: value of loan
O'Brien: 70
Assets test: value of loans and shares
Bentham: 7
Assets test: whether loan to private company forgiven
Downes: 52

Austudy

Austudy: full-time study
Ferrier: 53

Carer payment/allowance

Carer allowance: care provided on a daily basis in a private home
Walsh: 65
Carer payment: two or more disabled children
Borg: 2
Carer payment: whether child profoundly disabled
Harrison: 2
Carer payment and bereavement payment: whether left care permanently on admission to nursing home
O'Neill: 26

Compensation

Compensation: periodic compensation payments; special circumstances
Hanrahan: 67
Compensation: special circumstances; relationship between the payment of social security payments and the incapacity for which the compensation was awarded
Robinson: 66
Compensation: special circumstances arising from the application of the legislation
Dee: 14
Compensation: whether an award of interest is compensation
Mourilyan (Fed Ct): 31
Compensation preclusion: whether interest is part of compensation lump sum
Mourilyan (Fed Ct): 46
Compensation preclusion period: special circumstances; mental health
Woods: 38
Compensation preclusion period: special circumstances; small component of economic loss
Chamberlain (Fed Ct): 9
Compensation preclusion period: special circumstances; small component of economic loss
Willis: 28
Lump sum settlement of claim: whether in respect of lost earnings or lost capacity to to earn
Cioccia: 58
Preclusion period: special circumstances; severe incapacitating illness prior to compensation settlement
Bullock: 6