

# Federal Court Decision

## Waiver of debt: good faith

**PLEDGER v SECRETARY TO  
THE DFaCS**  
(Federal Court of Australia)

**Decided:** 19 December 2002 by  
Weinberg J.

Pledger appealed against a decision of the Administrative Appeals Tribunal (the AAT) that she owed the Commonwealth \$33,009.90 in carer pension payments paid between 29 July 1993 and 17 April 1997, and that this amount should be recovered.

### The facts

In 1992 when her mother became seriously ill Pledger applied for and was granted the carer pension. Her mother died on 18 April 1993. Pledger advised the Department of Social Security (the Department) and her mother's age pension was cancelled. Pledger continued to be entitled to receive the carer pension for another 14 weeks until 15 July 1993 when she ceased to be qualified.

In September 1993, August 1996 and February 1997 Pledger was sent letters by the Department in which it was stated that she was in receipt of the carer pension. In March 1997 the Department requested that Pledger obtain a medical report on her mother's condition. Pledger wrote to the Department advising them that her mother had died in 1993 and on 17 April 1997 her carer pension was cancelled. Pledger applied for and was granted newstart allowance.

### The law

According to the *Social Security Act 1991* (the Act) recovery of a debt may be waived in the following circumstances:

#### 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.
- (1A) Subsection (1) only applies if:
  - (a) the debt is not raised within a period of 6 weeks from the first payment that caused the debt; or
  - (b) if the debt arose because a person has complied with a notification obligation, the debt is not raised within a period of 6 weeks from the end of the notification period;

whichever is the later.

If a debt is waived it cannot be recovered.

### The issue

It was agreed that Pledger owed the debt to the Commonwealth, and that the carer pension had been paid because of administrative error by the Department. The only issue for the authorised review officer (ARO), the Social Security Appeals Tribunal (SSAT) and the AAT to consider was whether Pledger had received the carer pension payments in good faith.

### The AAT decision

The ARO found that Pledger was unable to show that she did not know that she was not entitled to receive the carer pension during the period. Therefore Pledger did not receive the payments in good faith. The SSAT affirmed the decision to raise the debt but substituted a new decision that the debt be written off because recovery of the debt would cause Pledger financial hardship. The SSAT refused to waive the debt because Pledger had admitted that she knew she was on carer pension when she had applied for an advance payment and the SSAT found that Pledger was aware that she was not entitled to receive carer pension after her mother's death.

In October 2000 Centrelink decided that Pledger could afford to repay the debt and began withholding part of her newstart allowance. Pledger requested review of this decision by the AAT. The AAT set aside that part of the SSAT decision that directed that the debt be written off, and substituted its decision that the debt should be recovered. According to the AAT Pledger admitted that she knew she was no longer entitled to the carer pension after her mother's death. She had expected the pension to be cancelled after she advised the Department that her mother died. She had also expected that she would be entitled to some other payment from the Department. The AAT stated the test in relation to good faith to be: a person who continues to use the funds after having tried unsuccessfully to correct the Department's error, does not receive those payments in good faith.

### Received in good faith

Weinberg J referred to the previous Federal Court cases of *Secretary to the Department of Education, Employment, Training and Youth Affairs v Prince*

(1997) 152 ALR 127 and *Haggerty v Secretary to the Department of Education, Employment, Training and Youth Affairs* (2000) 31 AAR 529 and concluded:

What seems to emerge from these authorities is that whether a payment has been received in good faith can only be determined after a careful consideration of the actual state of mind of the recipient of that payment. In that sense the test is entirely subjective, and not objective ... It should be noted, in this regard, that wilful blindness is itself a state of mind:

(Reasons, para. 59)

The Court complained that one of the difficulties it faced when deciding if there had been an error of law, was the brevity of the AAT's findings. It was difficult to discern Pledger's 'state of mind' when she received the payments from the AAT's reasoning. The AAT appeared to accept most of Pledger's evidence although it was not clear whether the AAT had made a finding that Pledger was aware she was not entitled to a pension of the type she was paid or she was not entitled to a pension of any kind. The AAT made no finding as to whether Pledger received more benefits than she was entitled to and this was a matter relevant to whether Pledger acted in good faith. It was also not clear whether the AAT accepted all Pledger's evidence concerning her attempts to have the Department's error rectified.

The statement by the AAT that Pledger did not act fraudulently was also unclear. Weinberg J accepted that there was a distinction between want of good faith and fraud. A person may have acted without good faith but not dishonestly. A finding that a person did not act fraudulently may simply have meant that the person did not act deceptively, or it may have meant that the person did not act dishonestly. If that was what the AAT was saying, there would be difficulty then saying that Pledger was not acting in good faith. The term "good faith" is broadly synonymous with "honesty" (Reasons, para. 77).

Pledger had argued that she had done nothing wrong, and the AAT accepted that she did not act fraudulently but did not address the question of whether Pledger had acted honestly.

It seems to follow that the applicant's belief that she had done nothing 'morally' wrong, not just by her own standards, but by the standards of or-

inary decent people, must at least be relevant to whether she acted in 'good faith'.

(Reasons, para. 90)

Pledger believed that she was entitled to receive some social security payment throughout the period she received the carer pension. It is not enough to establish lack of good faith to simply find that the person knew they were not entitled in law to a specific pension. It was not clear whether Pledger knew that she would receive a greater amount if she stayed on the carer pension and this together with Pledger's repeated attempts to rectify the Department's error, meant that establishing good faith was far more complex than the AAT realised.

Assuming that one accepts as true the applicant's account of her state of mind, I consider that there is a serious question as to whether ordinary, decent members of the community would regard what she did as 'dishonest'. I am not dissuaded from that view by the AAT's finding that she was 'aware' that she was being paid carer pension when 'no longer eligible'.

(Reasons, para. 93)

It was understandable that Pledger might genuinely be of the view that as she had done all she could to correct the Department's error, if the Department chose to call the pension it paid her a carer pension, then that was up to the Department. Weinberg J concluded by saying:

The expression 'received in good faith' in s.1237A(1) encompasses such a wide variety of circumstances that it is not helpful to seek to define them exhaustively. Instead, in each case there are considerations of degree, involving an assessment of the importance of a particular aspect of the state of mind of the recipient of the payment. Paradoxically, in an Act which is replete with highly technical language, and which defines some terms in a manner which is almost unintelligible, the expression 'good faith' is left undefined. Regrettably, on this occasion commendable legislative restraint has not produced clarity.

...

the words 'good faith', which are inherently open textured, are not used in any special sense in the Act. They are therefore to be accorded their ordinary and natural meaning. The words themselves are normative, and not descriptive. In other words, they are value laden, and the values which they reflect must be the values of ordinary, decent members of the community.

(Reasons, para. 102 and 103)

The Court rejected the submission by the Department that Pledger's efforts to rectify the Department's error were irrelevant and that she was obliged to leave the funds in the bank. Pledger had no other income between 1993 and 1997.

She could not be expected not to use the money in her bank account until the Department finally realised its error.

Weinberg remitted the matter back to the AAT and observed that the AAT would need to make specific findings including whether Pledger genuinely believed that she was entitled to some form of social security pension or benefit which was similar in amount to the one she was paid. Critical to this question was Pledger's state of mind throughout the period and what she believed, not what a reasonable person might have believed. An unreasonable belief is less likely to be accepted as being genuinely held.

#### Formal decision

The Federal Court set aside the decision of the AAT and remitted the matter back to the AAT differently constituted to be determined according to law.

[C.H.]

## **Disability support pension: confinement in a psychiatric institution; rehabilitation**

SECRETARY TO THE DFACS v FRANKS

(Full Federal Court of Australia)

**Decided:** 20 December 2002 by Spender, Drummond and Marshall JJ.

The Secretary appealed against the Administrative Appeals Tribunal (AAT) decision that Franks was undergoing a course of rehabilitation whilst detained as a restricted patient and thus entitled to receive a disability support pension.

#### The facts

Franks was receiving the disability support pension when he was charged with an indictable offence. He was referred to the Queensland Mental Health Tribunal to decide whether he was able to stand trial. Franks was found to be not fit to stand trial and he was detained as a restricted patient in a hospital under the Queensland Mental Health Act.

Whilst detained in hospital Franks participated in rehabilitation programs as part of his treatment. He was given restricted leave to visit sporting activities and art classes. Franks' period of

detention was uncertain. He was monitored by the Patient Review Tribunal who would decide when he could be released. He continued to participate in rehabilitation programs while he was detained. Franks' pension was suspended on 13 April 2000 as he was regarded as undergoing psychiatric confinement because he had been charged with an offence.

#### The law

Section 1158 of the Social Security Act 1991 (the Act) provides:

1158. An instalment of a social security pension, a social security benefit, a parenting payment or a pensioner education supplement is not payable to a person in respect of a day on which the person is:

- (a) in gaol; or
- (b) undergoing psychiatric confinement because the person has been charged with an offence.

'Psychiatric confinement' is defined in s.23(8) as including confinement in a psychiatric section of a hospital. Section 23(9) states:

23.(9) The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.

#### The AAT decision

The AAT decided that Franks was not undergoing psychiatric confinement because he was undergoing a course of rehabilitation. According to the AAT s.23(9) distinguished being confined in a psychiatric institution from being confined in a psychiatric institution to undertake a course of rehabilitation. The AAT narrowed the issue to whether there was a difference between a course of rehabilitation for a defined period and a course for an indefinite period. The AAT followed a previous AAT decision of Pardo and Secretary to the Department of Family and Community Services (2000) 4(7) SSR 84 deciding that 'during a period' in s.23(9) was to be construed as requiring a temporal connection between the confinement and the program of rehabilitation. Providing the confinement and rehabilitation are undertaken contemporaneously s.23(9) will apply.

#### The decision of Cooper J

On appeal to the Federal Court, Cooper J at first instance found it unnecessary to deal with the primary point raised, that is what constituted a 'course of rehabilitation' for the purposes of determining entitlement to disability support pension under the Act.