siders that the period ought to be reduced by applying the appropriate divisor at the time of the introduction of the GST to the balance portion of the compensation monies attributable from 1 July 2000. The portion of the preclusion period from 29 July 1997 to 30 June 2000 is 152 weeks. The original calculation may be broken down to represent the sum attributable to the period 29 July 1997 to 30 June 2000 as a total of $62,320, made up as 152 weeks x $410.00 = $62,320.

48. In determining the reduction in the period, the starting figure to which the divisor, effective on 1 July 2000, should be applied is;

$138,500

$ 62,320

$ 76,180

The balance of the preclusion period from 1 July 2000 is calculated as;

$ 76,180 = 140 weeks

$543.63

Therefore the preclusion period should total 292 weeks from 29 July 1997 — a reduction of 45 weeks from the original period.

The AAT held that the SSAT had not employed the terminology in s.1184K(1) of the *Social Security Act 1991* (the Act). The Tribunal found that the only power that the SSAT had was to treat the whole or part of the compensation payment as not having been made. It had misdirected itself by directing that a different divisor be used, so as to reduce the preclusion period by a specified number of weeks. The AAT noted that the SSAT could have remitted the matter with a direction that so much of the compensation payment as would reduce the preclusion period by 45 weeks be disregarded, but it had no power to direct the use of a different divisor so as to reduce the period by 45 weeks.

The AAT also considered another difficulty with the SSAT decision in directing that there must be a recalculation and specifying the result that recalculation must achieve. It noted that the SSAT may either vary a decision under s.149(1)(b) of the *Social Security (Administration Act) 1999* (the Administration Act) or, set aside a decision and remit the matter for reconsideration in accordance with the directions under s.149(1)(c) of that Act, but it did not have power to do both.

The issue

The AAT stated that the central issue in this matter concerned the meaning of the term 'special circumstances', and, in particular, the question whether a result which is required by the legislation, and which operates unfairly on a particular group of social security claimants, can without more, be considered a 'special circumstance', so as to come within s.1184K(1) of the Act.

Discussion

After noting that Keifel J in *Secretary to the DFaCS v Chamberlain* [2000] FCA 67 had concluded that the application of the formula in the Act 'cannot, by itself, amount to a special circumstance, one out of the ordinary', the AAT stated that the task of the Tribunal was to look at the facts 'personal to the applicant' and consider the question of special circumstances in light of that information (Reasons, para. 40).

The AAT noted that whilst this approach was adopted by the SSAT, it considered that:

> ... the only circumstance 'personal to the applicant', apart from the missing out on the benefit of the much larger 'income cut-out amount' which would have applied if the claim had been settled after July 2000, was the loss of value of investments. That was treated by the SSAT as due to the introduction of the GST. That factor applied to all Australians. Or, it if were due to the world-wide economic downturn, it would also be a general rather than a 'special circumstance'. Similarly, the harsh operation of the legislation which required Mr Downs' preclusion period to be calculated by reference to a 1998 divisor, which does not reflect the increase in costs due to the GST, applies to all recipients of compensation affected payments, whose preclusion period commenced prior to 1 July 2000 and extend beyond that date.

(Reasons, para. 41)

After reviewing the caselaw, that had considered the issue of the impact of the GST on a person whose claim had settled prior to 1 July 2000, the AAT relying on Heerey J in *Secretary to the DFaCS v Allan* [2001] FCA 1160 concluded that the factor is capable of being taken into account as 'one of a number of circumstances which in total ... may be regarded as special' (Reasons, para. 62). The AAT concluded that it was not, of itself alone, sufficient to constitute 'special circumstances' such as to make it appropriate to exercise the s.1184K(1) discretion.

The AAT concluded, on the evidence, that whilst the respondent must be very careful with his expenditure, with the help of parents, his family was managing to live on the income from the investments. The AAT also noted, that the respondent had moved to Victoria in the belief that there was more relief teaching available and held that it was reasonable to expect that he would be able earn an income from teaching. The AAT concluded that the respondent's circumstances lacked a special quality that would justify the discretion being exercised and opined that the discretion could not be exercised simply because the scheme of the Act should have recognised the position of those whose preclusion period commenced before 1 July 2000, by allowing them some adjustment to take account of the GST.

Formal decision

The AAT set aside the SSAT decision and decided that there were no special circumstances such that it was appropriate to treat any part of the respondent's compensation payment as not having been made. The preclusion period stood as originally calculated, from 29 July 1997 to 12 January 2004.

[G.B.]

Newstart allowance: marriage-like relationship; administrative error, special circumstances; waiver and write off

QX03/2 and SECRETARY TO THE DFaCS
(No. 2003/144)

Decided: 14 February 2003 by Dr E. Purcell.

The issue

The issue in this matter was whether an overpayment totalling $21,161.17 in newstart allowance (NSA) paid to QX03/2 in the period September 1997 to October 2000, should be recovered, and whether special circumstances existed or administrative error could be said to have occurred sufficient to justify waiver or write off of the amount due.

Background

QX03/2's partner received NSA from September 1997 to October 2000, save for a four-month break in 1998, as a condition of which he was required to declare fortnightly his earnings and those of his partner. A data match exercise in September 2000 established that the correct NSA entitlement may not have been paid. Centrelink sought to receive the debt noted above, and in June 2001 the SSAT affirmed this decision.

The applicant had applied for NSA in 1997 and declared a figure of $509 for his partner's earnings, as this was the amount

she had in the past earned from her casual employment, although employer information showed that her actual earnings varied considerably from this figure. The applicant's own employment was casual and irregular, and he agreed that he had not always disclosed the correct amounts of his casual earnings to Centrelink.

The applicant had been advised by Centrelink in the grant letter in August 1997 of the earnings amount on which his NSA payment was calculated, whilst a later letter in December 1997 advised him of the need to notify of both his own and his partner's correct earnings. He conceded that on the fortnightly forms he had lodged, the figures notified for his partner's earnings were 'probably pulled out of his head', whilst his partner agreed that the applicant would have been aware of a variation in her wages and hours worked when she changed from casual to full-time work in late 1998 and early 1989.

The applicant at the hearing provided evidence from his treating psychiatrist that he suffered from a history of depression, anxiety, with associated behavioural difficulties and some suicidal ideation. The Centrelink records noted that the applicant had been identified as having special needs for psychological assessment.

The law

Where a debt exists to the Commonwealth, the *Social Security Act 1991* (the Act) provides several mechanisms via which the debt may be waived or written off.

Under s.1237A of the act the debt **must** be written off where it 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'.

In addition, s.1237AAD allows for waiver when:

> 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 a 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.

Thus, waiver is required where the debt is solely due to administrative error and where the amounts in dispute were received in good faith, but also may occur where the debt did not arise from a knowingly made false statement or misrepresentation or failure to comply with the Act, provided there are special circumstances sufficient to justify such a waiver.

Under s.1236 of the Act write off is possible for a particular period where (amongst other things) '... (b) the debtor has no capacity to repay the debt ...'

Discussion

The Tribunal considered a series of related issues in this matter.

Was QX03/2 a member of a couple?

The Tribunal first considered whether QX03/2 and his partner were members of a 'couple'. Noting the requirements of s.4(3) of the Act, and having regard to the financial arrangements between QX03/2 and his partner, the shared household tasks, the acceptance of the relationship by family members, their sexual relationship, and their provision of mutual emotional support, the Tribunal concluded that the two were a 'couple' for Centrelink payment purposes. As a result, any income support paid to the applicant had to be calculated on the basis of his own and his partner's earnings.

Was waiver due to administrative error appropriate?

The Tribunal noted the oral evidence of both the applicant and his partner as to the amounts of earnings actually declared to Centrelink, and concluded that he had contributed to the error which led to the overpayment. As such, the overpayment was not *solely* due to an administrative error by Centrelink, and so s.1237A was not applicable and waiver under that provision was not possible.

Was waiver due to special circumstances appropriate?

Waiver under this provision required the Tribunal to consider whether the applicant had 'knowingly' made a false statement or representation to Centrelink, and whether there were 'special circumstances' in the case.

Noting the matter of *Callaghan and Secretary, Department of Social Security* (1996) 45 ALD 435, where it was argued that:

> ... the word 'knowingly' ... [means] that a person has actual knowledge, rather than constructive knowledge that he or she is making a false statement or representation or that he or she is failing or omitting to comply with a provision of the Act. That actual knowledge is to be ascertained by reference to the statements of the person as to his or her actual state of knowledge at the time and to events surrounding the false statement or the act or omission ...

The Tribunal concluded that the applicant's failure to check his partner's earnings and his failure to correctly disclose his own, meant that he had knowingly failed to comply with a requirement of the Act. In addition, the Tribunal applied the seminal test of 'special circumstances' established in *Beadle and Director-General of Social Security* (1984) 6 ALD 1 that such circumstances must be said to be 'unusual, uncommon or exceptional' to conclude that, notwithstanding the evidence as to QX03/2's health condition, there were no such circumstances in this case. Waiver under s.1237AAD of the Act was therefore not possible.

Should the debt be written off?

The Tribunal finally considered whether the debt should be written off for a time, allowing for the possibility of later recovery should the applicant's financial position improve.

The Tribunal noted regarding write off the findings in *L and Secretary, Department of Social Security* (1995) 21 AR 412 and in particular the view that:

> ... matters relating to the personal financial hardship of the individual are always relevant in any decision as to write-off under s.236(1). Retrospective considerations may occasionally be relevant. The essential inquiry will always be whether recovery is a feasible proposition, bearing in mind the financial means and obligations of the individual concerned.... Will recovery cause such personal hardship as to run contrary to the beneficial nature of this legislation? If an affirmative answer is reached to this question, then it would be appropriate to defer recovery ...

Here, the Tribunal accepted that the applicant had a psychiatric condition that remained neither fully diagnosed or treated, that he had limited work prospects, and that considering the totality of his position and the financial difficulties which would arise from recovery, compassionate considerations suggested that write off would be appropriate. The Tribunal directed that recovery be deferred until after the applicant's psychiatric state was fully diagnosed, treated and stabilised.

The formal decision

The Tribunal set aside the decision under review and determined that the debt should be written off.

[P.A.S.]