

Family tax benefit overpayment: administrative error, good faith and severe financial hardship; special circumstances

SECRETARY TO THE DFaCS and BIRGDEN
(No. 2003/15)

Decided: 23 January 2003 by J. Kiosoglous.

The issue

The issue in this matter was whether a debt of family tax benefit (FTB) for the period August 2000 to April 2001 should be recovered, or whether recovery of it should be waived.

Background

Birgden's son was born in April 1991 with severe cerebral palsy, following which she received various Centrelink payments over the years. She worked both casually and in contract positions with Flinders University, with frequent variation in her income. The letters she received from Centrelink often contained anomalies and discrepancies, and she gave evidence that she had written several times to advise of these errors, but that her advice to Centrelink did not result in any changes in her rates of payment. As a result, she told the Tribunal, she took little notice of correspondence from Centrelink.

Birgden was in receipt of family allowance and then FTB in the 2000 calendar year. In June and July 2000 Birgden was advised of the rate of her payments, and of the combined family income (\$4900) used to calculate that rate. In June 2000 she also received a health care card listing all her family members as dependent, after which she wrote to Centrelink querying this and advising that her husband was employed. Following this in August 2000 she received a form from Centrelink requiring her to provide income estimates, which she completed and returned, but which Centrelink conceded was disregarded due to administrative error, and her FTB payments continued unaltered.

In April 2001 Centrelink again wrote to Birgden advising that the combined family income used to determine the rate of FTB was \$4900. She responded in writing in May 2001 advising that the correct income level was \$10,500 for

herself and \$65,000 for her partner, after which Centrelink reduced her FTB payment rates. The actual family income for Birgden in 2000–2001 was \$73,000. Centrelink, in December 2001, sought to recover an overpayment of \$7247 in FTB, less an amount of \$1000, recovery of which was waived by ministerial direction. The SSAT affirmed the debt but waived recovery of amounts paid in the period August 2000 to April 2001 on the basis that the debt had occurred solely due to administrative error, that Birgden had received the payments in good faith and that recovery would cause severe financial hardship.

Birgden argued that she left the calculation of her correct FBT rate to Centrelink and that, given changes in Centrelink payment types and rates, she had no way of herself calculating what her correct entitlement might be. She contended that, because of her son's condition, and the implications upon the family housing needs, the family was in severe financial hardship. By contrast, Centrelink contended that Birgden should have expected that her payment rates would alter when she provided new income estimates, and particularly that she should have expected her rates to fall when higher estimates of income were provided, and ought to have queried Centrelink when her rates did not alter.

The law

The provisions in relation to recovery of debts are contained in *A New Tax System (Family Assistance) (Administration) Act 1999* (the Act). This Act provides by s.97 that waiver of a debt must occur when:

s.97 Waiver of debt arising from error

- (1) The Secretary must waive the right to recover the proportion (the **administrative error proportion**) of a debt that is attributable solely to an administrative error made by the Commonwealth if subsection (2) or (3) applies to that proportion of the debt.
- (2) The Secretary must waive the administrative error proportion of a debt if:
 - (a) the debtor received in good faith the payment or payments that gave rise to the administrative error proportion of the debt; and
 - (b) the person would suffer severe financial hardship if it were not waived.

In addition, s.101 of the Act provides in addition that waiver may occur if:

s.101 Waiver in special circumstances

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 the family assistance law; 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.

In summary, the Act requires that waiver must occur where the debt is solely attributable to administrative error, and may occur where the debt did not result from a false statement or representation knowingly made, provided special circumstances exist.

Discussion

It was not in dispute that Birgden was overpaid FTB, nor that a debt had arisen as a result; the sole question was whether that debt should be waived. Centrelink conceded that the overpayment was solely a result of administrative error from 18 August 2000 when Birgden had provided new income estimates which Centrelink had ignored. The Tribunal found that the period of sole administrative error ran until April 2001.

The Tribunal then considered several issues — first, the issue of good faith. The Tribunal noted the decision in *Haggerty v Department of Education, Training and Youth Affairs* (2000) 21 AAR 528 that:

... want of good faith will arise where there is a positive belief that the payment has been made by mistake. It will also arise where there is a suspicion held by the recipient that he or she may not be entitled to the payment made or a doubt as to the entitlement coupled with some objective basis for such suspicion or doubt. The provision does not, however, authorise the imputation of want of good faith ... simply because there are in existence objective facts which would raise a belief or a doubt or a suspicion of non entitlement in the mind of some imaginary recipient ...

The Tribunal determined that the key question was whether Birgden actually believed she was entitled to the payments received which, given her evidence and the history of her dealings with Centrelink, the Tribunal accepted was the case. The Tribunal concluded, given that history and Birgden's experience of the relationship between the advice she provided and the payment rates she received, that the '... only conclusion that a reasonable person could draw ... was that there was no clear

connection between the income recorded by Centrelink [in letters sent to Birgden] ... and the entitlement supposedly calculated from the quoted income' (Reasons, para. 74). The Tribunal therefore found that Birgden had received in good faith the FBT payments paid to her in the period August 2000 and April 2001, and so met the requirements of s.97(2)(a) of the Act.

Secondly, the Tribunal considered the question of financial hardship. Accepting that the family had incurred many expenses because of their son's disability, and lived frugally, the Tribunal nevertheless concluded that recovery of the debt would not cause 'severe' hardship. Hence the debt could not be waived under s.97 of the Act.

Finally, the Tribunal considered whether special circumstances could be said to exist. The Tribunal referred to the *Beadle* criteria that such circumstances must be unusual, uncommon or exceptional (*Re Beadle and Director-General of Social Security* (1984) 6 ALD 1) and noted that such circumstances must be assessed in the entirety of the situation presented rather than in any single circumstance. An important consideration was whether administrative error could be considered as one of the special circumstances within the provisions of s.101 of the Act. The Tribunal concluded in this regard that s.97 was intended to be beneficial, as an extra protection to those who receive overpayments through no fault of their own. However, where the requirements of s.97 were not met the Tribunal determined that there was no inconsistency in allowing factors considered within s.97 to be then considered in the context of s.101 — that is, as to whether they fall within the ambit of 'special circumstances'.

Having regard to the family's financial position, their son's disability, their careful expenditure of their available resources, the administrative error that had occurred, their good faith, and the financial difficulty and stress that would result if recovery were sought, the Tribunal concluded that 'special circumstances' could be said to exist. As such, applying s.101 of the Act, the debt should therefore be waived.

The decision

The Tribunal affirmed the debt but applying s.101 of the Act waived recovery of the debt for the period August 2000 to April 2001 on the basis that special circumstances existed.

[P.A.S.]

Disability support pension: impact of interacting mental impairments

TRIANTAFILLOU and
SECRETARY TO THE DFaCS
(No.2003/56)

Decided: 21 January 2003 by
Dr D. Weerasoorya.

The issue

In this matter the Tribunal was required to consider whether the impact of two mental conditions were such that Triantafillou continued to meet the qualification requirements for disability support pension.

Background

Triantafillou was diagnosed as having a learning disorder at primary school, and attended special classes throughout his school life. He was granted disability support pension (DSP) in 1993 on the basis of his intellectual disability and reduced capacity for independent living. At that time he was referred to Bizlink, a specialist employment agency funded to assist people with intellectual disabilities, who supported him from 1993 to 1998, and again from January 2001. Triantafillou, despite his disabilities, worked in various occupations, though he changed jobs frequently, and at the time of the hearing was employed as a restaurant kitchen hand. In a review of his DSP in 1999 he listed his medical condition as attention deficit hyperactivity disorder (ADHD), a diagnosis first made in 1998 when he was 22 years old, and seeing a psychiatrist. At the hearing Triantafillou stated that this condition caused him anxiety and led to difficulties with concentration, learning and in following instructions, but that he had located his current employment through his own efforts.

The law

The qualifications for DSP are contained in s.94 of the *Social Security Act 1991* (the Act) which provides:

94.(1) A person is qualified for disability support pension if:

- (a) the person has a physical, intellectual or psychiatric impairment; and
- (b) the person's impairment is of 20 points or more under the Impairment Tables; and
- (c) one of the following applies:
 - (i) the person has a continuing inability to work; ...

The meaning of 'continuing inability to work' is defined in s.94(2) of the Act as follows:

94.(2) A person has a **continuing inability to work** because of an impairment if the Secretary is satisfied that:

- (a) the impairment is of itself sufficient to prevent the person from doing any work within the next 2 years; and
- (b) either:
 - (i) the impairment is of itself sufficient to prevent the person from undertaking educational or vocational training or on-the-job training during the next 2 years; or
 - (ii) if the impairment does not prevent the person from undertaking educational or vocational training or on-the-job training—such training is unlikely (because of the impairment) to enable the person to do any work within the next 2 years.

'Work' is defined in s.94(5) of the Act: '... means work (a) that is for at least 30 hours per week at award wages or above; and (b) that exists in Australia, even if not within the person's locally accessible labour market.'

Consideration by the Tribunal

The applicant's impairments

The Tribunal considered several reports from treating specialists who had worked with Triantafillou for varying periods, but noted that the two key specialists whose reports were presented (a psychiatrist and a psychologist) agreed that he had two separate mental impairments, these being cognitive deficit (ADHD) and intellectual disability.

Having regard to the impact of the cognitive deficit on Triantafillou's ability in problem solving, concentration, initiative and in his capacity for abstract thinking, and the impact of his intellectual disability on his behavioural problems but noting that he was able to live independently, the Tribunal rated his two disabilities at 20 and 10 points respectively, and that he thereby satisfied ss.94(1) (a) and (b) of the Act. The Tribunal also found that Triantafillou suffered from generalised anxiety, as noted by his psychologist, but did not give this condition an impairment rating as it had not yet been diagnosed, treated and stabilised.

The applicant's ability to work

The Tribunal noted that Triantafillou's ability to cope with work as a kitchen hand had improved since he was first granted DSP, and that his most recent job had been held for over a year. In that position he was paid award wages, and worked varying hours but up to 30 hours per week. Having regard to his work efforts, management of his personal affairs