

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

and independent living, the Tribunal concluded that Triantafillou was trying to improve his self image and self esteem. However, although his intellectual impairment was mild and relatively static, his cognitive impairment though also mild was dynamic and could fluctuate in its impact quite unpredictably, and was itself influenced by any anxiety or depression. Further, the evidence from Bizlink was that Triantafillou was unable to manage yet on his own in the absence of a supportive employer, and the Tribunal noted the decision in *Hamal and Secretary, Department of Social Security* (1993) 30 ALD 517 that '... it is the normal workplace against which a person's abilities are to be judged and not the workplace of the benign employer'.

The Tribunal therefore concluded that Triantafillou satisfied s.94(2)(a) of the Act in that his impairments were sufficient to prevent him doing any work (that is, work for 30 hours per week in the open marketplace) within the next two years. However, he did not necessarily satisfy s.94(2)(b) as his impairments did not prevent him undertaking on the job training in his supported work environment. The issue for the Tribunal was whether such training would allow Triantafillou to perform work that he could not now perform taking into account his impairments. Having regard to the nature of these impairments, and the *Hamal* decision, the Tribunal concluded that such training was unlikely to enable Triantafillou to undertake work within two years, and that he therefore met the requirements of s.94(2) (b) of the Act.

#### Formal decision

The Tribunal set aside the decision under review and determined that Triantafillou continued to be qualified for DSP.

[P.A.S.]

## Loan to company: attributable assets and offsetting liabilities

**HANSFORD AND SECRETARY  
TO THE DFaCS  
(No. 2003/198)**

**Decided:** 28 February 2003 by  
D.J. Trowse

#### Background

Mr and Mrs Hansford were receiving age pension when the Department de-

ecided to reduce their rate of pension under the new trust and companies legislation. This decision was affirmed by the Social Security Appeals Tribunal.

Mr and Mrs Hansford were directors of a private company, Bethstan Pty Ltd. The company was set up as a vehicle for the purchase of shares in publicly listed companies. Initially shares were acquired by the company from funds made available by Mr and Mrs Hansford.

In December 1999 the company borrowed \$200,000 from Perpetual Trustees. \$75,565 was used to purchase further shares and the remainder was loaned by the company to Mr and Mrs Hansford to enable them to purchase their current home. The security for the loan of \$200,000 was a first mortgage over this home.

The loan account prior to December 1999 showed a debt from the company to Mr and Mrs Hansford of \$39,764. After offsetting this credit balance against the funds borrowed by Mr and Mrs Hansford from the company, there was a balance owing to the company of \$84,670.

#### Issues

The Tribunal identified two issues:

- The first was whether funds borrowed by a controlled company for the purchase of shares secured by way of mortgage over Mr and Mrs Hansford's home could be offset against the value of those shares.
- The second was whether the amount owed by Mr and Mrs Hansford to the company should be included as an asset.

#### Legislation

The Tribunal referred to ss.1208E, G and H of the *Social Security Act 1991* (the Act) which deal with the attribution of assets, charges or encumbrances relating to a single asset and the effect of unsecured loans on the value of assets.

#### Findings

##### *Exclusion of assets*

The Tribunal found that the company was a controlled private company, that Mr and Mrs Hansford were attributable stakeholders and that the asset attribution percentage was 100%. It was satisfied that the assets of the company were shares in public companies and funds were owed to it by Mr and Mrs Hansford.

It concluded that unless these assets were excluded under subsection 1208E(2) then the value of these assets

would be included in the value of Mr and Mrs Hansford's individual assets.

This subsection states as follows:

#### Excluded assets

**1208E(2)** The Secretary may, by writing, determine that, for the purposes of the application of subsection (1) to a specified individual and a particular company or trust, a specified asset is an excluded asset.

The Tribunal considered the Social Security (Attribution of Assets) Principles formulated under s.1209 E and found that there was nothing in these principles to support a conclusion that either of these assets should be excluded.

#### *Value of assets*

The Tribunal went on to consider the value of these assets, in particular whether the value of the shares held by the company should be reduced by the funds borrowed to purchase them.

The Tribunal referred to ss.1208G and H as follows:

#### Charge or encumbrance relating to a single asset

**1208G(1)** For the purposes of the application of this Division (other than this section) to a particular individual and a particular company or trust, if:

- (a) there is a charge or encumbrance over a particular asset of the company or trust; and
- (b) the charge or encumbrance relates exclusively to that asset; the value of the asset is to be reduced by the value of the charge or encumbrance.

**1208G(2)** Subsection (1) does not apply to a charge or encumbrance over an asset of a company or trust to the extent that:

- (a) the charge or encumbrance is a collateral security; or
- (b) the charge or encumbrance was given for the benefit of an entity other than the company or trust; or
- (c) the value of the charge or encumbrance is excluded under subsection (6).

...

#### Exclusion

**1208G(6)** The Secretary may, by writing, determine that, for the purposes of the application of this section to a specified individual and a specified company or trust, the whole or a specified part of a specified charge or encumbrance over one or more of the assets of the company or trust is excluded for the purposes of paragraphs (2)(c) and (4)(b).

**1208G(7)** A determination under subsection (6) has effect accordingly.

**1208G(8)** In making a determination under subsection (6), the Secretary must comply with any relevant decision-making principles.