

that she had attended Centrelink in June 2000 to notify of the change in her husband's circumstances and had completed a one-page form providing amounts her husband would be receiving from employment. Centrelink had no record of this form being completed and had continued to calculate her rate of parenting payment based on the figure of \$349.20. Notices were sent to McKenzie advising her that this figure was being used to calculate her rate of parenting payment. McKenzie gave evidence at the hearing that she had not received the mail and had previously made complaints to the post office. A neighbour also gave evidence of experiencing similar problems with his mail. The overpayment was detected by Centrelink when McKenzie completed a parenting payment review at the end of December 2000 resulting in her payment being cancelled and a debt being raised.

McKenzie at the hearing provided evidence from her treating doctor and counsellor that she had suffered from a history of depression and anxiety as well as physical health problems.

On appeal, the SSAT decided to set aside the decision and send the matter back for reconsideration in accordance with directions that the debt be waived because of sole administrative error by the Commonwealth.

The issue

The only issue for the AAT to decide was whether the debt could be waived. The relevant provisions of the *Social Security Act 1991* (the Act) are:

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.

Note: Subsection (1) does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).

1237AAD. 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 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.

Discussion

The Tribunal found that McKenzie was an honest and truthful witness and accepted her evidence that she had attended Centrelink in June 2000 and had completed a form in relation to her husband's change in employment. The Tribunal commented that the CRAM report relied on by the DFACS was only useful to the extent that it showed McKenzie's attendance was not recorded by Centrelink and found that it was not sufficient, given the force of other evidence, to contradict McKenzie's account. The Tribunal also accepted her evidence that she had been advised by a departmental officer that she would receive written advice within one week if there was to be a change to her parenting payment. The Tribunal noted that no such advice had been received, and accepted McKenzie's evidence of her belief that her husband's increased earnings were modest and that there might not necessarily be any change as the increase in income probably fell within her understanding of the income limit. Having accepted McKenzie's evidence, the Tribunal found that the administrative error made by Centrelink, in failing to record the information provided by McKenzie about her husband's income, was relevant to waiver on the ground of special circumstances. The Tribunal opined that this error was crucial as McKenzie's belief was that from that point Centrelink was taking into account the correct earnings information to assess her parenting payment.

In relation to the notices issued to McKenzie during the relevant period, the Tribunal accepted McKenzie's submissions that s.29 of the *Acts Interpretations Act 1901*, which is similar to s.237 of the *Social Security (Administration) Act 1999*, in relation to notices of decision, prescribes a presumption of service which can be rebutted by evidence to the contrary. On the evidence, the Tribunal found that the notices had not been received, noting that this amounted to a special circumstance. The Tribunal accepted McKenzie's evidence about her mail problems and that she had taken reasonable steps to rectify the mail problem. The Tribunal also accepted that it was a reasonable decision for McKenzie not to obtain a post office box based on financial constraints.

Having regard to the Department's failure to act on information provided to it by McKenzie notifying of her husband's changed circumstances, the administrative error of crucial Centrelink

letters not being served on her, her psychological and physical health and her limited financial means, the Tribunal found that McKenzie's circumstances are 'precisely those envisaged by the legislators when framing the discretionary provision of s.1237AAD of the Act' (Reasons, para. 84).

Having found that there were special circumstances pursuant to s.1237AAD of the Act to warrant waiver of the entire debt, the Tribunal did not make any findings in relation to whether the debt could be waived pursuant to s.1237A of the Act.

Formal decision

The AAT set aside the decision under review and substituted a decision that the debt of \$3063 owed by McKenzie to the Commonwealth should be waived pursuant to s.1237AAD of the Act due to her special circumstances.

[G.B.]

Sole parent pension: substantial delay in raising debt; special circumstances waiver

MCLEAN and SECRETARY TO
THE DFACS
(No. 2003/321)

Decided: 7 April 2003 by N. Bell.

The issue

The issue before the Tribunal was whether the debt owed by McLean should be waived in whole or in part due to special circumstances.

Material facts

Whilst in receipt of sole parent pension, McLean was employed at Blacktown Hospital for the period April 1995 to 2 January 1997. Throughout the relevant period, she had submitted review forms advising of her earnings over the preceding 12 weeks. In October 2000, a data matching exercise with the Australian Taxation Office yielded information about McLean's earnings in the relevant period and this resulted in her payments being reviewed. On 20 April 2001, an overpayment was raised. By the time of the hearing, the debt had been fully repaid.

Applicant's evidence

McLean told the Tribunal that it had always been her practice to lodge three-monthly review forms with Centrelink on time and accompanied by the relevant payslips. She questioned how the overpayment error could have arisen as she knew that she would have given Centrelink all of her payslips and provided all the relevant information on her forms. She told the Tribunal that the error should have been dealt with closer to the time it arose, particularly when the information she required to refute it, for example, her payslips, was still available and Centrelink had copies of those payslips and the forms lodged by her.

She told the Tribunal that she had two children who were generally in good health with the exception of asthma that was controlled by medication. She also told the Tribunal that she had a \$5000 credit card debt because she would often pay her bills with her credit card and although she was up to date with her bills, her credit card debt remained outstanding.

Discussion

The Tribunal noted that the most significant special circumstance surrounding the debt was the time that elapsed before the debt was raised. The Tribunal noted that the period began in May 1995 but that the debt was not raised until April 2001, some six years later. There was also a delay in raising the overpayment, following the data-matching exercise. The Tribunal commented that the frequency with which the DFACS undertook data-matching exercises and the speed with which it acted on information yielded by those exercises was a matter for the DFACS.

The Tribunal went on to acknowledge the difficulties faced by McLean in meeting an allegation of debt after the elapse of six years, and decided that this factor should be taken into account in considering whether special circumstances existed. The Tribunal noted that the substantial delay meant that McLean could not access any records, including payslips, about the income she declared and the forms she completed had been destroyed. The Tribunal also commented that the lapse in time meant that any advantage she may have had arising from the overpayment had long since passed and that she had to meet the liability for the overpayment a time long after the effect of that advantage had ceased.

The Tribunal concluded that the length of the delay in raising the debt in this case was unusual and had a significant effect on the applicant's ability to meet the

contentions made against her and to absorb the burden of repayment. The Tribunal decided, taking all matters into account, it was appropriate to waive 50% of the debt raised against the applicant.

Formal decision

The Tribunal set aside the decision under review and substituted a new decision that, given the special circumstances of the case, recovery of the amount of 50% of the debt owed by McLean to the Commonwealth should be waived.

[G.B.]

Overpayment: waiver due to special circumstances

**MORGAN and SECRETARY TO
THE DEPARTMENT OF
EDUCATION, SCIENCE AND
TRAINING
(No. 2003/391)**

Decided: 30 April 2003 by
D.W. Muller.

Background

Morgan borrowed a pair of binoculars from the Batchelor Institute of Indigenous Tertiary Education (BIITE) in the year 2000. On 2 February 2001, BIITE offered Morgan a place in the Bachelor of Applied Science (Natural and Cultural Resource Management) course, which he accepted. On 12 February 2001, Morgan claimed ABSTUDY payments, and told Centrelink that he would be starting his course on 5 March 2001. Centrelink's letter to Morgan, outlining his obligations and detailing his ABSTUDY payments was returned to Centrelink unopened.

On 5 March 2001, BIITE wrote to Morgan, informing him that his failure to return the binoculars had caused him to incur a debt of \$155, which represented the cost of the item. The BIITE policy was that students with outstanding debts to the institution would not be allowed to re-enrol unless the debt was settled by the re-enrolment date. The re-enrolment date for Semester 1 2001 was 31 March 2001.

On 18 April 2001, Morgan arranged for BIITE to take amounts from his bank account to cover this debt. No deductions were made as a result of those arrangements. Also on that date, BIITE

informed Morgan that he was not enrolled in the course.

Morgan informed Centrelink that he was not enrolled in the course on 23 April 2001, and his ABSTUDY payments were suspended from that date. An overpayment of \$1603.93 was raised on 9 May 2001.

The binoculars were found on 21 July 2001 and returned to BIITE.

The issues

The AAT agreed that Morgan was not enrolled in an acceptable course at a recognised institution during the payment period, and that there was a valid ABSTUDY debt.

However, the Tribunal decided to waive the debt under s.43F of the *Student Assistance Act 1973*, which provides:

43F 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 false representation; or
 - (ii) failing or omitting to comply with a provision of this 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.

The AAT found that Morgan did not knowingly make a false statement to Centrelink: at the time of his claim, he understood that he was validly enrolled with BIITE, and he advised Centrelink within days of being told that he was not so enrolled.

The AAT found that Morgan did not understand the consequences of his failure to return the binoculars by 31 March 2001. The failure of BIITE to advise him of the critical date, to fully explain the repercussions of their policy regarding unpaid debts and enrolment and the consequences of that policy with respect to his ABSTUDY payments, amounted to special circumstances.

Formal decision

The Tribunal found that the circumstances were sufficiently unusual and special to warrant the exercise of the discretion to waive the debt.

[E.H.]