

social security payment and the amount was not payable to the recipient ...' (s.1223(1)). This latter section was amended with effect from 1 October 1997 to provide that a debt exists where '... the recipient was not qualified for the social security payment when it was granted; or ... the amount was not payable to the recipient ...' (emphasis added). The Act further provided by s.1223(5) that a debt exists where the amount received by a person is greater than the correct amount which should have been paid.

Where a debt exists recovery may be waived where s.1237AAD of the Act applies, which provides:

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.

#### Did a debt exist?

The Tribunal first considered whether a debt existed in respect of the DSP payments received by Mrs Boyd.

The Tribunal concluded that no false statement or representation was made by Mrs Boyd as to her husband's employment or earnings and, as she had not received the letter supposed to be sent to her in March 1997, she had not failed to comply with a provision of the Act. As such, no debt arose under s.1224 of the Act. Similarly, although in some fortnights no DSP was payable to Mrs Boyd, she had remained qualified for DSP, and hence no debt arose under s.1223 of the Act during the period in question to 1 October 1997.

However, from 1 October 1997 the amendment to s.1223 came into effect, which provided that a debt could exist if either the person was not qualified for the payment when granted or the amount in question was not payable. Applying this amended provision, the Tribunal concluded that a debt did exist in respect of those payment periods after that date when, because of her husband's earnings, no DSP was payable to Boyd.

The Tribunal considered also s.1223(5) of the Act and determined that a debt existed in respect of the DSP

overpayments received by her prior to 1 October 1997 (because those payments were made on the basis of incorrect combined income figures); and likewise in respect of DSP overpayments made after that date (because she received amounts other than the 'correct' amount of her entitlement in those fortnights where she was entitled to a nil payment and in other periods where she was entitled to a reduced payment).

In summary, therefore, the Tribunal concluded that a debt existed in respect of the whole of the overpayments of DSP for the period July 1997 to January 2001.

#### Should any part of the debt be waived?

The Tribunal considered the requirements of s.1237AAD of the Act, and concluded that the debt had not arisen from any false statement or representation by Boyd. However, for s.1237AAD 'special circumstances' must be able to be said to exist, for which it was necessary to show that '... something unfair, unjust or unintended had occurred or that there [was] some feature out of the ordinary ...' (*Groth v Secretary, Department of Social Security* (1995) 40 ALD 541 at 545).

In this matter, the Tribunal concluded that the intention of the legislation was to '... characterise as debt ... amounts paid to a person who was not entitled to receive them regardless of whether that person received them in good faith or not' and to recover these other than where special circumstances exist (Reasons, para. 27). Boyd was of the belief that the income figures advised via her taxation returns would have been made known to Centrelink through data matching. Further, as no letters were sent to Boyd informing her of her obligations, she was unaware of the need to advise of her husband's earnings. The Tribunal noted that the system of administration used by Centrelink allowed incorrect payments to be made to Boyd for an extended period. However, the Tribunal concluded that '... [this] system of administration potentially led to injustice for many if not all social security recipients but it did not lead to any injustice or unfairness to Mrs Boyd that was not visited, or potentially visited, upon all other recipients of payments under the Act ...' (Reasons para. 29).

On this basis, the Tribunal found that there were no special circumstances sufficient to warrant waiver of the debt.

#### The decision

The Tribunal set aside the decision under review and determined that a debt of \$12,250 existed for the period July 1997 to January 2001.

[P.A.S.]

## Disability support pension overpayment: good faith; failure to notify

GOUBRAN and SECRETARY TO THE DFaCS  
(No. 2003/558)

Decided: 16 June 2003 by N. Isenberg.

#### The issue

In this matter the issue was whether Goubran owed a debt of disability support pension (DSP) totalling \$1862 for the period March 2001 to October 2001, and whether any or all of the alleged debt should be recovered.

#### Background

Goubran was in receipt of DSP for some years after a heart attack in 1994, following which he eventually resigned from his previous employment as a teacher. His wife also worked casually or part-time as a teacher and her income affected the rate of DSP paid to Goubran. She negotiated his Centrelink application and managed any issues which arose regarding his claim.

From late 1998 Mrs Goubran worked casually but irregularly, being called when work was available, though for the latter three terms of 2000 this became more regular part-time (2 or 3 days per week) work. In 2001 her work again became casual and less predictable.

From 1998, after commencing employment, Mrs Goubran would each fortnight advise Centrelink by telephone of her earnings, though these were unpredictable. In late 2000, after she ceased working for the year and when her carer's allowance ceased, she applied for newstart allowance (NSA). From then she notified Centrelink of her irregular earnings via fortnightly NSA forms, having been advised by Centrelink that telephone advice regarding her earnings was no longer required. Only one such fortnightly form was able

to be located by Centrelink, but Mrs Goubran produced diary and payslip evidence of her earnings for the period in question. Her evidence was that often her actual wages were not paid to her until a fortnight after the period in which she worked. On some occasions her fortnightly forms were not processed until she queried the absence of payments to her bank account. In 2001 Centrelink incorrectly advised Mrs Goubran that her income was in excess of \$3000 during a period when she had in fact been overseas, and from then she ceased having confidence in the information Centrelink provided to her.

She was aware that her earnings would affect her husband's rate of DSP, but did not check the actual rate he was receiving. Centrelink conceded that it had not transposed the earnings information provided by Mrs Goubran to her husband's DSP file, as a result of which an overpayment of \$1862 had occurred.

#### The law

The Tribunal found that Goubran had been overpaid some \$1862 in DSP, which applying ss.1223(1) and (1AB) of the *Social Security Act 1991* (the Act), is a debt. The issue was whether all or part of that debt should be recovered.

The Act by s.1237 provides:

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.

In determining, therefore, whether a debt can be waived under this provision attention must be paid to whether or not the debt arose solely through administrative error by Centrelink, and whether

the relevant payments were received in good faith by the recipient.

#### Discussion

The Tribunal first considered whether adequate financial information had been provided to Centrelink by Mrs Goubran. The Tribunal noted that she was a 'scrupulous record keeper' with a history of regularly advising Centrelink of each occasion on which she was offered work. As NSA reporting periods did not correspond with her pay periods it was impossible to correlate the information — indeed, the Tribunal concluded that '... it was unclear how information provided by [Mrs Goubran's] employer ... could ever be of assistance in ascertaining what a newstart allowance applicant had 'earned' during the relevant period. The employer's information relates to payment, and this is not the criterion by which an applicant's entitlement is assessed ...' (Reasons, para. 37).

Having regard to her history of record-keeping, the Tribunal concluded that Mrs Goubran had advised Centrelink of the whole of her earnings during the period in question, and that therefore the overpayment had arisen solely through Centrelink's error in failing to transpose the information she provided to Goubran's file.

In relation to the issue of good faith, required for s.1237A to apply, the Tribunal noted the decision in *Secretary, Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 50 ALD 186 that '... if a person knows or has reason to know that he or she is not entitled to a payment received ... that person does not receive the payment in good faith. Absent such knowledge or reason to know, the receipt would be in good faith' (at p.189).

A lack of 'good faith' can be said to exist when:

... for whatever reason, the recipient acts without an honest belief that he or she was entitled to receive and retain the payment when he or she receives the payment and decides to exercise control over it by retaining it ... (*Jazazievska v Secretary, Department of Family and Community Services* (2000) 65 ALD 424 at 435-6).

And further that 'good faith' is absent 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 (*Heggerty v Department of Education, Training and Youth Affairs* (2001) 67 ALD 129 at 534).

The Tribunal, applying these decisions, noted that it was the state of mind of the individual concerned regarding the payment in dispute — rather than that of the supposed imaginary recipient — that was critical to the determination of 'good faith'. In this matter, the Tribunal concluded that given Mrs Goubran's history of dealing with Centrelink, and her careful advice as to her earnings, she had no reason to suspect or doubt that the DSP payments made to Goubran were correct, and therefore that they were received in 'good faith'. It followed, pursuant to s.1237A, that the whole of the debt must be waived.

#### Formal decision

The Tribunal set aside the decision under review and determined that the entire debt be waived.

[P.A.S.]