

- (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.

Thus for waiver to occur under this provision, there must be 'special circumstances' and, in addition, an applicant must not have 'knowingly' made a false statement or representation.

Discussion

The Tribunal considered the meaning of the terms 'day-to-day care' and 'care' in ss.22(2)(b) and (c), having regard to Pamela's situation. The Tribunal noted the decision in *Secretary, Department of Social Security v Field* (1989) 25 FCR 425 and concluded that Pamela ceased being in her father's day-to-day care whilst she lived with her mother, and that, therefore, her father was not entitled to receive FTB for her.

The Tribunal then considered whether the FTB overpayments paid to the applicant should be waived in whole or part. The Tribunal referred to the decision in *Beadle and Director-General of Social Security* (1984) 6 ALD 1 that to amount to 'special circumstances' a situation must be unusual, uncommon or exceptional. The Tribunal noted the psychiatric evidence that Pamela's father was 'consumed with his daughter's welfare' and so unable to make a rational, logical or cogent decision regarding his response to Centrelink. Further, having regard to the applicant's overall psychiatric conditions, and notwithstanding his steady improvement over time, his conditions and their implications could not be confined to the particular periods when he was in hospital or undergoing consultations with his psychiatrist — rather they applied throughout the period in question.

The Tribunal concluded that, given his psychiatric condition and its impact upon him, that applicant could not be said to have had actual knowledge of his failure to comply with his notification obligations (*Callaghan and Secretary, Department of Social Security* (1996) 45 ALD 435 applied), and that his circumstances were unusual and uncommon sufficient to meet the *Beadle* requirements, and that therefore waiver of the overpayment was appropriate.

Given the applicant's argument that he had in fact expended the FTB moneys on Pamela, the Tribunal directed that the overpayment be waived to the extent that the applicant was able to provide corroborating evidence that the payments were disbursed for Pamela's benefit.

In passing, the Tribunal noted the suggestion that the Department review its protocols for dealing with clients with known psychiatric conditions so as to avoid situations which might aggravate a pre-existing condition.

Formal decision

The Tribunal set aside the decision under review.

[P.A.S.]

Family tax benefit debt: waiver, severe financial hardship; administrative error; special circumstances

WHITE and SECRETARY TO THE DFaCS (No. 2004/13)

Decided: 9 January 2004 by M. Sassella.

The issue

In this matter the issue was whether an overpayment of Family Tax Benefit ('FTB') should be waived due to administrative error by Centrelink or through special circumstances. Both White and her husband were receiving Centrelink benefits, some of which were not being counted as income for FTB purposes when they should have been.

Background

White was in receipt of FTB from July 2000, and was paid fortnightly on the basis of her estimated income. In the financial year 2001/02 Centrelink determined that an overpayment of FTB totalling \$1919 had occurred. In that year White was in receipt of disability support pension, whilst her husband received newstart allowance.

In April 2001 White advised Centrelink that the family's estimated income for 2001/02 was \$12,000, but in

fact her own and her husband's respective Centrelink payments in that year totalled \$18,486. At the time of advising Centrelink of the estimate (\$12,000), White told Centrelink that she was in receipt of disability support pension, but was told 'not to worry about the DSP as it is not taxable' (Reasons, para. 12), even though such payments are taken into account as income for FTB purposes. In June 2001 Centrelink wrote to White outlining her ongoing payments, which letter included the advice that income for the 'secondary earner' was shown as nil and which advised her of the need to inform Centrelink should the combined income fall outside certain specified limits.

The Tribunal determined that an overpayment of FTB totalling \$1919 had occurred in the relevant year. The issue for consideration was whether any of that overpayment should be waived and, if so, on what basis.

The law

The requirements for waiver of debts to be considered are contained in ss.97 and 101 of the *Family Assistance (Administration) Act 1999* ('the Act'). This Act by s.97 provides for waiver where the debt has arisen solely through administrative error and where the relevant payments were received in good faith —

97(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.

97(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.

A further waiver ground, where special circumstances can be said to exist, is provided by s.101 of the Act —

101. 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.

Discussion

The Tribunal noted and affirmed the decisions in *Vitalone and Secretary, Department of Social Security* (1995) 38 ALD 169 that recipient notification notices (such as the letter received in June 2001 by White) are to be construed strictly, and in *Secretary, Department of Social Security and Hoy* (1998) 52 ALD 477 that recipient notification notices must be expressed with sufficient certainty that the recipient is left in no doubt as to his or her obligations. The Tribunal agreed with White that the drafting and content of the letter was such that her obligations were not clear.

Centrelink was administering and so aware of the payments being made to Mr and Mrs White, but did not check these when assessing her estimate of income, whilst the oral advice White was given by Centrelink in April 2001 led her to believe that she was receiving the correct payments. Indeed, the Tribunal concluded, the incorrect advice given to White in April 2001 in effect deterred her from making and providing an estimate of her own income. Noting that there was no evidence of any false statement or representation which resulted in the debt, nor any knowing failure to comply with a provision of the Act, the Tribunal concluded that the payments were received by White in good faith and the overpayment was solely due to Centrelink administrative error.

For waiver to be possible under s.97 of the Act, 'severe financial hardship' must be the outcome should the debt be recovered. The Tribunal considered the policy outlined in Centrelink's Family Assistance Guide that a person is said to be in 'severe financial hardship' if left with \$10 or less per fortnight after reasonable expenses are deducted from fortnightly after-tax income. The Tribunal noted that although it was not required to apply Centrelink policy, nevertheless White did not appear to fall within this definition, given her income and expenses. These included some medical expenses and outstanding debts but also expenses for tobacco (\$130 per fortnight) and entertainment (\$40 per fortnight). The Tribunal concluded that the former expenditure was '... in one sense an expensive luxury item and is probably especially ill-advised in a household where adults suffer from diseases such as diabetes, hypertension and heart disease' (Reasons, para. 32).

Despite noting these matters, the Tribunal made no finding as to whether severe financial hardship would result if waiver did not occur. However, the Tribunal considered that the failure of Centrelink to give White accurate advice in April 2001 (and, indeed, to effectively deter her from estimating her own income) was sufficient to amount to 'special circumstances' within s.101 of the Act. Referring to the requirements in *Beadle and Director General of Social Security* (1984) 6 ALD 1 that such circumstances must be unusual, uncommon or exception, the Tribunal noted that '... [it] may be that the provision of incorrect advice by Centrelink officers is not as unusual as one might require from a literal interpretation of the *Beadle* principle. However, it clearly should be' (Reasons, para. 41). Accordingly, the Tribunal found that special circumstances did exist, and accordingly that the overpayment should be waived.

Formal decision

The Tribunal set aside the decision under review.

[P.A.S.]

Youth allowance overpayment: notional entitlement to alternative payment; special circumstances

MENON and SECRETARY TO THE DFACS
(No 2003/1064)

Decided: 9 October 2003 by M. Carstairs.

The issue

Centrelink sought to recover an amount of \$6067.63 in youth allowance ('YA') paid to Menon in the period April 1999 to January 2000. On review, the SSAT determined that Menon was entitled as a student to YA until July 1999, and so reduced the amount of overpayment to \$4288.79. Menon argued that this debt should be reduced by her notional entitlement to an alternative payment, and argued that there were special circumstances which applied in her case.

Background

Menon claimed YA in March 1999 and from 15 April 1999 was paid on the basis of her student status through enrolment at the Australia Institute of Professional Counsellors ('AIPC'). The AIPC confirmed that she attended a single seminar in July 1999, but submitted no assignments. Menon produced medical evidence in support of her anxiety and depression, and her need for counselling during 2000–2001, and also advised that she had worked irregularly in the second half of 1999. Menon had married since the period in question; both she and her husband were employed, and had various repayments associated with a mortgage and personal loans. Menon at the time of the hearing was repaying the Centrelink debt at a rate of \$100 per month.

The law

The qualifications for YA are contained in s.541B of the *Social Security Act 1991* ('the Act'), whilst overpayment matters are covered by s.1224 of the Act. At the Tribunal, Menon did not dispute the debt itself, and accepted that she did not meet the qualification requirements for YA after July 1999. She contended that she would have been, however, entitled to some form of Centrelink payment, and that her health and other circumstances made it difficult for her at the time, and that these amounted to 'special circumstances'.

Section 1237AAD of the Act provides that waiver of a debt may occur in situations amounting to 'special circumstances':

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.

The question therefore was whether Menon's argument that she had a notional entitlement to another benefit, and her health and personal situation, could amount to special circumstances under s.1237AAD of the Act.