(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 the1947 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.

The decision

The Tribunal did not accept that Menon had a notional entitlement to another benefit. Noting the requirements of s.12(3) of the *Social Security Administration Act 1999* that to enable transfer between payments an applicant must be qualified for another payment, the Tribunal was not satisfied that Menon was qualified for newstart allowance or special benefit at any time in the period in question, and noted that the eligibility requirements for newstart allowance cannot be satisfied retrospectively (*Moon and Secretary to the Department of Family and Community Services* [2003] AATA 676).

To fall within the waiver provisions of s.1237AAD circumstances must be unusual, uncommon or exceptional (*Beadle and Director-General of Social Security* (1984) 6 ALD 1). Here the Tribunal noted the evidence of Menon's health difficulties, but that she was now married, employed and in better health, and concluded that '... whilst setting up a home can be a difficult and expensive time for young people, there is nothing that lifts [Menon's] circumstances to the level of unusualness that a favourable exercise of the discretion [in s.1237AAD] requires' (Reasons, para. 22).

Formal decision

The Tribunal affirmed the decision under appeal.

[P.A.S.]

Debt: Garnishee notice; extent of review powers

MOREL and SECRETARY TO THE DFaCS (No. 2003/1253)

Decided: 12 December 2003 by E.K. Christie.

Background

Morel had outstanding debts to the Department of $6150.18. Various amounts were recovered from him. In October 2002, Morel offered to pay $5.00 a fortnight in repayment of the debts. On 14 November 2002, the Department gave Morel a copy of a garnishee notice to a Bank. On 18 November 2002, the Department recovered $6150.18 from an account in Morel's name with the Bank. The Bank account comprised funds borrowed by Morel.

The issue

The issue was whether the Department issued the garnishee notice correctly in accordance with the legislation.

The law

Section 1230C of the *Social Security Act 1991* ('the Act') provides for 'Methods of recovery of debt (due to the Commonwealth)' and s.1230C(1)(a) prescribes a 'garnishee notice' as one such method.

Section 1230C(2) of the Act prescribes the requirements for the use of these methods of recovery of a debt. Before a garnishee notice can be issued, the Commonwealth must first have sought to recover the debt by deductions from social security payments or by payment of instalments and the debtor must have failed to enter into a reasonable arrangement to repay the debt or, having entered into such an arrangement, failed to make a payment.

Section 1233 of the Act provides that where a debt is recoverable from a person under the Act, the Secretary may give a garnishee notice to a person 'who holds ... money on account of the debtor'. The notice can require the person holding the money to pay it to the Commonwealth up to the amount of the debt. It is an offence to not comply with the notice. A copy of the notice must be given by the Secretary to the debtor.

Section 1233(7A) provides generally for a garnishee notice to be issued within six years of the debt arising 'starting on the first day on which an officer becomes aware, or could reasonably be expected to have become aware, of the circumstances that gave rise to the debt'.

Section 151(2) of the *Social Security (Administration) Act 1999* set limits on the SSAT's powers of review and s.151(2)(c) provides that the power to review does not include s.1233 of the 1991 *Social Security Act.*

Scope of review

The Tribunal noted that the operation of s.151(2) of the Administration Act *Social Security (Administration) Act 1999* limited the SSAT's powers so that it could determine only whether, in law, the garnishee notice could be issued — rather than making a determination on the merits as to whether it was appropriate for the notice to have been issued.

The Tribunal further noted that its powers in relation to the decision by the Department to garnishee the debt owed by Morel from her bank account was similarly limited by the operation of s.1253(4) of the Act. The Tribunal referred to the Federal Court decision of *Walker v Secretary, Department of Social Security* (1997) 147 ALR 263 which indicated that the Tribunal's powers of review were limited in the same way as the SSAT.

Issue of garnishee notice

The Tribunal considered whether the procedures for the issue of the garnishee notice, as prescribed by the legislation, had been adhered to by the Department.

Whether a bank held money in account of Morel

The Tribunal concluded that the Bank held money, in three accounts, in Morel's name. The Tribunal noted this was inconsistent with Morel's Statement of Financial Circumstances which she had completed in October 2002.

Whether recovery of the debt due to the Commonwealth had firstly been sought through a social security payment

The Tribunal noted that this issue was not in dispute. Recovery of the debt was made by disbursements from a variety of social security entitlements over time. The Tribunal concluded that the Department had first sought to recover the debt from Morel through disbursements from a range of social security benefits she received over the period December 1997 to September 2002.

Whether repayment by instalments had been sought by an arrangement entered into under s.1234

The Tribunal concluded that repayments by instalments to recover the debt due to the Commonwealth had been made over the period 1997 to 2002.

Whether Ms Morel has failed to enter into a reasonable arrangement to repay the debt

The Tribunal found that Morel had two debts totalling $8010.10 that had been outstanding since 1997. During this time, she purchased two properties but did not clear the debt due to the Commonwealth. In her Statement of Financial Circumstances (October 2003), she stated the total value of her properties to be $452,000 to $462,000 and her outstanding mortgages as $429,489. The Bank records indicated total loan accounts at $222,086. The Tribunal found the discrepancies in these property values, particularly the outstanding amount