

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 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

of mortgage, was a further example of inconsistent evidence by Morel.

The Tribunal concluded that given the long-term nature of the debts and Morel's financial history, that the Department had made genuine attempts to negotiate an alternative arrangement but that the offer of Morel to pay \$5 per fortnight towards the debt due to the Commonwealth was not a reasonable arrangement.

Whether a garnishee notice was issued to Ms Morel and the Bank in accordance with prescribed procedures

The Tribunal accepted Departmental evidence that a garnishee notice was delivered to the Bank and Morel on the same day.

Whether the garnishee notice was issued within six years of the debt arising

The Tribunal found this statutory requirement was met as the garnishee notice was issued on 14 November 2002 and the two overpayments in question were raised in March 1997 and April 1997.

The Tribunal found there was no error in fact or law to prevent the Department from deciding to issue a garnishee notice. The Tribunal found that the garnishee notice was correctly issued in accordance with the requirements as prescribed by the legislation.

Formal decision

The decision under review was affirmed.

[M.A.N.]

Age pension: underpayment; date of effect of decision about arrears

**SECRETARY TO THE DFaCS and
CASPERSZ
(No. 2003/1300)**

Decided: 18 December 2003 by
M.J. Carstairs.

Background

Mr and Mrs Caspersz each received age pension. Their rates of age pension were affected by their financial investments. In 1995 they advised the Department

that they had purchased two annuities which would mature in five years (February 2001). The Department made a computer record of the annuity and the date of maturity and the Caspersz' rates of pension were recalculated. When the annuities matured, the Casperszs purchased different financial investments with the proceeds. Centrelink continued to assess the annuities as assets because it was unaware of the different financial investments. About July 2002, the Casperszs with the assistance of their accountant made enquiries about their rates of pension. As a result the rates were adjusted. The Department decided that the new rate of pension could not be retrospectively adjusted from 1 February 2001.

The issue

The issue was what should be the effective date of decision about the new rate of pension, that is, whether arrears of pension should be paid back to February 2001.

The legislation

Section 78 of the *Social Security (Administration) Act 1999* ('the Act') states:

If the Secretary is satisfied that the rate at which a social security payment is being, or has been, paid is less than the rate provided for by the social security law, the Secretary must:

- (a) determine that the rate is to be increased to the rate provided for by the social security law; and
- (b) specify the last-mentioned rate in the determination.

Section 108 defines a decision under s.78, correcting the rate of pension, as a *favourable determination*. Section 109 and 110 set dates of effect for *favourable determinations* of this kind. Section 109 of the Act provides:

109(1) ... If:

- (a) a decision (the original decision) is made in relation to a person's social security payment; and
- (b) a notice is given to the person informing the person of the original decision; and
- (c) within 13 weeks after the notice is given, the person applies to the Secretary, under section 129, for review of the original decision; and
- (d) the favourable determination is made as a result of the application for review;

the favourable determination takes effect on the day on which the determination embodying the original decision took effect.

109(2) ... If:

- (a) a decision (the *original decision*) is made in relation to a person's social security payment; and

- (b) a notice is given to the person informing the person of the original decision; and
- (c) more than 13 weeks after the notice is given, the person applies to the Secretary, under section 129, for review of the original decision; and
- (d) the favourable determination is made as a result of the application for review;

the favourable determination takes effect on the day on which the application for review was made.

109(3) ... If:

- (a) decision (the *original decision*) is made in relation to a person's social security payment; and
- (b) the person is not given notice of the original decision; and
- (c) the person applies to the Secretary, under section 129, for review of the original decision; and
- (d) the favourable determination is made as a result of the application for review; the favourable determination takes effect on the day on which the determination embodying the original decision took effect.

Section 110 of the Act provides for the setting of dates of effect where claimants provide information about changed circumstances:

110(1) ... Subject to subsections (2) to (11) (inclusive), if a favourable determination is made following a person having informed the Department of the occurrence of an event or change of circumstances, the determination takes effect:

- (a) on the day on which the person so informed the Department; or
- (b) on the day on which the event or change occurred;

whichever is the later.

Letters from Department

The following letters to both Mr and Mrs Caspersz were relevant to the Tribunal decision: letters dated 27 June 1996 ('the first letters') stating that the rate of pension 'will be \$195.90 per fortnight starting from 11 July 1996'. In the part headed 'How we have assessed your combined yearly income', the letters stated that the Casperszs' financial investments were assessed at \$627.20; superannuation/annuities were assessed at \$13,474, and total income was assessed at \$14,101.20; and letters dated 19 June 2001 ('the third letters') stating the rates of payment of age pension between three periods 6 June 2001 and 19 June 2001, 20 June 2001 and 3 July 2001 and from 19 July 2001 onwards. The third letters went on to state, under the heading 'Information used for calculating your regular payment', that the rate of age