The law

Section 1237A of the *Social Security Act 1991* ('the Act') provides:

> **Waiver of debt arising from error**
>
> *Administrative error*
>
> **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.

Discussion

The AAT discussed four decisions of the Federal Court which considered the meaning of the expression 'received in good faith'.

In *Secretary, Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 152 ALR 127 Finn J referred (at 130) to a person's state of mind concerning receipt of the payment:

> [I]f that 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.

The Department submitted that it was not reasonable for Duncan to assume he was entitled to the money he received, when he had not specifically applied for a benefit, and his daughter had received a notice saying her claim for youth allowance had been rejected. Duncan said he was not used to dealing with Centrelink; he had spoken with a Centrelink officer and understood the defects in his daughter's claim were being corrected; and he thought payments could be made in the interim.

The AAT concluded that the belief did not have to be reasonable, with reference to *Haggerty v Department of Education* (2000) 331 AAR 529. French J said (at 534 and 535) that a want of good faith arises where there is a positive belief that the payment is made by mistake, or where a person holds suspicion or doubts about their entitlement, and there is an objective basis for the suspicion or doubt.

> The provision does not, however, authorise the imputation of want of good faith in any of the senses above described simply because there are in existence objective facts which would raise a belief or a doubt or a suspicion of non-entitlement in the mind of some imaginary recipient.
>
> Concern, puzzlement, upset and a perception of unusual circumstances, coupled with absence of further inquiry, are not enough themselves to constitute want of good faith.

The AAT referred to *Pledger v Secretary Department of Family and Community Services* [2002] FCA 1576 in concluding that the test as to whether a recipient should have known or suspected they were not entitled was not an objective test. In *Pledger* Weinberg J said a 'careful consideration of the actual state of mind of the recipient' was required, and in that sense 'the test is entirely subjective, and not objective'. However, 'idiosyncratic views as to what might be regarded as acceptable behaviour, including the standards of a "Robin Hood", will not be regarded as amounting to "good faith"'.

The AAT considered the decision of Cooper J in *Jazazievska v Secretary Department of Family and Community Services* [2000] FCA 1484 was consistent on that point in the reference to turning a 'blind eye' as not amounting to receipt in good faith.

Turning to Duncan's actual state of mind the AAT said

> I am satisfied he actually believed he was receiving what he was entitled to receive. That belief was not necessarily reasonable ... He may well have wondered or be puzzled [sic] about his entitlements but that is why he spoke with Centrelink officers on a number of occasions ... Mr Duncan was unused to dealing with Centrelink and was almost certainly naïve ... But I do not accept his assumptions about the behaviour of Centrelink were so idiosyncratic as to prevent him relying on s.1237A.

(Reasons, para. 10)

Formal decision

The decision of the SSAT to waive the right to recover the debt was affirmed.

[H.M.]

Overpayment age pension: overseas pension income not declared; special circumstances waiver

VAN WEEREN and SECRETARY TO THE DFaCS (No. 2004/578)

Decided: 7 June 2004 by S. Webb.

Background

On 1 April 1992 the *Social Security Agreement between Australia and the Kingdom of the Netherlands* (the Agreement) came into effect. Van Weeren received Australian and Dutch age pensions since 1992 and in April of that year he attended an information seminar and received a letter from the Dutch authorities concerning the Agreement. He was advised that his Dutch pension was subject to bi-annual indexation adjustments and under the Agreement, Dutch authorities would inform Centrelink of general bi-annual indexation increases in Dutch age pension. Van Weeren received monthly statements advising him of the rate of his Dutch pension.

Van Weeren was notified of adjustments in the rate of his Australian age pension in notices dated 10 March 1995, 15 September 1995 and 23 August 2000. These notices specified his annual income and his obligation to inform Centrelink if his weekly income exceeded a specified amount. Letters dated 10 March 1995 and 15 September 1995 specified his overseas income as $7513 per annum or $144.48 weekly. The letters also required him to notify Centrelink within 14 days if his gross income went above $144.48 per week. His income did in fact exceed those specified amounts but he did not inform Centrelink.

Van Weeren was also sent letters about changes in the exchange rate used by Centrelink in converting his Dutch age pension; however, these letters did not inform him of the rate of his Dutch pension either in Guilders, Euros or Australian dollars.

On 31 May 2003 Van Weeren was sent a notice, informing him that the rate of his Australian pension was being recalculated on the basis of the rate of his Dutch pension as advised to Centrelink by the Dutch authorities. On the same day Van Weeren was informed that in the period from 1 April 1999 to 25 March 2003 his Australian pension had been overpaid in the amount of $4484.97 and a debt would be raised under s.1223(1) of the *Social Security Act 1991* ('the Act'). The amount of the debt was later varied to $4479.77 after reconsideration of the decision. That decision was affirmed by an authorised review officer on 27 June 2003 and again affirmed by the SSAT on 30 September 2003.

The issue

The sole issue for determination by the AAT was whether there were special circumstances that made it desirable to waive the debt in whole or in part under s.1237AAD of the Act.

The law

The AAT concluded that there was a debt and also concurred that the debt did not arise solely by error of the Commonwealth and therefore could not be

waived under s.1237A of the Act. The AAT then considered whether the debt could be waived under s.1237AAD of the Act concerning 'special circumstances'.

The AAT noted Van Weeren understood his obligation to inform Centrelink if his income increased when receiving a disability support pension prior to 1992. The AAT adopted an actual rather than a constructive interpretation of '*knowingly*' (see *Callaghan and Secretary, Department of Social Security* (1996) 45 ALD 435 at para 48). In this case the AAT accepted Van Weeren's claim he did not know that by not declaring increases in his Dutch pension he was in fact failing or omitting to comply with a provision of the Act.

The findings

The AAT accepted that Van Weeren attended an information seminar and received a letter from the Dutch authorities concerning the Agreement. That letter is in both Dutch and English and states:

> We are obliged to send the Australian DSS a copy of our decision which shows the [Dutch General Old Age Act] AOW pension rate you are entitled to *as from the date the Agreement comes into effect*. If after the date on which the Agreement comes into effect, there are any changes in your circumstances which may affect the rate of your AOW pension, we will be obliged to apply the provisions of the Agreement [sic].

The AAT noted Van Weeren's claim that Dutch government representatives attended the meeting and two officers from the Department of Social Security. Centrelink had not challenged this, nor was the claim that the officials at the meeting explained that under the Agreement the Dutch authorities were required to inform the then Department of Social Security of any changes to the rate of the Dutch pension. Van Weeren's assertion that this information led him to believe that the Dutch authorities would inform the Department of Social Security of any change in the rate of his Dutch pension was accepted by the AAT.

The AAT accepted that there was no evidence Van Weeren received any further information from Centrelink concerning his obligations under the Act following commencement of the Agreement, but was sent notices setting out the annual rate of his Dutch pension income on 10 March 1995, 15 September 1995 and 31 August 2000.

The AAT was satisfied that Centrelink's failure to clearly communicate with Van Weeren his obligations under the Act following commencement of the Agreement in a timely manner was an omission of significance. The AAT said that Van Weeren was entitled to expect to be informed of his obligations under the Act following commencement of the Agreement even though, by his own account, he had previously been advised of the requirement to inform Centrelink of any increase in his income while in receipt of a disability support pension.

Centrelink's failure constituted a special circumstance the significance of which was increased by the subsequent delay in communicating Van Weeren's obligations until 10 March 1995.

Van Weeren's argument was that it was not reasonable to expect him to apply fluctuating exchange rates to calculate the weekly rate of his Dutch pension for the purpose of informing Centrelink, when he understood that the Dutch authorities were informing Centrelink of the correct rate at which his pension was paid.

The AAT did not accept that submission as it considered that it was not necessary for him to perform complex calculations based on fluctuating rates of exchange. The advice he received from the Dutch authorities concerning the rate of his pension payments clearly indicated the amount of his pension in Netherlands Guilders, the applicable exchange rate and the amount of Australian dollars that was deposited into his bank account. The AAT said that it was not unreasonable to expect Van Weeren to either calculate the weekly rate from the monthly payment or to inform Centrelink of the monthly rate in compliance with his obligations under the Act, but he did not. Van Weeren claimed he did not do so because he thought, and had been led to believe, that Centrelink already had that information from the Dutch authorities. The AAT did not accept that those assumptions excused him from compliance with the notices he was sent in 1995.

The AAT accepted that there was inference in the correspondence in February 1992 and on 31 May 2003 that the Dutch authorities were informing Centrelink of bi-annual indexation adjustments to the general rate of Dutch pensions. While there was insufficient evidence to support a finding that the Dutch authorities regularly provided information to Centrelink on a bi-annual basis, the AAT accepted that the Dutch authorities did provide information concerning the indexation rates for Dutch pensions to Centrelink. However, it appears that Centrelink did not act on information provided by the Dutch authorities until March 2003.

The AAT noted that if Centrelink did indeed regularly compare social security payment records with the Dutch authorities it was surprising that Van Weeren's case was not identified as anomalous before March 2003. Had such comparative assessments been undertaken thoroughly and on a regular basis after commencement of the Agreement it is reasonable to expect that Van Weeren's failure to declare increases in his Dutch pension income would have been exposed in a timely manner and the amount of overpayment, and consequent debt, would have been minimised.

The AAT referred to the case of *Cymerman and Secretary, Department of Family and Community* Services [2003] AATA 1354 noting that, while neither the Secretary nor Centrelink were obligated under the Agreement or the Act to keep abreast of changes in the rate of Dutch pension, Centrelink's failure to carry out any audit or check for a period of years contributed to Mrs Cymerman's perception that she was being paid on a proper basis. Similarly, it took 11 years for Centrelink to identify a problem with Van Weeren's age pension payments, during which period, like Mrs Cymerman, he was under the impression that his payments were in order and information about the rate of his Dutch pension was being provided to Centrelink by the Dutch authorities under the Agreement.

The AAT accepted that the delay constituted special circumstances despite Van Weeren's failure to comply with the notices he was sent.

Van Weeren was 77 years of age, frail and suffered from a number of medical conditions. He lived in rental accommodation and owned a vehicle fitted with a hoist for lifting groceries and used a scooter because of difficulty walking any distance. His income was solely derived from his Australian and Dutch pensions. The AAT was not satisfied that Van Weeren's age and poor health were factors alone that rendered his circumstances as special. The AAT did however accept medical evidence that Van Weeren's health was adversely affected by factors such as stress caused by his '*problems with social security*'.

The AAT concluded that the special circumstances of the case made it desirable to waive 50% of the debt on the basis that it was not the intention of the Act to materially contribute to the ill health of a frail age pension recipient who is

liable for a debt to the Commonwealth, especially in circumstances where the magnitude of the debt was increased by delay and inadequate procedures on the part of the Commonwealth.

Formal decision

The decision under review was varied so that 50% of the debt was waived because of special circumstances pursuant to ss.1237AAD of the Act. The matter was remitted to the Secretary on that basis to determine the amount of the debt that was outstanding and an appropriate recovery plan.

[S.P.]

Waiver: administrative error, good faith and special circumstances

SCHULZE and SECRETARY TO THE DFaCS (No. 2004/705)

Decided: 30 June 2004 by D.G. Jarvis.

Background

Schultze was overpaid parenting payment partnered between November 2001 and March 2003 and a debt was raised of $9557.83. The amount of the debt was varied to $6029.53 which was confirmed by an authorised review officer and in turn by the Social Security Appeals Tribunal, which found that there was no basis on which the debt could be waived.

The issue

The issues in this appeal were whether the debt should be waived:

- under the 'administrative error' provisions of the *Social Security Act 1991, or*
- under the 'special circumstances' provisions of the *Social Security Act 1991.*

The evidence

Schultze's evidence was that he incorrectly made non-allowable deductions from his wife's income and consequently provided Centrelink with a lower income figure than her actual income. He conceded the debt was caused by his error.

However, he told the Tribunal that he provided income figures on 22 October 2001 in relation to family allowance and that Centrelink took no action to adjust the rate of parenting payment he received.

He also completed a parenting payment review form on 12 February 2002, but did not fully answer the questions.

Centrelink reassessed parenting payment by reference to this form and assumed income on the basis of a 2001 profit and loss statement attached to the form.

The Department's submissions

On behalf of the Department it was argued that the overpayment for the period 22 October 2001 to 12 February 2002 was caused solely by the administrative error of Centrelink; however payments were not received in good faith.

The Department argued that payments made after 12 February 2002 resulted partly from Centrelink's error and also Schultze's error in failing to complete the form correctly. Consequently, there were no grounds to waive any part of the debt, after 12 February 2002, on the basis of administrative error.

Administrative error waiver

The Tribunal dealt with the second portion of the debt that arose as a result of administrative error. It agreed with the Department's submission that although Centrelink mistakenly used incomplete information, Schultze also contributed to the overpayment and consequently the debt had not arisen due to sole administrative error on the part of Centrelink.

In relation to the first portion of the debt, the issue was whether the money was received in good faith. The Tribunal referred to the cases of:

- *Secretary, Department of Employment, Education, Training and Youth Affairs v Prince* (1997) 50 ALD 186
- *Haggerty v Department of Education, Training and Youth Affairs* (2000) 31 AAR 529
- *Jazazievska v Secretary, Department of Family and Community Services* (2000) 65 ALD 424.

The Tribunal found that Schultze would have expected a reduction in his pension to flow from the increased estimate of income. He also had an objective basis for this on the grounds of previous experience of a pension overpayment. Although the payments were paid to a bank account which was managed by his wife the Tribunal found that Mr and Mrs Schultze had 'reason to know' based on past experience and knowledge that the parenting payment partnered pension rate should have changed, and yet they did not check this. This failure to monitor Centrelink payments amounted to indifference or recklessness on his part. The Tribunal therefore concluded that he did not receive payments in good faith.

Special circumstances waiver

The Tribunal then considered special circumstances waiver. It first considered the issue of whether Schultze or another person knowingly made a false statement or failed to comply with the Act. The Tribunal found that although Schultze was indifferent or reckless in the management of Centrelink obligations, he did not knowingly fail to advise Centrelink in relation to income.

The Tribunal then considered the circumstances of the case and found that Schultze was injured as a result of a bike accident and was limited in some of the tasks he could perform. As a result of this injury his earning capacity through part of 2002 and 2003 was reduced. The Tribunal also found that two administrative errors occurred during the period of the overpayment.

The Tribunal concluded that it would waive the amount of $2500 on the basis of the combination of errors made by both Schultze and Centrelink, and the hardship caused to Schultze as a result of his bicycle accident.

Formal decision

The AAT set aside the decision under review, and substituted a decision that the amount of $2500 be waived on the grounds of special circumstances.

[R.P.]

Member of a couple while assurance of support in force

STANISZEWSKI and SECRETARY TO THE DFaCS (No 2003/ 644)

Decided: 22 December 2003 by O. Rinaudo.

Background

Staniszewski married on 26 March 2002. His wife had arrived in Australia on 22 February 2002 and was subject to a two-year newly arrived resident's wait-