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-

ing period for benefits. Weislaw Kuzma provided an assurance of a support for Mrs Staniszewski. On her arrival Mrs Staniszewski had $15,000.

Centrelink determined on 17 June 2002 that Staniszewski's disability support pension should be paid at the partnered rate. The decision was affirmed by the SSAT on 13 March 2003.

The issue

The issue was whether there was a special reason to not treat Staniszewski as being a member of a couple.

The evidence

Staniszewski submitted that the $636 Centrelink was paying the family per fortnight was insufficient to support him, his wife, and their son. Of the money his wife had on arrival, $9600 had been spent on college fees for their daughter in the United States. Staniszewski was not forthcoming about when that money was sent, or about how or when the remaining funds were expended, though it appears some was spent on house renovation. Staniszewski provided a document dated one day before the AAT hearing purporting to attest that he and his wife had been living separately under one roof since December 2002. Staniszewski said that Kuzma had been earning approximately $900 a week when he signed the assurance of support, but had since had an accident and was now receiving sickness benefit, and was no longer in a position to provide support. No independent evidence of this statement was provided.

The law

Section 24 of the *Social Security Act 1991* ('the Act') provides:

> **Person may be treated as not being a member of a couple (subsection 4(2))**
>
> **24.(1)** Where:
>
> (a) a person is legally married to another person; and
>
> (b) the person is not living separately and apart from the other person on a permanent or indefinite basis; and
>
> (c) the Secretary is satisfied that the person should, for a special reason in the particular case, not be treated as a member of a couple;
>
> the Secretary may determine, in writing, that the person is not to be treated as a member of a couple for the purposes of this Act.

Discussion

The AAT determined that Staniszewski was lawfully married and residing with his wife, and that in June 2002, when the decision was taken to pay him at the married rate, Mrs Staniszewski had $15,000 in her possession.

The Department submitted that Departmental guidelines prevent the application of s.24 when an assurance of support is in force. Accepting the need to pay college fees of $9600, the Staniszewskis nonetheless had $5400 to use to support themselves over a period of time. Until 7 November 2003 Centrelink had also paid Staniszewski $240 family tax benefit per fortnight.

The AAT considered the case of *Sarmini and Secretary Department of Family and Community Services* (2003) AATA 90, accepting the quoted proposition therein:

> The Tribunal must, in addition to considering the legislative requirements, consider the policy guidelines and it is clear to me that section 24 of the Act both from the legislation and the intention behind the legislation, both in terms of the Migration Regulations and in terms of the Act in combination with the policy considerations would make it undesirable and inappropriate to have the discretion contained within section 24 to be exercised.

The AAT rejected Staniszewski's application on the basis that: he was receiving $240 per fortnight family tax benefit until 7 November 2003; a valid and enforceable assurance of support was in force and it had not been demonstrated that the assurer could not provide an adequate level of support; and the Staniszewskis had spent a considerable amount of money after his claim for the single rate of disability support pension and her claim for special benefit were rejected.

Formal decision

The AAT affirmed the decision to pay Staniszewski's disability support pension at the married rate.

[H.M.]

Marriage-like relationship: special reasons and discretion

RENDELL & PATRICK and SECRETARY TO THE DFaCS (No. 2004/711)

Decided: 2 July 2004 by D. Trowse.

The issue

In this matter the key issue was whether Rendell and Patrick should be considered to have been in a marriage-like relationship, the consequence of which would be that their rates of income support payment would be reduced.

Background

Rendell and Patrick began a relationship in 1985. Shortly after Patrick became pregnant, Rendell moved into shared rental accommodation at Melrose Park with her, her father and brother. Rendell did not wish the pregnancy to proceed, and had never paid maintenance in respect of his son Leigh, born in March 1986. The evidence was that Rendell and Patrick ceased their relationship when Leigh was born, though they continued to live at the same address, and both contributed to the rent. Rendell engaged in other relationships. In 1991 Patrick and her son moved from the home to live in a housing trust unit at Giles Plains, closer to where her father and brother had themselves moved in 1987, and in 1991 she gave birth to a daughter by another father, from whom she received maintenance payments. Patrick was in receipt of parenting allowance at the single rate, whilst Rendell, from 1995, received disability support pension at the single rate.

The move to Giles Plains proved to be difficult financially for Patrick, and she also had personal safety concerns and schooling difficulties with her son. She and Rendell had maintained occasional contact, and in early 1996 she agreed to return with her children to the Melrose Park home, and to contribute to rent and utility costs. She and Rendell then, in mid-1996, jointly leased a property in Mitchell Park, the rent for which was paid on a rotating basis, and in respect of which, in their bond application, they indicated they were not a couple

Discussion

The Tribunal considered the various requirements contained in s.4(3) of the Act. In respect of *financial aspects*, the Tribunal noted that Rendell and Patrick had no joint assets, and no legal obligations in respect of each other, and each contributed to rental and utility costs. Regarding *the nature of the household,* Rendell and Patrick occupied different areas of the house, owned separate furniture, and each took responsibility for their own room cleaning, laundry and cooking, though occasionally they did dine together. The support and care of the two children was the prime responsibility of Patrick. She did provide meals, and do laundry for Rendell during short periods when he was unwell and confined to bed. Rendell occasionally con-