dent economic loss and future economic loss. Applying *DSS v a'Beckett* 21 ALD 90 wherein it was held that claimant statements (especially the formal statements of claim) asserting a loss should be given substantial weight in determining how the settlement sum was arrived at, the Tribunal concluded that in this matter it was 'not satisfied that economic loss statements played no part in the eventual settlement of the matter ...'

The Tribunal concluded that the compensation payment was made partly in respect of lost earnings or lost capacity to earn, notwithstanding the difficulties Ms Wolfe was at that time having in obtaining employment.

The Tribunal noted the criteria set out in *Beadle v DSS* (1985) 7 ALD 670 that, to be 'special', circumstances must be unusual, uncommon or exceptional such that the normal application of the law would result in an unfair or inappropriate result. Applying these criteria, the Tribunal found in this matter that there were no circumstances sufficient to justify exercise of the discretion contained in s.1184 of the Act.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]

Background

Family allowance estimate debts explained

A recent decision made by the Administrative Appeals Tribunal (AAT) *Secretary, Department of Family and Community Services and Julianna Butt* (AAT, D.F. O'Connor J, President, H.E. Hallowes, Senior Member and Dr J.D. Campbell, Member, decided Sydney, 28 July 2000) has resolved a number of issues on which previously conflicting decisions had been delivered by the Tribunal regarding family allowance[1] estimate debts.

The family allowance program has enabled a person's entitlement to be assessed upon either their base year income (the income earned in the financial year previous to the calendar year in which payments are made) or their current year income where Submodule 2 of Module H of the Family Allowance Rate Calculator set out in the *Social Security Act 1991*, permits. Where Submodule 2 is used, it usually has involved a recipient making an estimate of the income to be earned in the remainder of the relevant financial year.

For many people, estimating their income is a difficult task and events such as retrenchment, back pay, changes in accounting systems, promotions, overtime, increased hours of casual employment, variations in returns from self-employment — all make estimating income harder. Further, these matters are usually entirely unknown at the time the estimate is given.

Where a person's estimate was found to have varied from their actual income by more than the accepted margin of error, the Department has used s.885 to recalculate the person's entitlement. Where such a re-calculation has occurred the difference between the rate paid and rate payable is a debt under s.1223(3) of the Act.

From 1 January 1996 the margin of error for estimates was reduced from 25% to 10%. As a result, large numbers of recipients were asked to repay debts for payments made after this date.

Limit of section 885

In Ms Butt's case, the Tribunal determined, that s.885 could only be used to recalculate a person's entitlement where the estimate had been lawfully used to calculate the person's rate under the rate calculator in the first place. If the rate calculator did not provide that the estimate should be used, either no debt existed where the pre 1 October 1997 debt recovery provisions applied, or the debt arose from administrative error and might be waived under s.1237A.

When can the current year estimate be used?

Essentially, Submodule 2 states at sections 1069-H13 and H14 that a person's rate should be assessed with reference to the base year income, unless one of two situations arise.

The first is where a person is required to provide an estimate of the income they expect to earn in the current year. This can be due to the occurrence of an 'assumed notifiable' or 'notifiable event'. These are events listed on forms and letters.[2] Where one of these events occurs and it does, or is likely to, increase the person's income to more than 110% of the base year income, the estimate can be used.

The second is where a person requests in writing that an estimate of their current year income be used under s.1069-H21.

In both of these cases, where the actual income earned was more than 110% of the estimated amount, the rate payable has to be re-assessed in accordance with s.885(1). However, the impact of both types of estimate debts can be restricted to the end of the calender year under s.1069-H15 in respect of requests, and under s.1069-H17 or s.1069-H19 in respect of 'assumed notifiable' and 'notifiable events', depending on the circumstances.

Ms Butt's case

Ms Butt's case concerned two alleged overpayments. The first from 1 August 1996 to 28 August 1997 and the second from 11 September 1997 to 10 September 1998. Throughout these periods she completed a number of review forms which required her to update her estimates. As her estimates were always lower than the base year income, the Department assessed Ms Butt's rate on the basis of the estimate (thus affording her a higher rate of payment). However, the standard review forms did not contain a question which asked whether Ms Butt wanted her family payments assessed on the estimated income rather than the base year. Use of the estimated income exposed her to the risk of overpayment, whereas the base year, while paying at a lower rate, did not expose her to that risk. In addition, Ms Butt's circumstances changed in early 1997. The parties agreed that the change was a notifiable event, but it did not, nor was it likely to, lead to an increase in Ms Butt's income beyond 110% of the base year.

When does a person request that an estimate be used?

The Department argued that Ms Butt had made a 'request' by filling out the estimate sections of the forms and responding to letters by providing more information about her income. The Tribunal did not accept this and adopted the

approach of Deputy President Forgie in *Stuart and SDSS* (1998) 54 ALD 241, stating that Ms Butt was simply following the requirements on the forms and was given no choice of assessment on any other basis. This did not constitute a request in writing and requirements of s.1069-H21 had not been met.

Extent of impact of notifiable and assumed notifiable events

The Tribunal also considered the application of ss.1069-H18 and H-19 of the Act. It determined that while a notifiable event occurred in March 1997 (Ms Butt had returned to part-time work and her husband commenced self-employment) neither section applied to Ms Butt. This was because the income earned in both the event tax year 1996/1997 and the year following the event tax year 1997/98 did not exceed by more than 10% the income earned in the relevant base year 1994/95.

In determining its position in relation to the application of these provisions the Tribunal affirmed the reasoning applied by Deputy President Forgie in the matter of *SFACS and Dyson* (AAT, Brisbane, 20 April 2000). In that case the Deputy President decided that a debt existed for overpayments made up to 31 December 1996 as a notifiable event had occurred in late 1996 and the income in the event tax year exceeded the base year income by more than 10%. The debt was correctly raised under s.1223(3) and its reference to s.885.

However, she concluded that:

- s.1069-H18 ceased to have application after the end of the calendar year in which the notifiable event occurred;
- s.1069-H19 could not apply to use a later year of income where s.1069-H18 had been held to apply in the event tax year;
- the correct application of s.1069-H19 required its application at the time a person advised of the notifiable event. A decision had to be made on the likelihood of the person's income in the following tax year exceeding the base year income on the basis of the evidence available at that time. The provision could not simply be used to re-assess a rate once the actual income for that following tax year was known and had exceeded the base year amount by more than 10%.

The decision meant that for payments made after the commencement of the new calender year, the Department had to use the new relevant base year income to determine any debt.

Consequence of no application of submodule 2

In Ms Butt's case, as s.1069-H21 was not complied with, no other provision in the Act allowed the Secretary to assess the rate payable on any other basis than the base year of income. Section 885(1)(a) and (b) could not be satisfied as there was no need to use an estimate to determine the rate payable. Section 1223(3) then could not be used.

The Tribunal determined that the overpaid amount was the difference in the rate paid (using the most recent current year estimate) and the rate that should have been paid (using the base year of income) and not the difference between the amount paid using the estimate and the amount that would have been paid had the estimate been correct.

Any overpayment on this basis had to be determined under either s.1223(1) (where the person had no entitlement) or s.1223(5) (where the person had reduced entitlement). However, any overpayment involving payments made to Ms Butt before 1 October 1997 could not be raised as debts under these provisions as the two sections only became operative from that date and s.1224 did not apply.

Waiver due to administrative error

Any payments which were paid after 1 October 1997 and were debts raised under s.1223(1) or (5) must be waived under s.1237 A(1). This was because the debt was caused solely by the Department's administrative error of failing to use the base year income and Ms Butt received the payment in good faith. It could not be said that Ms Butt knew or ought to have known that the Department ought to have used her base year income. All of the correspondence and requirements forwarded to her were based on this error.

Application

The Welfare Rights Centre has observed from other cases that defective forms which did not offer recipients the choice of base year or estimate assessment were in use as late as 1998. Further, in some cases where corrected forms have been used, the absence of a request by a recipient has gone unnoticed and it remains necessary to examine the forms given to recipients who are being paid on estimates after 1998 to ensure that a genuine request has in fact been made.

The Centre is concerned that many people may be repaying 'debts' they do not owe. Yet the decision in this matter would indicate that:

- any overpayments made in these circumstances prior to 1 October 1997 are not recoverable debts.
- where estimates were incorrectly used by the Department, systemically incorrect correspondence followed giving the recipients no basis on which it could be said that they knew or ought to have known that they were being overpaid by the failure to use their base year. Whether or not the estimate itself was ultimately incorrect would appear to have been immaterial. Consequently, while the overpayments made after 1 October 1997 are debts, they were due to administrative error and received in good faith. The mandatory waiver provision ought to apply.
- in respect of debts arising due to assumed notifiable and notifiable events, care must be taken to ensure these do not unduly include periods past the end of the relevant calendar year.

Sandra Koller
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John Rome is a Welfare Rights Centre volunteer worker on this project.

References

1. Family Allowance was formerly known as Family Payment. The scheme has been replaced by the Family Tax Benefit Scheme from 1 July 2000.
2. In this matter the relevant notifiable event was conceded and no argument was entered into in respect of the point raised in Blackberry's case.