

of the Agreement, using the exchange rate applicable at the time of the AAT's decision. The result of that calculation resulted in a nil rate being payable to Harman, although his income only marginally exceeded the relevant income limit. The AAT noted that it was up to Harman to keep watch on his income and the exchange rate and make a fresh application for pension should his situation alter.

#### Formal decision

The AAT affirmed the decision under review.

[A.T.]

## Newstart allowance: whether 'unemployed'

**JAMES and SECRETARY TO THE DSS**  
(No: 12570)

**Decided:** 30 January 1998 by A.F. Cunningham.

James and her father had been involved in owning and racing horses since 1972, and she had obtained a trainer's licence in the late 1970s. James had received newstart allowance (NSA) since 1993, and in 1994 she had leased and moved to a 9 hectare property set up to train race horses. James said she had some 20 horses being worked and trained on the property at various times, and most had been unsuccessful. Since the middle of 1996 she had only 2 or 3 horses on the property. She had never registered the business because she did not have the \$30 fee, and she had never derived any profit from it.

On 7 June 1996 James entered a Case Management Activity Agreement (CMAA) in which she agreed to 'continue with horse training business' and to 'develop concept of horse training business'. A DSS officer arranged to visit James at home on 27 June 1997. According to James he arrived early, just as she was about to go for a ride with an owner and a trainer. The evidence was that the officer did not inform James of her rights in respect of the visit. The interview was conducted outside within hearing of the others, and took less than 20 minutes. The interview form stated James was working 8 hours a day for 7 days a week.

James said she was anxious to conclude the interview quickly, so she read and signed the form quickly. NSA was then terminated as James was considered to be not unemployed, and she sought review of that decision.

The SSAT had affirmed the decision because it found James' business activity demanded a substantial amount of time which would prevent her from engaging in other remunerative work. James told the AAT her current involvement consisted of an hour each morning to feed, clean out and work the horses, and 15 minutes in the evening to feed and clean out. Her racing involvement averaged 3 days a month, mainly Sundays. It did not prevent her from taking on other paid work, and she had made recent efforts to seek employment.

#### Unemployed

The issue was whether James was unemployed within the meaning of s.593 of the *Social Security Act 1991*. The AAT also looked at s.595(1) which provides:

'If:

- (a) a person undertakes paid work during a period; and
- (b) the Secretary is of the opinion that, taking into account:
  - (i) the nature of the work; and
  - (ii) the duration of the work; and
  - (iii) any other matters relating to the work that the Secretary considers relevant;

the work should be disregarded;

the Secretary may treat the person as being unemployed throughout the period.'

The AAT found that James' present time commitment of 1.25 hours a day was minimal and could scarcely prevent her from undertaking remunerative employment. It was satisfied that she was unemployed within the meaning of s.593. It said it appeared inconsistent for the DSS to require James to enter a CMAA in which she agreed to continue her horse racing business, and then to terminate NSA 12 months later when she was acting in accordance with the agreement.

#### Formal decision

The AAT set aside the decision and remitted it for reconsideration with the direction that NSA be reinstated.

[K.deH.]

## Application for review: limitation on date of effect

**THE AZZOPARDIS and SECRETARY TO THE DSS**  
(No. 12422)

**Decided:** 21 November 1997 by A.M. Blow.

Mr and Mrs Azzopardi live in Malta. They lodged claims for disability support pension (DSP) and wife pension respectively in January 1995. In August 1995 Mr Azzopardi's claim was rejected on basis of his level of impairment. As a result Mrs Azzopardi's claim was also refused. In January 1996 an officer of the Maltese Department of Social Security contacted his Australian equivalent and asked about the status of the Azzopardis' claims. The Australian officer replied on 9 February that the claims were rejected. On 20 May 1996 a Maltese officer sent a further facsimile together with additional medical evidence. On the basis of this information, the DSS decided in June 1996 to grant DSP to Mr Azzopardi with effect from 8 February 1996, the first pension pay day after the receipt of the first communication from the Maltese officer in January 1996. Mr Azzopardi appealed the decision not to grant the pension from the date of claim. Mrs Azzopardi's claim was refused because she did not qualify for the wife pension before 30 June 1995.

#### The issues

The issues were whether Mr Azzopardi sought a review of the decision, and whether the date of effect of the grant of DSP should have been earlier.

#### The legislation

The relevant parts of s.1240(1) of the *Social Security Act 1991* (the Act) state that a person affected by a decision of an officer under the Act may apply to the Secretary to the DSS for a review of the decision. Section 1239(1) indicates that the Secretary may review a decision if satisfied that there is sufficient reason to review the decision.

Section 115(1) states that a determination to pay the DSP under s.114 takes effect on the day on which the determination is made, or on such later day or earlier day as is specified in the determination. Section 115(3) states that if a decision is made to reject a claim for DSP, notice of this decision is given to the person, the person requests a review

of the decision under s.1240 more than 3 months after notice is given and a determination is then made to grant the claim, the determination takes effect from the day the person sought the review.

#### Request for review

The decision to pay the pension from February 1996 was based on the fact that Mr Azzopardi had requested a review more than 3 months after the decision to reject his claim was made. The AAT did not accept that the communications from the Maltese official amounted to a request for a review from Mr Azzopardi. At the time of the first communication in January 1996, the officer did not know what the decision was, and the Tribunal found that in May 1996 the officer was discharging his duties as an officer under the Maltese department and pursuant to an International Agreement between Australia and Malta. He was not acting as an agent for the Azzopardis.

Consequently, the AAT found that 'the delegate who made the decision to grant the disability support pension was not exercising the power conferred by s.1240, but was exercising the power conferred by s.1239(1)(a)': Reasons, para. 14. The limitations on backdating in s.115(3) do not apply to decisions reviewed under s.1239; instead the provision in s.115(1) applies.

Mrs Azzopardi's claim for wife pension was rejected on the basis of s.146V of the Act which states that a woman is not to be granted a wife pension unless her claim is lodged and she qualifies before 30 June 1995. The AAT found that as Mr Azzopardi's DSP should take effect from January 1995, Mrs Azzopardi must be regarded as having qualified for wife pension prior to June 1995.

#### Formal decisions

1. The decision under review concerning Mr Azzopardi dated 11 June 1996 is varied to the extent that the date with effect from which his DSP is granted is changed to the first pension pay day after 9 January 1995.
2. The decision under review concerning Mrs Azzopardi dated 21 August 1995 is set aside. In substitution for that decision, a decision is made granting her a wife pension with effect from the first pension pay day after 9 January 1995.

[M.A.N.]

## Age pension: hardship provisions; false statement; debt and write off

SECRETARY TO THE DSS and  
WHITE  
(No. 12520)

**Decided:** 23 December 1997 by H.E. Hallows.

#### The background

In April 1994, White asked the DSS to consider her entitlement to age pension under the hardship provisions. White asked the Secretary to the DSS to disregard her assets of a property at Seaspray, and claimed that the valuations of property at Settlement Road, Pearsondale and Fisks Lane, Pearsondale were too high. In late April 1994, White advised the DSS she had sold her Settlement Road property to her son for \$70,000, that she lived at Fisks Lane, and she owned land across the road. Also, she had sold a number of properties to support a failed business venture of her son, and she had about 25 head of cattle on one property valued at \$300 each. She explained that two loans to her son and daughter-in-law no longer existed as the business was sold at a loss.

On 5 August 1994, White was granted the age pension under the hardship provisions. Reviews of White's assets and income were carried out in August 1995, February 1996 and August 1996. As part of these reviews White indicated she had either 32 or 30 head of stock. The loans were assessed as irrecoverable.

In April 1996, White's accountant provided some financial details to the DSS. In October 1996, a DSS Complex Assessment Officer noted that on 30 June 1994, White had 185 head of cattle (22 less than her opening stock for the financial year) and the farm had made a profit of \$15,308. As a result a DSS officer decided that the hardship provisions did not apply to White. The DSS cancelled White's pension and raised a debt of \$20,118.60.

#### The issue

White did not dispute the amount of the overpayment. The issues were whether this overpayment was a debt, and whether the debt should be recovered.

#### The legislation

Section 1224(1) of the *Social Security Act 1991* (the Act) states that an amount of social security payment paid to a person because the person made a false statement is a debt to the Commonwealth.

Sections 1236 and 1237 provide for writing off or waiving a debt to the Commonwealth in particular circumstances. These sections were amended by the *Social Security Legislation Amendment (Budget and Other Measures) Act No. 84 of 1996* (the amending Act). These amendments were effective from 1 October 1997. Part 4 of the Schedule to the amending Act includes provisions detailing, amongst others, that the amendments are to apply to an application for review that is not finally determined before 1 October 1997.

The hearing commenced on 22 September 1997 but was adjourned and reconvened on 11 December 1997. Consequently, the AAT applied the Act as amended on 1 October 1997.

#### The debt

The AAT found that White made false statements to the DSS about her cattle numbers. This continued until August 1996. The AAT also found that an amount of age pension was paid to White as she made a false statement, and the amount is a debt to the Commonwealth.

#### Recovery of the debt

In relation to waiver, the AAT did not accept the debt was solely attributable to administrative error (s.1237A(1)). Although the DSS did have the profit and loss figures on live stock available to it in April 1996, White continued to wrongly advise that she only had 32 head of cattle up until August 1996.

The AAT also considered s.1237AAD which provides for waiver in special circumstances. The AAT noted that White expected to be paid age pension until she could build up her stock numbers, and she purchased a slasher shortly after being granted age pension on this basis.

'The Tribunal was satisfied that Mrs White thought that she had an entitlement to age pension under the hardship provisions. However on the balance of probabilities White must have known that she was not providing the Secretary with correct figures with respect to her cattle numbers. The discrepancy between the figures she provided to the Secretary and to the Commissioner of Taxation are such that the Tribunal finds that it could not exercise the discretion in s.1237AAD as it is not satisfied that the debt did not result wholly or partly from Mrs White knowingly making a false statement.'

(Reasons, para.19)

Consequently waiver was not considered appropriate.