claim for Widow B Pension may not be required (s.369(3)). However, the Tribunal concluded that the provisions of s.362A were overriding, and that therefore any deemed entitlement to Widow B pension had to arise before 20 March 1997 — clearly an impossibility in Gwiazda's situation as her husband died in October 1997. As she was neither qualified for, nor had she lodged a claim for, Widow B Pension before 20 March 1997, she could not be paid that pension. In addition the Tribunal concluded that as she had not yet reached age pension age she was not entitled to any other social security payment from Australia.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]

Compensation preclusion: special circumstances; lack of causal connection

SECRETARY TO THE DFaCS and ROMANOSKI (No. 13529)

Decided: 10 December 1998 by J.T.C. Brassil.

Background

Romanoski was receiving newstart allowance (NSA) for the period March 1990 to 4 October 1995. Since 5 October 1995 he was receiving disability support pension (DSP). On 11 July 1993 he was injured in a motor vehicle accident. His compensation claim was settled for $170,000 in December 1997.

The Department applied a preclusion period from 11 July 1993 to 19 July 1997, pursuant to s.1165 of the *Social Security Act 1991*.

The SSAT decided that there were special circumstances for the period up to 4 October 1995, which would justify the use of the discretion in s.1184(1), pursuant to which the Secretary may treat whole or part of the compensation payment as not having been made. The 'special circumstances' were that there was no causal connection between the payment Romanoski was receiving from Centrelink and the compensation payment.

The issue

The issue for the AAT was whether special circumstances existed which would make it appropriate to treat the compensation payments made prior to 5 October as if they had not been made.

The legislation

Section 1163(9) of the Act, inserted in 1993, specifically states that a causal connection is not necessary before a payment can be a 'compensation affected payment'.

Discussion

The AAT stated that:

> 'it is necessary to look further than the lack of a causal connection to determine whether appropriate special circumstances exist in respect of the respondent.'

(Reasons, para. 34)

The AAT accepted the views of Hill J in *Haidir v Secretary, DSS* (1998) 994 FCA 20 August 1998:

> 'Without putting too fine a point upon it, the purpose of the basic thrust of the legislation was to avoid a claimant being entitled to both social security benefits and benefits in the nature of income through lump sum payments.'

(Reasons, para. 36)

The AAT was sympathetic to the circumstances of Romanoski, who was in difficult circumstances due to ill health following the motor vehicle accident, and who had insufficient assets. However, the AAT must apply the tests in *Beadle* (1984) 20 *SSR* 210 as to special circumstances. Romanoski's circumstances, while 'not desirable for anyone to endure . . . unfortunately, are not uncommon or unusual or exceptional in our society'.

Formal decision

The AAT set aside that part of the SSAT's decision which found special circumstances to exist for the period 11 July 1993 to 4 October 1995.

[K.deH.]

Sole parent pension: assets test, loans to trust

CALLEJA and SECRETARY TO THE DFaCS (No. 13576)

Decided: 23 December 1998 by W.G. McLean.

Background

Calleja lodged a claim for sole parent pension in 1997 in which she declared personal and business assets and income. The information declared showed that she was the sole shareholder and director of a family company as well as the beneficiary of a family trust of which the family company was the trustee. The trust accounts showed a loan by the beneficiary to the trust. The loan, some $153,243, was made by Calleja to the trust in 1996.

The issue

The issues before the AAT were:

- what was the value of the loan for social security purposes; and
- was the loan an unrealisable asset and hence to be disregarded for purposes of the assets test?

The legislation

The *Social Security Act 1991* (the Act) provides that in valuing assets for pension or benefit calculations, loans are valued in terms of the amount that remains unpaid on them. This is provided for in s.1122 of the Act:

> 'If a person lends an amount after 27 October 1986, the value of the assets of the person for the purposes of this Act includes so much of that amount as remains unpaid but does not include any amount payable by way of interest under the loan.'

The Act makes provision for assets to be disregarded in circumstances of severe financial hardship and where it can be shown that an asset is unrealisable. This is provided for in s.1129 and s.1130:

> '1130.(1) If s.1129 applies to a person, the value of:
>
> (a) any unrealisable asset of the person; and
>
> (b) any unrealisable asset of the person's partner;
>
> is to be disregarded in working out the person's social security pension rate.'

The loan

By the time of the AAT hearing, certain amounts had been agreed between the parties as the value of Calleja's personal assets. The tax return for the trust in the

1996/97 financial year showed primary production losses and tax losses carried forward from earlier years. The trust accounts recorded that a subordination agreement had been entered into between the trustee company and Calleja to subordinate the beneficiary's loan to the trust. In the trust financial statements at the end of the 1996/97 tax year only an amount of some $10,000 showed as owing to Calleja. Calleja's accountant gave evidence that there had been an agreement to limit loan repayments rather than show the whole amount of the loan in any one year. This enabled the trust to show a small surplus in trust funds at the end of the 1996/97 financial year. The evidence before the Tribunal at hearing was that by the end of the 1996/97 tax year the loan had been reduced from $153,243 to $106,936. The repayment was made possible because Calleja's aunt had loaned money to the trust.

The Tribunal held that the value of the loan was its full amount at any time, not the $10,000 showing on the books. The Tribunal found that the proper value of the loan at the time of claim (April 1997) was its face value. The Tribunal was satisfied on the evidence that at the time of claim that was $106,936. It was not correct to take the full amount loaned at June 1996 as was contended by the Department.

The accountant also gave evidence that the trustee company faced the decision of whether to liquidate the trust in view of its poor financial position. Certain sales had been completed and primary production stock had been disposed of. However, the AAT considered that Calleja had the sole capacity to wind up the trust and may decide to continue it to utilise the tax loss credits. It was not, therefore, a situation where the loan was unrealisable.

The Tribunal noted that Calleja had made an application to the Department to have the loan disregarded under the financial hardship rules on the basis that the loan was an unrealisable asset. That application to apply the hardship provisions had been rejected by the Department. However Calleja had not sought review of that decision, so the Tribunal could not look at that issue.

[M.C.]

Parenting allowance: overpayment; waiver or write off

SECRETARY TO THE DFaCS and WHITE
(No. 9900016)

Decided: 15 January 1999 by E. Christie.

The issue

The issue for consideration by the AAT was whether the debt of parenting allowance (PA) raised against Mrs White should be written off, or waived wholly or in part due to administrative error or special circumstances. The amount of the debt was, at the date of hearing, $8021 and was for the period March 1996 until May 1997. The decision by the Department to raise and recover the debt had been set aside on 15 May 1998 by the SSAT which concluded that although the debt had not arisen solely through administrative error, and therefore could not be waived, special circumstances did exist sufficient to write off the recovery of the debt until October 2001, when White's youngest child would have turned 18 years.

Background

White claimed PA in December 1995, declaring her income at that time to be $370 a fortnight. Her husband received newstart allowance from November 1995 until March 1996 and declared his wife's fortnightly earnings on his newstart forms submitted in this period. Due to Department error White's fortnightly income was coded as $0 in March 1996 when her allowance was reclassified.

From December 1995 until June 1996 White had received 11 Department letters notifying her of her PA entitlements (including 4 such notifications after March 1996 when the Department error occurred), but her husband contended that he and his wife 'did not know what to make of the notification notices' and did not read the backs of the notices they received. At no stage had White queried whether the amounts specified in the notification notices were correct.

Evidence was given that Mr and Mrs White were both discharged bankrupts, with considerable debts due to a failed business, including a loan to Mrs White's parents. Mr White had also received treatment for depression during the period in question. Evidence was also given that Mrs White understood that entitlement to PA was based on her income alone, rather than joint family income.

The law

Section 1237A of the *Social Security Act 1991* (the Act) sets out the circumstances in which waiver of a debt *must* occur:

> '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.
>
> Section 1237AAD provides further that waiver may occur in situations amounting to 'special circumstances' —
>
> 1237AAD. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:
>
> (a) the debt did not result wholly or partly from the debtor or another person knowingly:
>
> (i) making a false statement or false representation; or
>
> (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
>
> (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
>
> (c) it is more appropriate to waive than to write off the debt or part of the debt.
>
> A debt may be written off only if the provisions of section 1236 are satisfied —
>
> 1236.(1) Subject to subsection (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.
>
> 1236.(1A) The Secretary may decide to write off a debt under subsection (1) if, and only if:
>
> (a) the debt is irrecoverable at law; or
>
> (b) the debtor has no capacity to repay the debt; or
>
> (c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
>
> (d) the debtor is not receiving a social security payment under this Act and it is not cost effective for the Commonwealth to take action to recover the debt.'

Discussion

The AAT found that White had contributed to the debt by her failure to respond to the notices sent to her by the Department. As such the debt could not be said to have arisen 'solely' through administrative error, and so it could not be waived under the provisions of s.1237A(1).

As to whether special circumstances existed sufficient to justify waiver under s.1237AAD, the AAT considered the benchmark decision of *Beadle and Director General of Social Security* (1984) 6 ALD 1; (1984) 20 *SSR* 210 that, to be 'special', the circumstances needed to be:

> '... unusual, uncommon or exceptional ... This is not to say the circumstances must be unique but they must have a particular quality of unusualness that permits them to be described as special.'