Aged person's savings bonus: not member of a couple; provision not ambiguous

SECRETARY TO THE DFaCS and MADDISON
No. 2001/0778

Decided: 12 September 2001 by N. Bell.

Background

Maddison was paid a savings bonus of $134.00 in July 2000. The payment arose out of limited savings and investments held in her own name. Maddison and her husband enjoy, jointly, the benefits of periodic withdrawals made by the husband from his superannuation fund and deposited by him into their joint savings account. The amount of savings bonus had been calculated by reference to the amount of half the sum held in a joint savings account by Maddison and her husband and did not include one half of funds held by her husband in his superannuation fund.

The issues

The issue was whether, for the purposes of the calculation of Maddison's aged person's savings bonus (savings bonus), 50% of the income from her husband's superannuation rollover fund should be taken into account. In working out a person's annual retirement income and annual savings income (those being relevant to the calculation of the savings bonus), s.5(3)(e) of the Act provides for an assumption to be made, for the purposes of the calculation, that the customer is not a member of a couple.

Legislation

The relevant legislation is *A New Tax System (Bonuses for Older Australians) Act 1999* (the Act). In particular, s.5 of that Act provides for the calculation of a person's annual retirement income and annual savings and investment income:

> **5** Annual retirement income and annual savings and investment income —customers with previous calculation of ordinary income on a yearly basis
>
> (1) This section applies to a Family and Community Services customer if, on one or more occasions in the period covered by the 2 qualifying years, the Secretary was required to work out the customer's ordinary income on a yearly basis for the purpose of determining the customer's entitlement to any payment under the Social Security Act 1991.
>
> (2) If the Secretary was required to work out the amount on only one such occasion, the customer's annual retirement income and annual savings and investment income for the purposes of this Part are worked out in accordance with subsections (3) and (4).
>
> (3) The customer's annual retirement income is the amount of the ordinary income on a yearly basis that would have been required to be worked out on the occasion if:
>
> (a) any pension under Part II or IV, or a payment by way of allowance under Part VI, of the Veterans' Entitlements Act 1986 paid to the customer were disregarded; and
>
> (b) any application of section 1171 of the Social Security Act 1991 were disregarded; and
>
> (c) any payment under the Social Security Act 1991, to the extent that it was not exempt from income tax under the Income Tax Assessment Act 1997, were included in ordinary income; and
>
> (d) any amount taken by Division 1B of Part 3.10 of the Social Security Act 1991 to be ordinary income on a financial asset that is a deprived asset were disregarded; and
>
> Note: Any actual return on the deprived asset is also disregarded: see subsection 1083(1) of the Social Security Act 1991.
>
> (e) the customer were not a member of a couple.

Section 15AB(1) of the *Acts Interpretation Act 1901* provides:

> (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> ...
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

Is section 5(3)(e) ambiguous or unreasonable?

The Department submitted that the provisions of s.5(3)(e) of the Act are clear and unambiguous. The Act had a specific purpose, being the one-off payment of bonuses, and was distinct from the *Social Security Act 1991* and the scheme of continuing payments established under that legislation. The Department submitted that the particular purpose of the Act, that is, the payment of one-off bonuses, made it inappropriate to attempt to interpret the legislation by reference to provisions of, or schemes established by, the *Social Security Act 1991* and the *Family Law Act 1975*.

Similarly, the Department referred to s.15AB of the *Acts Interpretation Act 1901* and argued that none of the bases on which extrinsic material (including Explanatory Memorandum) may be used in the interpretation of an Act, pursuant to that provision, were established in relation to s.5(3)(e). The Department argued that the provision was neither ambiguous nor obscure and that the ordinary meaning conveyed by the text of the provision does not lead to a result that is manifestly absurd or unreasonable.

Maddison submitted that the purpose of the Act was to benefit self-funded or partially self-funded retirees who had been disadvantaged by the government's new tax system. This was supported in the Explanatory Memorandum. Maddison argued that it is appropriate to refer to the Explanatory Memorandum because the relevant 'provisions were in conflict with the purpose or policy behind the legislation, as stated in the Explanatory Memorandum' (Reasons, para. 10).

Maddison submitted that the application of s.5(3)(e) produced a result that is unreasonable. The Department treated an amount held jointly by her and her husband in a joint savings account as joint moneys and had halved it for the purposes of calculating Maddison's entitlement. For these purposes Maddions was treated as a member of a couple. On the other hand, the Department had failed to recognise that, notwithstanding the husband's superannuation rollover investment was in his name only, that investment was regarded and used by Maddison and her husband as a joint investment. As a result Maddison was granted a bonus considerably smaller than that granted to her husband whose income from his superannuation rollover fund is taken into account in the calculation of his entitlement.

Maddison referred the Tribunal to the treatment of superannuation funds as a joint asset under the *Family Law Act 1975* and by the Family Court.

The Tribunal found that the provisions of s.5(3)(e) were neither ambiguous nor obscure and required no reference to the material contemplated by s.15AB(1) of the *Acts Interpretation Act 1901* on that basis.

In considering whether the ordinary meaning of the text of the provision leads to a result that is manifestly absurd or is unreasonable, the Tribunal commented:

it must be kept in mind that the legislation has a specific purpose in relation to a one off payment. While it employs a scheme of assessment that is not identical to the one employed by the *Social Security Act 1991*, that does not, of itself, render the result unreasonable. Similarly, the failure of the legislation to 'look behind' the nomination of a single beneficiary under a superannuation fund may be out of step with the treatment of such funds in the family law jurisdiction, but neither does this render the result unreasonable. It should also be kept in mind that a joint savings account is, on the face of it, a joint asset, in this case in two names, capable of equal division between two people deemed to not be members of a couple, while a superannuation fund, generally, and in this case in particular, is in the name of one person only and so not amenable to such division. This is so notwithstanding its potential for consideration by the Family Court. The Tribunal considers that, while there may be critics of the Act and of the effect of section 5(3)(e), neither this, nor any of the matters noted above, render the provision unreasonable.

(Reasons, para. 14)

... As to the impact of the Family Law Act 1975 and decisions of the Family Court concerning superannuation, the Tribunal is unable to see any basis for their application to the operation of section 5(3)(e).

(Reasons, para. 16)

Formal decision

The Tribunal set aside the decision under review, and in substitution therefore decided that the Respondent was deemed not to be a member of a couple for the purposes of calculating her aged person's savings bonus, and is therefore entitled to an aged person's savings bonus in the sum of $134.00.

[M.A.N.]

Carer pension: knowingly make statement; waiver

WOODWARD and SECRETARY TO THE DFaCS (No. 2001/0818)

Decided: 27 September 2001 by N. Bell.

Woodward received carer pension in respect of her mother. A Centrelink delegate of the Secretary, DFaCS decided to raise and recover an overpayment of carer pension of $3997.90 for the period 26 November 1998 to 15 April 1999, during which period Woodward's mother, in respect of whom the pension was paid, had entered a nursing home. This decision was affirmed by the authorised review officer and then by the SSAT.

Facts

Woodward accepted that she had been overpaid the sum of $3997.90 as she agreed she had not notified Centrelink that her mother had entered a nursing home, as she was obliged to do.

Woodward, who was aged 59 years had lived as an unmarried only child with her parents until her father died. After that, she lived with her mother. She was emotionally dependent on her mother, even though she had, until her mother developed Alzheimer's disease, a full-time job. When her mother became unable to look after herself, Woodward left her job, and devoted herself full time to the care of her mother. She began to receive carer payments in March 1998. In approximately July or August 1998 her mother had a fall and broke her leg. She was hospitalised and Woodward then arranged for her to enter a nursing home.

The nursing home was very basic, and Woodward spent her entire days at the nursing home, providing care for her mother which the nursing home was too understaffed to provide. During this period Woodward let everything go, was unable to look after her own affairs, and was depressed. She agreed that she had received letters from Centrelink during this period, but had simply put them away in drawer without reading them.

The law

Woodward did not deny the debt, nor allege that it arose from any error of Centrelink.

The relevant legislation therefore is s.1237AAD of the *Social Security Act 1991* (the Act), which provides:

Waiver in 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.

Note: Section 1236 allows the Secretary to Write off a debt on behalf of the Commonwealth.

The submission for Woodward was that, at the time, she was simply incapable of attending to the notices. Therefore, she did not knowingly fail to comply with the requirements of the notice. Special circumstances, of the kind contemplated by s.1237AAD of the Act, apply here, in that Woodward at the time the debt arose, had impaired psychiatric health arising from the stress and depression associated with her mother's decline; an associated inability to look after her own affairs; and her alternative notional entitlement to newstart allowance with an exemption from the activity test.

The AAT accepted Woodward's evidence that during the period her mother was in the nursing home she was distraught and disorganised, focusing only on matters pertaining to her mother's welfare. The AAT also accepted that Woodward did this to the detriment of other aspects of her life, including her finances, the maintenance of her house and car, and the payment of bills. Her ability to arrange nursing home accommodation for her mother is, in the AAT's view, indicative of her particular focus on her mother at that time rather than of a normal level of organisational or functional capacity. The AAT accepted that Woodward did not knowingly fail to comply with a requirement of the Act. The AAT followed *Nisha and Secretary, Department of Family and Community Services* [2000] AATA 315 and *Secretary, Department of Social Security and Donald* (AAT 12461, 4 December 1997).

The experience of caring for an elderly relative who is suffering from the effects of dementia or of Alzheimers disease is unfortunately not an uncommon one. It is also, commonly, a distressing experience. However, the Tribunal considers that the context in which the Applicant was required to care for her mother, at home and when she entered the nursing home, served to particularly heighten the distress caused by the experience, and did so to an unusual degree. The Applicant's particular and exclusive dependence on her mother and the nature of their previous relationship and living arrangements meant that the common experience of caring for an elderly, Alzheimers disease affected parent, was exceptionally distressing for the Applicant ... The [AAT] considers that these circumstances are 'special' within the meaning of section 1237AAD of the Act.

(Reasons, paras 33 and 34)

Decisions

The AAT set aside the decision under review and in substitution decides that the debt owed by Woodward to the Commonwealth should be waived.

[A.B.]