Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

DIVISION:	**Social Services & Child Support Division**
REVIEW NUMBER:	**2017/M113469**
APPLICANT:	**[The applicant]**
OTHER PARTIES:	**Secretary, Department of Human Services** **Chief Executive Centrelink**
TRIBUNAL:	**Professor Terry Carney AO, Member**
DECISION DATE:	**Friday 25 August 2017**

DECISION

On Friday 25 August 2017, the Tribunal decided to *set aside* the decision to raise and recover an overpayment debt of Newstart Allowance in the amount of $815 for the period 25 August 2010 to 12 June 2011 and *send it back to be re-determined* in light of directions that:

1. No debt or debt component is able to be founded on extrapolations of fortnightly earnings whether from Australian Taxation Office records or employer statements of unapportioned total earnings for a period of employment greater than a fortnight;
2. The earnings components of any recalculated debts as may be raised must be based on and confined to any pay slip or bank records for precise fortnights obtainable in the exercise of statutory powers to do so (if set in train);
3. Debt amounts (if any) as so varied are recoverable debts (not able to be waived); but otherwise
4. Monies apparently recovered (in the amount of $817.94 if accurately recorded at Folio 50) are to be repaid.

This means the application was essentially successful.

Any references appearing in square brackets indicate that information has been removed from this decision and replaced with generic information so as to protect the privacy of the individuals consistent with sections 147 and 168 of the Social Security (Administration) Act 1999

REASONS FOR DECISION

WHAT IS THE BACKGROUND TO THIS APPLICATION?

1. This review is about the decision of the Department of Human Services (better known as 'Centrelink') to raise and recover an overpayment debt of Newstart Allowance in the revised amount of $815 for the period 25 August 2010 to 12 June 2011, allegedly due to not properly taking into account earnings.
2. [The applicant] believes she should not owe any debt because she correctly advised Centrelink about all employment and earnings. Centrelink disagrees because [the applicant] could not supply pay slips, and also concludes that recovery of the debt amounts is not to be waived due to Centrelink error or special circumstances.
3. The prior history of the decision I am reviewing today is that Centrelink raised a debt for the period mentioned in paragraph 1 above, in a decision of 23 May 2017. When [the applicant] challenged the debt it was reviewed by an authorised review officer (subsequently 'ARO') who on 25 May 2017 agreed with the decision to raise and recover a debt.
4. [The applicant] applied for review by this Tribunal on 28 July 2017. In reviewing Centrelink's decision of 25 May 2017 my task is to 'step into the shoes' of the previous decision-maker, and determine what is the correct and preferable decision under the law.
5. I heard and decided [the applicant]' application for review in [State] on Friday 25 August 2017. [The applicant] participated in the hearing by conference telephone, giving her information on affirmation.
6. *My decision and reasoning in brief*: As explained below, I have found that during the alleged debt period [the applicant] was engaged in occasionally episodic work with five different employers, of varying duration and employment conditions. Because Centrelink has calculated the debt on the basis of averages derived from the Australian Taxation Office ('ATO') or unapportioned figures supplied by [the applicant] and has not utilised its powers to obtain fortnightly earnings figures, there is insufficient evidence to establish an overpayment debt or its size.
7. Although any overpayment as may be found in exercise of those powers is not due to Centrelink error and although I find it cannot be waived due to special circumstances (none were found), I am obliged to set the decision aside and send it back to Centrelink with the direction that any fresh debt amount (if any) be grounded in precise fortnightly earnings figures.

WHAT ARE THE ISSUES TO BE DECIDED?

8. The main question to be decided in this application is whether [the applicant] has been overpaid Newstart Allowance (subsequently 'NSA'), and if so, whether that debt is recoverable.

9. The relevant provisions of the *Social Security Act 1991*, are discussed in more detail under 'What is the Law and How has the Tribunal Applied It?' below.

CONSIDERATION

What did [the applicant] tell the Tribunal and how does it relate to other evidence?

10. [The applicant] explained that she had received a first debt calculation of $2,185 on 31 October 2016 (Folio 93). Between then and the decision under review another six different figures were raised.

11. After she queried the first debt amount she endeavoured to obtain employer records of fortnightly earnings from her five employers over the alleged debt period (of 25 August 2010 to 12 June 2011) but one was no longer in business ([Employer 1]) and the other four could only supply global earnings over the whole periods of employment. None supplied actual earnings paid for a given fortnight. The information was passed on to Centrelink sometime in November 2016.

12. After being told of a supposed debt amount of $2,185 on 31 October 2016, [The applicant] was:

    - advised on 13 December that it was actually $1,594.78 (Folio 50), and
    - on the following day received a letter saying it was $0 (which she assumed was a recalculation based on information she had supplied but was later told was an 'error letter' received by other clients of Centrelink).
    - Then, on 28 April 2017 she received a debt collection phone call about a $1,594.78 debt (Folio 67), which when queried
    - she was advised was actually for $1,294.80, and
    - on 22 May after asking to see the calculation was sent a Multi-cal for 16 May showing a debt of $1,313.16 (cover letter only at Folio 98).
    - Finally, the decision under review raised an amount of $815 including (at Folio 5) reference to an unexplained $498.16 'credit' which reduced an otherwise higher figure to this amount.

13. Where all of these figures all came from is difficult to know, since all I was provided with were two calculations showing workings for two quite different debt amounts: (i) one for $1313.16 (Folio 17) and (ii) another for $1,594 (Folio 42).

14. The $498.16 'credit' may well have been one of the debt 'repayments' noted at Folio against a then $2,185 total, but why this was singled out without referring to the three other repayments bringing it down to $815 I cannot fathom.

15. Nor can any confidence be held by me in the figure of $815 being quoted by the ARO as being the original debt, when in fact at best it appears to be the outstanding balance of the one as *first advised in October 2016.*

16. Finally, in light of the above apparent reversion to the October 2016 'starting debt' figure (derived as it was from averaging of ATO data match information) I have difficulty in accepting that entry by [the applicant] of the 'different dates' of employment (see Folio 69) apparently did not alter that debt amount *at all*.

17. However, none of the above is relevant beyond confirming that [the applicant] had a strong foundation for complaining that in light of so many different figures for the debt she had no confidence in the correctness of the latest calculation.

18. Because I have found that [the applicant]' income fluctuated from fortnight to fortnight I find that extrapolation of a fortnightly rate achieved by dividing ATO annual or other income figures for a stated period by the number of fortnights in that period, fails to reach the required level of 'satisfaction' I am required to achieve about the precise income earned in each individual fortnight, before being able to determine a debt in the quantum suggested by Centrelink.

19. The short reason for this is that, while such ATO information may more than justify Centrelink in exercising its powers to require employers (or banks) to supply fortnightly payment records, it is insufficient to establish a precise debt quantum as is required under the application of the Full Federal Court in *McDonald*[1] and the High Court's 'Briginshaw principle'.[2] This requires that I set aside the present debt amount, for reasons now elaborated in more detail under 'What is the law…'.

20. Turning to other matters, [the applicant] told me, and I accept, that her finances are now secure, following obtaining [a] position at [Employer 2], on an annual salary of around $50,000. [The applicant]' health she described to me as 'good'. She did not identify any other special circumstances and volunteered that she was not seeking consideration of waiver on this basis. It was also agreed that there was no suggestion of Centrelink error in giving rise to a debt (if any debt amount is lawfully established in the future).

21. For convenience, most of this and other evidence (and my findings about it), particularly those relating to the financial and other circumstances of [the applicant], are dealt with in the context of how the law applies, as discussed under the next main heading.

What is the law and how has the Tribunal applied it?

How is the rate of payment of Newstart Allowance determined?

22. The rate of NSA payable to a person such as [the applicant] is set out in the Benefit Rate Calculator B.[3] That Calculator adjusts the rate of payment on the basis of the income of the person. There are levels below which the income does not affect the rate and rules about the amount of the reduction of the payment for each dollar of income above the relevant threshold, as well as rules about accrual and depletion of work credits.[4]

23. For the reasons now explained, while I think it very unlikely, I cannot rule out the possibility that [the applicant] has been overpaid NSA, but I cannot reach the required state of satisfaction about the precise size of any such overpayment.

This is because I do not accept that the key changes introduced by Centrelink's online compliance intervention (OCI) for raising and recovering debts (as outlined in a recent Ombudsman's report[5]) absolves Centrelink from its *legal obligation* to obtain sufficient information to found a debt in the event that its 'first instance' contact with the recipient is unable to unearth the *essential* information about *actual* fortnightly earnings.

24. [The applicant] no longer held pay-slips for the alleged debt period and her attempts to obtain information from her employers did not significantly advance the state of information beyond that yielded by ATO data matching for undifferentiated earnings across the whole periods of employment for particular employers (her date adjustments as mentioned seem to produce the same figure). As is a matter of record, Centrelink's then website advice (until the last couple of months of 2016) was for clients only to keep such records for six months.[6]

25. In such cases I find that legally it is Centrelink's obligation to obtain the information (the reference to Centrelink assistance in gathering the information and 'navigating the system' is sufficient in my opinion only in situations where the person is experiencing difficulties in loading documents, or where information is very readily to hand).

26. In what follows the more technical legal basis of my reasoning as just summarised is set out in more detail.

What is the law about determining whether there is an overpayment and settling the size of any such debt?

27. <u>*A question of proof of a debt rather than the threshold for enquiries?:*</u> This question, I conclude, is concerned *not* with the circumstances which may give rise to doubts or concerns sufficient to motivate Centrelink *enquiries and investigations* (where the legislation sets negligible thresholds to the exercise of powers to require provision of information, such as that the information be 'considered [that it] may be relevant' to a social security issue[7]) *but rather* with the issue of in what circumstances a decision-maker (including this Tribunal) can find that there is an overpayment.

28. That narrower question is the one addressed by Full Court of the Federal Court in *McDonald*.[8] As explained by the Court, the general starting point is that there is no 'onus' of proof as such on either party (neither on Centrelink nor an applicant for review).[9]

29. <u>*The McDonald standard of satisfaction:*</u> Elaborating on the way a Tribunal 'steps into the shoes' of the maker of the decision under review, Woodward J wrote:

> It must act on the material which is before it but, as I have already pointed out, it is not bound by rules of evidence and may inform itself on any matter in such manner as it thinks appropriate.

> It is true that facts may be peculiarly within the knowledge of a party to an issue, and a failure by that party to produce evidence as to those facts may lead to an unfavourable inference being drawn – but it is not helpful to categorize this common sense approach to evidence as an example of an evidential onus of proof. The same may be said of a case where a good deal of evidence pointing in one direction is before the Tribunal, and any intelligent observer could see that unless contrary material comes to light that is the way the decision is likely to go. Putting such cases to one side there can be no evidential onus of proof in proceedings before the AAT unless the relevant legislation provides for it….
>
> If the AAT finds itself in a state of uncertainty after considering all the available material, unable to decide a question of fact either way on the balance of probabilities, it will be necessary for it to analyse carefully the decision it is reviewing. If, for example, it is a decision whether or not to cancel a pension in the light of changed circumstances, then it has failed to achieve the statutory requirement of reaching a state of mind that the pension should be cancelled. If, on the other hand, it is a decision, to be made in the light of fresh evidence, whether or not the pension should ever have been granted in the first place, then it has failed to be satisfied that the person ever was permanently incapacitated for work.[10] [my underlining]

30. Or as Jenkinson J (who differed from Woodward on the outcome of failing to be 'satisfied' of a matter on the particulars of the case at hand) put it, after explaining that, unlike courts who may '*determine a matter against a party on whom lies the onus of proof, and who fails to offer any proof… without further enquiry*' this Tribunal must still determine the question on the merits even where it:

> may find itself unpersuaded either that a circumstance exists or that it does not exist. (The same may be said of a past or a future circumstance.) The … administrative authority will determine, by reference to the substantive law, whether it is the **existence or** the **non-existence** of the circumstance which is determinative of the question for decision.[11] [my underlining and bolding]

31. *What is the outcome if something is not established to the McDonald level?:* While care should always be taken not to misrepresent the meaning when reducing passages like the above to simple propositions, the answer to this has been variously stated as meaning that unless a decision-maker is satisfied about pertinent facts or criteria then the status quo prevails.[12] Or to put it another way, if unable to satisfy itself about key matters, then a 'default' outcome may result.

32. In the Federal Court case of *Harris*,[13] after indicating that parties might be expected to provide material such as a 'properly prepared application', Gyles J observed (omitting references), that:

> The AAT stands in the shoes of the Department and is in precisely the same situation as the decision maker. The fact that, as a practical matter, it chooses to conduct quasi-adversarial proceedings and does not have available direct access to medical specialists for the purposes of investigation, does not change the nature of the function being performed by it. The provisions of s 33 of the AAT Act give ample scope for the AAT to arrange investigation of a claim. The decision maker is bound to use his or her best endeavours to assist the AAT to make its decision […]. The AAT has inquisitorial powers and may exercise them where appropriate. […] It is not, of course, every case that will require such measures. In general, an applicant for a benefit must satisfy the decision maker of the necessary criteria. However, cases such as this [a DSP application] may demand such an approach [i.e. active steps by Centrelink].[14]

33. Gyles J was there dealing with an application for the disability support pension, but the point about being mindful of the activist or 'inquisitorial' powers and procedures available to the Tribunal, and of course to Centrelink, is a pertinent one.

34. *What is the effect of the 'nature' or 'effect' of the matter being decided?:* Finally, there is another important principle to consider in a case such as the present, known by the name of the High Court ruling as the *Briginshaw principle.*[15]

35. This principle maintains the *same* test of satisfaction (civil balance of probabilities) but states that the *strength* of the evidence needed to reach that level of satisfaction varies according to the 'nature' or the 'effect' of what it is that is to be established.

36. As a matter of common understanding, an allegation of a debt has moral and practical consequences (on credit worthiness standing and ratings advice[16]). It is well accepted therefore that establishment of a debt and its size is a matter which leads to an 'upwards variation' in the strength of material required.[17]

37. Or as Dixon J expressed himself in *Briginshaw*:

> Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of the given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced in inexact proofs, indefinite testimony, or indirect inferences...[18] [my underlining]

38. *What does Centrelink argue about such legal questions?*:

39. In explaining the design of the OIC system it has been indicated that the main change is that Centrelink will 'no longer' exercise its statutory powers to obtain wage records and that the 'responsibility' to obtain such information lies with applicants seeking to challenge a debt.[19] However in previous cases when asked to provide detailed submissions, Centrelink correctly accepted that *McDonald* means while '*the onus of proof lies with claimant* ***however ... this can be obscured by the duties required of the [then] Director-General.***'[20]

40. This 'default outcome' (as I have termed it above) is always a product of the legislation, *whichever* way it falls, as *McDonald* makes very clear. As explained below, if on the present facts (as I have found) Centrelink is unable to advance sufficiently convincing proofs of a debt or debt amount, then no debt can arise in law.

41. It is not a matter of the alleged debtor having advanced further information (though in practice this may be the most efficient way of clarifying it). Rather it is that *Centrelink has not established* the proposition (the debt quantum) it was required to establish (here due to reliance on a methodology which is *incapable*, other than in rare instances of unchanging fortnightly income, of addressing the architecture of the fortnightly rate payments).

How does this part of the law apply to [The applicant]' alleged debt?

42. The short answer to my question is that the law results in there being no provable overpayment or overpayment quantum on the facts before the Tribunal.

43. The reason it does not establish either an overpayment or its quantum is due both to the lack of sufficient strength of evidence and to simple mathematics.

44. The lack of strength of evidence flows from my characterisation of the overpayment 'methodology' — involving extrapolation of ATO or other employment income information over a period, divided to produce an average fortnightly, and then applied to NSA payment periods to raise a debt — as, at best, raising no more than the sufficient doubt about the accuracy of past payments as to warrant the exercise of powers of enquiry held by Centrelink (or indirectly by this Tribunal: see paragraph 32 of these Reasons above). It is too uncertain, and too slight a basis to satisfy the *Briginshaw* standard in a fortnightly rate debt matter.

45. The simple mathematics, once my finding of episodic and variable weekly earnings is taken into account and feed into the legislative context of a requirement to determine a fortnightly NSA rate based on earnings attributable to that fortnight, as further moderated by any reduction of raw gross earnings figures by reference to the 'earnings bank' provisions[21] — is that almost any speculated figure between no debt and the alleged debt amount is capable of being calculated. This is no hypothetical assertion; the actual case examples presented in the Ombudsman's report revealed very substantial changes indeed between the actual and any true overpayment.[22]

46. <u>*Summary:*</u> I therefore find no proven overpayment of any quantum. The foundation on which the suggested overpayment rests falls well below even the '*inexact proofs*' and '*indirect inferences*' which Sir Owen Dixon found to be an unacceptable form of proof of such matters in *Briginshaw* (see paragraph 37 above). Within the terms of *McDonald,* given the structure of overpayment provisions and overpayment debts, the failure to establish the overpayment leads to the default of no debt (see paragraph 30 and the preceding paragraph above).

47. The next question is which of the powers of the Tribunal I should exercise.

What power have I decided to use in giving effect to my decision?

48. The main powers available to the Tribunal are:

    a) to set the decision aside and substitute no debt;[23]

    b) to set the decision aside and send it back to be redetermined in accord with directions;[24]

    c) to adjourn the proceedings and exercise Tribunal powers to seek information directly;[25]

    d) or to adjourn the proceedings and exercise powers to require Centrelink to supply the Tribunal with such employment records it can obtain.[26] (Unlike other divisions of the AAT, the special power of 'remittal' for reconsideration

'at any stage of a proceeding for review', is not an option here, because the *Administrative Appeals Tribunal Act 1975* (subsequently '*AATA 1975*') withdraws that power,[27] leaving the last mentioned power to require Centrelink to use its powers).

49. I determined that the complexity of earnings investigations, and the lack of information about the contact details of the employers, rendered resort to the direct inquisitorial powers of the Tribunal (option (c) above) — as envisaged in *Harris* (see paragraph 32) — to be inappropriate.

50. Option (a) on the above list, of setting the debt aside and substituting a decision that there is no debt, was very seriously entertained on the facts of this present application. No rules would have prevented Centrelink from making any fresh, securely grounded decision about a new debt (broadly speaking there are no estoppel or res judicata barriers to prevent this[28]). However I concluded (on a very fine balance) that such a decision was not in the public interest or consistent with AAT objectives. First because it would appear 'odd' to ordinary people that a 'no debt' decision could later be raised afresh; secondly, because lack of proof of the current debt does not mean that there is no other debt amount to be investigated.

51. Option (d) on the above list, that of adjourning to await the results of a Tribunal direction to Centrelink to exercise its powers to compel production of information (section 192 *SS(A)A 1999*) was also seriously considered. However I was mindful of the need for this Tribunal to be expeditious, and of the ability for such a requirement to be incorporated as a direction (option (b)).

52. Option (b) was therefore the one I decided was appropriate in all the present circumstances (as set out in more detail at the end of my Reasons).

53. In light of my findings of no overpayment, strictly it is not necessary for me to consider whether an overpayment became a debt, and if so whether that debt is recoverable. However for completeness I will briefly do so.

When does a debt arise and was there a 'debt' of [the applicant]' NSA?

54. Section 1222A of the *SSA* 1991 provides that a debt only arises if another provision of the legislation makes it a debt.

55. So far as a debt of a payment like NSA is concerned, these are all collectively called 'social security payments', which in turn includes a 'social security benefit'.[29] Then the phrase 'social security benefit' is separately defined in a provision which lists NSA.[30]

56. So far as creation of a legal debt of a 'social security payment' like NSA is concerned, the relevant part of the law reads:

> 1223(1) Subject to this section, if:
>
> (a) a social security payment is made; and
>
> (b) a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;
>
> the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment.

(1AB) Without limiting by implication the circumstances to which paragraph (1)(b) applies apart from this subsection, a person who obtained the benefit of a social security payment is taken not to have been entitled to obtain the benefit if the payment should not have been made for any one or more of the following reasons:

(a) the payment was made to the person by mistake as a result of a computer error or an administrative error;

(b) the person for whose benefit the payment was intended to be made was not qualified to receive the payment;

(c) the payment was not payable;

(d) the payment was made as a result of a contravention of the social security law, a false statement or a misrepresentation;

(e) the payment was made in purported compliance with a direction or authority given by the person who was entitled to obtain the benefit of the payment but the direction or authority had been revoked or withdrawn before the payment was made;

(f) the payment was intended to be made for the benefit of someone else who died before the payment was made.

57. The next question is how the size of any debt is calculated. In a case like the present the debt calculation software utilised by Centrelink incorporates all the relevant rules found in the Rate Calculator. The program and associated calculations adjust for factors such as maximum payment rates, and other special rules.

58. However in the absence of precise fortnightly earnings for the relevant payment fortnights I cannot put a figure on that overpayment debt, if any.

59. The next question is whether all or any of whatever debt as might subsequently be found is recoverable.

What is the law about waiver of debts?

60. The rules about waiver of social security debts (such as NSA) are found in subsection 1237(1) of the *SSA 1991*. This section provides that debts must or may be waived, in whole *or part*, but 'only in the circumstances described in sections 1237A to 1237AAD'.

61. These sections provide that a debt must be waived if:

- It arises 'solely from' administrative error and the monies were received in 'good faith': subsection 1237A(1); and the error was not detected within 6 weeks (subsection 1237A(1A)); or
- The debt has already been taken into account by a court in imposing a longer custodial sentence for any offence: subsection 1237AA(1); or
- The debt arose from an underestimate, in good faith, of the value of a property which was difficult to value: subsection 1237A(2); or
- The debt is for less than $200 and it is not cost effective to pursue it: (subsection 1237AAA(1), unless it is more than $50 and able to be recovered by deductions from ongoing social security payments: subsection 1237AAA(2).

- It is the difference between the amount originally claimed and the 'settlement amount' agreed on between the parties in a civil action for recovery of the amount: subsection 1237AAB (1); or a settlement in the Administrative Appeals Tribunal: subsection 1237AAB(2); or
- The Commonwealth has received 80% of the sum, agrees to accept this in full satisfaction of the debt and the person lacks the capacity to pay the balance: subsection 1237AAB(3); or
- The amount is the amount of a family tax benefit or former family payment due to, but not claimed by the person (or their partner) during the overpayment period in question: section 1237AAC).

62. A separate provision (discussed later) provides a choice (a 'discretion') not to recover some or all of a debt where there are 'special circumstances'.

63. Published decisions of the General Division of this Tribunal and decisions of the Courts elaborate the meaning of some aspects of the law about social security payments, and will occasionally be referred to by me in the endnotes to these Reasons.[31]

What is the law about sole Centrelink error and good faith receipt?

64. If a debt is due entirely to Centrelink error and the overpayment money has been received in good faith, the law prevents its recovery, as just explained in the list above.

65. <u>*What is the meaning of good faith'?*</u>: The legal test of good faith receipt hinges on whether the person actually had an honest belief of entitlement at that time, as the Federal Court made clear in *Prince.*[32] In law, 'good faith' is simply the converse of bad faith. It turns on the state of mind of the person when the money is physically received (or discovered in an account).

66. Good faith may be negated by actual knowledge of lack of entitlement (or other 'irregularity'), or by a reckless disregard for such consequences.[33] *Wilful* blindness will serve to impute lack of good faith in the person, but only when it hints at *bad faith*: the situation where a person deliberately chooses not to inform themselves of matters, or deliberately chooses not to allay doubts in their mind.

67. I am satisfied that [the applicant] received her NSA in good faith.

68. <u>*What is the meaning of 'sole error'?*</u>: As explained in Federal Court the test of sole error is a strict one, calling for a 100% contribution to the origin of the debt.[34] In that case, Justice Wilcox criticised the AAT for not being sufficiently strict about this, writing that:

> [I]t seems to me, the Tribunal failed to consider the significance of the inclusion, in s 1237A(1), of the word 'solely'. For the subsection to have effect, the 'proportion' of the debt … must be 'attributable solely' to administrative error. It is not enough that, in the absence of administrative error, the debt would not have arisen. Administrative error must be the sole cause, not merely one of multiple causes.[35]

69. It is irrelevant that the contributing error which breaks the Centrelink chain causation is a minor one[36] unless '*those other errors or factors follow as a result of the*

Commonwealth's administrative error (i.e. they are incidental to the Commonwealth's error), then it may be that the debt is attributable solely to the Commonwealth's administrative error'.[37]

70. It is well settled by court and AAT decisions that receipt of a letter from Centrelink, which letter contains sufficient information to raise a doubt or concern about the correctness of a payment — even if not actually capable of being understood by or not having actually been read by the actual recipient of that letter — serves to introduce an 'additional' cause of the portion of the overpayment arising on and after that date. While no doubt out of accord with some community views of what is 'fair', this is nevertheless the law. Thus in *Re Chalmers*[38] Senior Member Bean of the AAT concluded that sole error ceased to operate after receipt of an 'account statement' type letter from Centrelink.[39]

71. In the present application there is no suggestion of any Centrelink error in *generating* any overpayment had I found one, so the provision could not apply.

72. I now turn briefly to debt waiver under the special circumstances discretion, as now discussed.

What is the law about waiver for 'special circumstances'?

73. The 'special circumstances' provision for social security payments such as NSA (section 1237AAD) provides that a debt 'may' be waived:

> 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 a false representation; or
>
> (ii) failing or omitting to comply with a provision of this 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.

74. <u>*What is the meaning of 'knowingly'?*</u>: The 'gateway' test in subsection 1237AAD(a) has been found to be one which calls for showing an *actual awareness* (or guilty intent) which is associated with the action or inaction of the debtor, even if that awareness is different from a 'fraudulent intent'.[40]

75. I find that [the applicant] genuinely did not doubt that she was being paid correctly. So I find that she did not knowingly do or fail to do something within the meaning of this part of the subsection. Consequently the door remains open for consideration of special circumstances waiver.

76. 'Special circumstances' as mentioned in subsection 1237AAD(b) of the *SSA 1991*, refers to the debtor's personal circumstances. It is intended to be interpreted flexibly and the phrase covers a wide variety of possibilities, including matters serving to take the case out of the usual or ordinary pattern, or otherwise producing a result which is unjust, unreasonable or otherwise inappropriate in the context of the statutory purpose.

77. The legal position as just outlined has been established in a number of Federal Court rulings.[41] As the Federal Court observed, the phrase is not confined to 'exceptional' situations, provided there is something that distinguishes the case.[42]

78. In addition to more usual combinations of factors, such as financial hardship or health, departmental error may be counted among the factors which may lead to a finding of special circumstances.[43] Such combinations of departmental mistakes and other factors may be found to be special.[44]

79. Finally, any exercise of the discretion once special circumstances are established is not confined to the position of the applicant, but includes considerations going to the 'general administration of the social security system', such that public money has been spent when the law did not permit it, or errors and poor administration'.[45]

Are [the applicant]' circumstances 'special'?

80. The answer to this question, had it arisen (and it did not) would have been 'no'.

81. [The applicant]' finances as previously outlined do not constitute financial hardship as defined, so this could not have been a special circumstance. [The applicant]' health was also sound, so this would not have been a special circumstance. No other relevant matter was advanced as a possible special circumstance

82. Consequently I would have been unable to contemplate the exercise of the waiver discretion (the gate would have been effectively 'locked', preventing me from entering what some Tribunal members have called the 'paddock of discretion').

Should any debt be written off?

83. The answer to this question would also have been 'no', as now explained.

84. The power to write off a social security debt (which, contrary to usual language in this case merely 'defers' its recovery), is now highly restricted. Section 1236, so far as it is relevant, provides:

> 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.
>
> (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) it is not cost effective for the Commonwealth to take action to recover the debt.
>
> (1B) For the purposes of paragraph (1A)(a), a debt is taken to be irrecoverable at law if, and only if:
>
> (b) there is no proof of the debt capable of sustaining legal proceedings for its recovery; or

(c) the debtor is discharged from bankruptcy and the debt was incurred before the debtor became bankrupt and was not incurred by fraud; or

(d) the debtor has died leaving no estate or insufficient funds in the debtor's estate to repay the debt.

(1C) For the purposes of paragraph (1A)(b), if a debt is recoverable by means of:

(a) deductions from the debtor's social security payment; or

(b) deductions under section 84 of the A New Tax System (Family Assistance) (Administration) Act 1999 ; or

(c) setting off under section 84A of that Act;

the debtor is taken to have a capacity to repay the debt unless recovery by those means would result in the debtor being in severe financial hardship.

85. In light of [the applicant]' circumstances I would have concluded that write off was not more appropriate.

DECISION

On Friday 25 August 2017, the Tribunal decided to *set aside* the decision to raise and recover an overpayment debt of Newstart Allowance in the amount of $815 for the period 25 August 2010 to 12 June 2011 and *send it back to be re-determined* in light of directions that:

1. No debt or debt component is able to be founded on extrapolations of fortnightly earnings whether from Australian Taxation Office records or employer statements of unapportioned total earnings for a period of employment greater than a fortnight;
2. The earnings components of any recalculated debts as may be raised must be based on and confined to any pay slip or bank records for precise fortnights obtainable in the exercise of statutory powers to do so (if set in train);
3. Debt amounts (if any) as so varied are recoverable debts (not able to be waived); but otherwise
4. Monies apparently recovered (in the amount of $817.94 if accurately recorded at Folio 50) are to be repaid.

This means the application was essentially successful.

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[1] *McDonald v Director-General of Social Security* [1984] FCA 59; 1 FCR 354; 6 ALD 6.

[2] *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. Also see the joint decision of the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449-450, and of the Full Federal Court in *Rana v University of South Australia* [2007] FCAFC 188, at [31].

[3] Section 1068 of the *SSA 1991* as applied by section 643.

[4] *SSA 1991* sections 1073D-1073J.

[5] Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system. Report* April 2017 [available at http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf] at pp 5-6, 31-38.

[6] Commonwealth Ombudsman, at p 13 note 22.

[7] See for example section 192 *SS(A)A 1999.* Regarding the purpose and breadth of this power see *Hendy v The Manager Centrelink (Ipswich)* [2004] FMCA 579 Rimmer FM] and (in respect of its predecessor) *Sheil v Secretary, Department of Social Security* [1999] FCA 1237 paragraph 39; (1999) 56

ALD 465, where Katz J explained 'Parliament's purpose in including the provision was to confer a power capable of being used in aid of the prevention or recovery of unjustified payments of social security benefits'. The power displaces privacy objections (*Rahman v Ashpole* [2007] FCA 1067 (Graham J) and includes the obligation to provide estimates: *Re Adkins and Secretary, Department of Family and Community Services* [2005] AATA 714, Senior Member Friedman at paragraph [18]. The exercise of the power was assessed on a test of reasonableness by Senior Member Fice in *Re Almosawi and Secretary, Department of Social Services* [2015] AATA 968 (at paragraph [17]. See also Deputy President Hotop in *Re Budalich and Secretary, Department of Employment and Workplace Relations* [2007] AATA 1258 on the issue of 'relevance' and of specification of what is required to be supplied (at paragraphs [30]-[31].

[8] *McDonald v Director-General of Social Security* [1984] FCA 59; 1 FCR 354; 6 ALD 6. FCR page references for this case are cited subsequently.

[9] See Woodward J at 356-358; Northrop J at 366; Jenkinson J at 368-369. The principle was reaffirmed by the Full Court in *Re Australian Telecommunications Commission v Shirley Else Barker* [1990] FCA 489 at paragraph [18].

[10] Woodward J at 358.

[11] Jenkinson J at 369.

[12] *Re Waller and Secretary, Department of Family, Community Services and Indigenous A*ffairs [2007] AATA 1902 then Member Frost at paragraph [23], cited with approval by Senior Member Walsh in *Re Parker and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 98 at paragraph [34]. It was translated as a 'practical onus' by Senior Member Professor Creyke in *Re Russell and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 52 at paragraph [35].

[13] *Harris v Secretary, Department of Employment and Workplace Relations* [2007] FCA 404; (2007) 158 FCR 252; 45 AAR 247; Gyles J.

[14] Gyles J at paragraph [19].

[15] *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. Also see the joint decision of the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449-450, and of the Full Federal Court in *Rana v University of South Australia* [2007] FCAFC 188, at [31].

[16] Including agencies such as Dun and Bradstreet. See also ASX at http://www.asx.com.au/products/bonds/credit-ratings.htm

[17] See for example the analysis by Deputy President Jarvis in *Re Kambouris; Secretary, Department of Education, Employment and Workplace Relations* [2008] AATA 221 at paragraph [30]-[32] and also Senior Member Bayne in *Re Johnson and Department of Family and Community Services* [2000] AATA 424 at paragraph [39].

[18] Dixon J in *Briginshaw* at 60 CLR 362.

[19] Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system. Report* April 2017, at p 5 paragraph 2.5.

[20] This reflects the 'model litigant' and the statutory requirement that decision-makers must use their '*best endeavours to assist the Tribunal to make its decision in relation to the proceeding': see AATA 1975* subsection 33(1AA).

[21] *SSA 1991* Module J of section 1067G, points 1067G-J1 [diagram], 1067G-J3 [method statement].

[22] Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system. Report* April 2017, at p 8 note 15: '*For example: Ms D's debt was reduced from $2 203.24 to $332.21, Mr S's debt from $3777.43 to zero, Ms H's debt from $5,874.53 to zero, Ms G's debt from $2914.20 to $610.07 and Ms B's debt from $1441.64 to $267.51.*

[23] *AATA 1975* subsection 43(1)(c)(i).

[24] *AATA 1975* subsection 43(1)(c)(ii).

[25] *SS(A)A 1999* subsection 165A(1) (issuing a notice to any person with relevant information, requiring it to be supplied).

[26] *SS(A)A 1999* section 166 (directing the exercise of the information gathering powers of section 192).

[27] See *AATA 1975* subsection 40D(1).

[28] See the extended review of such principles by Deputy President Forgie in *Rana and Military Rehabilitation and Compensation Commission* [2008] AATA 558.

[29] This is brought about by various definitions found in section 23 of the *SSA 1991*. First, a 'social security payment' is defined to include a 'social security benefit' (s 23(b) of the definition of that term) and a social security pension (s23(a)).

[30] In paragraph (a) of the definition of 'social security benefit'.

[31] These decisions may be accessed at http://www.austlii.edu.au/au/cases/cth/AATA/

[32] *Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 26 AAR 385 [152 ALR 127; [1998] ASSC 84,475 (¶92-162)] (Fed Ct), (Finn J at 387-388).

[33] *Jazazievska v Secretary, Department of Family and Community Services* [2000] FCA 1484, 65 ALD 424 (Cooper J in Federal Court 20 October 2000, paragraph [45]).

[34] See *Secretary, Department of Family & Community Services v Sekhon* [2003] FCA 76,

[35] Ibid, paragraph [41].

[36] *Re Gagatek* [2012] AATA 255 Senior Member Walsh at paragraph [40].

[37] Ibid, also *Re Gerhardt* [1996] AATA 173

[38] [2011] AATA 540.

[39] Ibid, at paragraph [34] of the AAT Reasons.

[40] *Re Callaghan* (1997) 45 ALD 435 at p 445; *Re Bitunjac* (1998) 52 ALD 674 p 687.

[41] Cases include: *Angelakos v Secretary, Department of Employment and Workplace Relations* [2007] FCA 25 (Fed Ct), Besanko J at [33]; *Ryde v Secretary, Department of Family and Community Services* [2005] FCA 866 (Fed Ct), Branson J; *Dranichnikov v Centrelink* (2003) 75 ALD 134; [2003] FCAFC 133 (FC Fed Ct); *Secretary, Department of Social Security v Hales* (1998) 82 FCR 154 (Fed Ct) French J at 162.

[42] See Besanko J in *Angelakos v Sec DEWR* (2007) 100 ALD 9; 44 AAR 436; [2007] FCA 25.

[43] See for example the decision of the AAT in *Re Baukes* [2011] AATA 645.

[44] For instance in *Re Schultz*, even though Deputy President Jarvis of the AAT wrongly excluded notional entitlement as a special circumstance, special circumstances waiver was applied on the basis of the other factors in play, such as departmental error [2004] AATA 705) at paragraphs [38]-[39].

[45] Deputy President Forgie of the AAT in *Re Timothy Davy* [2007] AATA 1114 at paragraph [80]; and Senior Member Dunne in *Re Hermann* [2013] AATA 711, at paragraph [35].