



**DECISION AND
REASONS FOR DECISION**

[2015] AATA 159

Division **GENERAL ADMINISTRATIVE DIVISION**

File Number **2014/5117**

Re **Kylie McMurray**

APPLICANT

And **Secretary, Department of Social Services**

RESPONDENT

DECISION

Tribunal **Mr C Ermert, Member**

Date **19 March 2015**

Place **Melbourne**

The Tribunal affirms the decision under review.

.....[sgd].....

Member

Social Services - family assistance benefits - overpayment - debt owed to the Commonwealth - administrative error - debt attributable solely to error made by the Commonwealth - received in good faith - no financial hardship - no special circumstances - decision affirmed

LEGISLATION

A New Tax System (Family Assistance) (Administration) Act 1999

CASES

Davy and Secretary, Department of Employment and Workplace Relations [2007] AATA 1114

Haggerty v Department of Education Training & Youth Affairs [2000] FCA 1287

Secretary, Department of Education, Employment, Training & Youth Affairs v Prince (1997) 152 ALR 127

REASONS FOR DECISION

Mr C Ermert, Member

19 March 2015

INTRODUCTION

1. From 1 July 2003 to 8 April 2014 (the *relevant period*) Mrs McMurray, the Applicant, was overpaid \$94,219.84 in Family Tax Benefit (FTB), Child Care Benefit (CCB) and Schoolkids Bonus (SKB) by Centrelink, the service provider for the Department of Social Services, the Respondent. She was not entitled to receive these payments, which are therefore debts owed to the Commonwealth. The overpayments were the result of an error by Centrelink. An incorrect coding on her computer record resulted in the continued payment of Mrs McMurray's benefits even though her income exceeded the level at which they ceased to be payable.

2. On 16 March 2011 Mrs McMurray brought the matter to the attention of Centrelink when she reported an estimated combined annual income of \$274,479. The Centrelink officer who received the advice referred the case to a Senior Practitioner who, on 17 March 2011, determined that Mrs McMurray was still entitled to payment at the maximum rate.
3. On 17 April 2014 a Centrelink officer noted the error and recorded the overpayments as debts to be recovered. On 28 April 2014 Mrs McMurray requested a review of the debt decision. On 10 July 2014 an Authorised Review Officer (ARO) decided to waive the debts that arose before 1 July 2012 as they were incurred after the time allowed by the legislation. These debts amounted to \$76,971.67. The ARO decided, however, that the debts that arose during the *relevant period* should not be waived. These debts amounted to \$17,248.18.
4. On 10 September 2014 the Social Security Appeals Tribunal (SSAT) affirmed the ARO decision. This matter is an application for review of the SSAT decision.

THE HEARING

5. At the hearing Mrs McMurray represented herself. She was accompanied by her husband, Mr McMurray. Mr de Uray, a Principal Government Lawyer, represented the Respondent.
6. I had before me the documents provided by the Respondent in accordance with section 37 of the *Administrative Appeals Tribunal Act 1975* (the T-documents). For Mrs McMurray, I took her letter dated 13 January 2015 into evidence as Exhibit A1.
7. I also had before me the Secretary's Statement of Facts and Contentions dated 13 February 2015.

THE ISSUES

8. Prior to my hearing the evidence, Mr de Uray submitted that in this case the material facts are not in dispute. He stated that the Secretary accepts that the errors resulting in the debts are attributable solely to the Commonwealth. He stated further that at all times

Mrs McMurray was open and transparent in providing information to Centrelink. Mr de Uray submitted that Mrs McMurray accepts that she received the excess payments. Mrs McMurray agreed with this statement.

9. Mrs McMurray agreed that the details of the debts as recorded in the documentation were correct. She also agreed that a debt recovery plan would not cause her financial hardship.
10. The parties agreed, correctly in my view, that the sole issue to be decided is whether Mrs McMurray should repay all or part of the payments made to her in error.

THE LEGISLATION

11. The relevant legislation is contained in the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act).

THE EVIDENCE

12. In her evidence Mrs McMurray stated that at all times she had been honest and open with Centrelink. She said she queried the benefits payments in 2011. She said her enquiry was *sent upstairs* but the department still found that her payments were correct.
13. Mrs McMurray referred to paragraph 39 of the SSAT's Reasons for Decision and said that she did not knowingly contribute to the debt. Referring to paragraphs 35 to 37 of the Reasons, Mrs McMurray said that she was offended and distressed by the statements made in regard to her autistic child. She said she had never had government support for her child and she was offended by the suggestion that she re-enter the workforce.
14. In his cross-examination Mr de Uray asked numerous questions to ascertain when Mrs McMurray first had doubts about the payments or suspicions that the level of benefits she was receiving was not correct. Mrs McMurray answered consistently that she noticed nothing untoward about the level of benefits until 2011, when her husband's salary increased significantly, giving them more disposable income. It was then that she raised the issue with Centrelink. Up to that time she trusted the Department to make the correct payments.

SUBMISSIONS

15. In her oral submissions Mrs McMurray reiterated the contentions in her written statement (Exhibit A1). She contended that she was not responsible for debts caused by the Department's errors.
16. Mr de Uray submitted that the debt of \$16,018.18 for FTB for the period between 1 July 2012 and 8 April 2014 and the debt of \$1,230 for SKB were not raised out of time. He contended that, for these debts to be waived, Mrs McMurray would have to be in financial hardship, which she did not claim to be. He contended that these debts must stand.
17. In regard to the debts incurred before 1 July 2012, Mr de Uray submitted that this hearing was *de novo*. Accordingly, the tribunal must consider whether the payments were received in good faith in accordance with the provisions of section 97(3)(c) of the Administration Act. Mr de Uray did not contend, however, that Mrs McMurray had received the payments otherwise than in good faith.

TRIBUNAL CONSIDERATIONS

18. Section 97 of the Administration Act provides relevantly:

Waiver of debt arising from error

(1) *The Secretary must waive the right to recover the proportion (the administrative error proportion) of a debt that is attributable solely to an administrative error made by the Commonwealth if subsection (2) or (3) applies to that proportion of the debt.*

(2) *The Secretary must waive the administrative error proportion of a debt if:*

(a) *the debtor received in good faith the payment or payments that gave rise to the administrative error proportion of the debt; and*

(b) *the person would suffer severe financial hardship if it were not waived.*

(3) *The Secretary must waive the administrative error proportion of a debt if:*

(a) *the payment or payments were made in respect of the debtor's eligibility for family assistance for a period or event (the eligibility period or event) that occurs in an income year; and*

(b) *the debt is raised after the end of:*

(i) *the debtor's next income year after the one in which the eligibility period or event occurs; or*

(ii) the period of 13 weeks starting on the day on which the payment that gave rise to the debt was made;

whichever ends last; and

(c) the debtor received in good faith the payment or payments that gave rise to the administrative error proportion of the debt.

(4) For the purposes of this section, the administrative error proportion of the debt may be 100% of the debt.

Debts raised before 1 July 2012

19. Applying the provisions of section 97(3) to the debts raised before 1 July 2012, I note there is no disagreement that the provisions of sections 97(3)(a) and (b) are satisfied and I find accordingly. Section 97(3)(c) requires that the payments were received in good faith.

In *Secretary, Department of Education, Employment, Training & Youth Affairs v Prince* (1997) 152 ALR 127, Finn J found that

if that person knows or has reason to know that he or she is not entitled to a payment received – ie is not entitled to use the moneys received as his or her own – that person does not receive the payment in good faith. Absent such knowledge or reason to know, the receipt would be in good faith.

20. In *Haggerty v Department of Education Training & Youth Affairs* [2000] FCA 1287 French J (as he then was) said:

Consistently with what his Honour said in the Prince case, want of good faith will arise where is a positive belief that the payment has been made my mistake. It will also arise where there is a suspicion held by the recipient that he or she may not entitled to the payment made or a doubt as to the entitlement coupled with some objective basis for such suspicion or doubt. The provision does not, however, authorise the imputation of want of good faith in any of the senses above described simply because there are in existence objective facts which would raise a belief or a doubt or a suspicion of non-entitlement in the mind of some imaginary recipient.

21. In this case there is no evidence that, before March 2011, Mrs McMurray had any knowledge that she was not entitled to the payments she was receiving. There is no evidence that Mrs McMurray held any suspicions or doubts that she was not entitled to the payments. She said in evidence that she simply trusted the Department to make the correct payments. I find that Mrs McMurray received in good faith those payments that give rise to the debts raised before 1 January 2012.

22. As all the provisions of section 97(3) are satisfied, I find that the debts totalling \$76,971.67 must be waived.

Debts raised after 1 July 2012

23. As the debts of \$16,018.18 for FTB and \$1,230.00 for SKB were not raised out of time the provisions of section 97(2) apply. I have already found that Mrs McMurray received the payments in good faith. I find that section 97(2)(a) is satisfied.
24. Mrs McMurray has already agreed that she would not suffer severe financial hardship if the debt were not waived. Accordingly, I find that section 97(2)(b) is not satisfied. As a result, I am not required to waive these debts under the provisions of section 97(2) of the Administration Act.

Special Circumstances

25. Section 101 of the Administration Act allows for waiver of part or all of a debt if the Tribunal 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;*
 - (ii) *Failing or omitting to comply with a provision of the Family Assistance law; 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 write off the debt or part of the debt.*
26. There is no contention that Mrs McMurray made false statements or failed to comply with any of the provisions of the Family Assistance law. Indeed Mr de Uray accepted Mrs McMurray's evidence that, at all times, she provided full and timely information to Centrelink. I am satisfied that the provisions of section 101(a) are met and find accordingly.
27. The only issue raised by Mrs McMurray that could be considered as a *special circumstance* is that the debts resulted solely from errors of Centrelink and she should

not be held responsible for those errors. In the Secretary's Statement of Facts and Contentions Mr de Uray submits that Mrs McMurray's circumstances are not sufficiently special to warrant the exercise of the discretion allowed under section 101 of the Administration Act.

28. I note the decision of this Tribunal in *Davy and Secretary, Department of Employment and Workplace Relations* [2007] AATA 1114, in which Deputy President Forgie stated (in paragraph 80):

[S]pecial circumstances are not merely directed to the person's own circumstances. Rather, they are directed to those that are "special circumstances...that make it desirable to waive". That necessarily requires a consideration of the person's individual circumstances but also a consideration of the general administration of the social security system. Waiver of the debt would mean that Mr Davy would have had the benefit of part of his DSP in circumstances in which he was not entitled to it...He has had the benefit of the money and there is no injustice in requiring him to repay the money of which he has had the benefit but not the entitlement.

29. In this case, Mrs McMurray has had the benefit of FTB and SKB payments without being entitled to them. As with Deputy President Forgie in *Davy*, I am not satisfied that there are special circumstances that make it desirable to waive all or part of the debt arising in the period after 1 July 2012, and I find accordingly.

CONCLUSION

30. I have found that:
- the debts raised before 1 January 2012, totalling \$76,971.67, must be waived;
 - the debts raised after 1 January 2012, totalling \$17,248.18, are not waived; and
 - no special circumstances apply which make it desirable to waive all or part of the debt.
31. My findings are in accord with those of the SSAT. Accordingly, I affirm the SSAT decision.

DECISION

32. The Tribunal affirms the reviewable decision.

I certify that the preceding 32 (thirty-two) paragraphs are a true copy of the reasons for the decision herein of Mr C Ermert, Member

.....[sgd].....

Associate

Dated 19 March 2015

Date of hearing

10 March 2015

Applicant

In person

Advocate for the Respondent

Mr Tim de Uray, Department of Social Services