Federal Court of Australia
District Registry: Victoria
Division: General

No: VID611/2019

DEANNA AMATO
Applicant

THE COMMONWEALTH OF AUSTRALIA
Respondent

ORDER

JUDGE: JUSTICE DAVIES

DATE OF ORDER: 27 November 2019

WHERE MADE: MELBOURNE

THE COURT DECLARES BY CONSENT THAT:

1. The demand for payment of an alleged debt first made by the Respondent to the Applicant on 2 March 2018 (the **alleged debt**) was not validly made because the information before the decision-maker acting on behalf of the Respondent was not capable of satisfying the decision-maker that:

   (a) a debt was owed by the Applicant to the Respondent, within the scope of s 1222A(a) and s 1223(1) of the *Social Security Act 1991* (Cth) in the amount of the alleged debt; or that

   (b) any of the necessary preconditions for the addition of a 10% penalty to such a debt, as prescribed by s 1228B(1)(c) of the *Social Security Act 1991* (Cth) were present.

2. In consequence of the declaration in paragraph 1, the notice purportedly issued on 2 March 2018 was not a validly issued notice for the purpose of s 1229 of the *Social Security Act 1991* (Cth) because the decision-maker could not have been satisfied that a debt was owed in the amount of the alleged debt.

3. In consequence of the declaration in paragraph 1, the garnishee notice given to the Australian Taxation Office (the **ATO**) under s 1233(1) of the *Social Security Act 1991* (Cth), requiring the ATO to pay to the Commonwealth the lesser of $3,215.38 or the entirety of the Applicant's tax refund, was not a lawfully issued notice because the decision-maker could not have been satisfied that a debt was owed by the Applicant to the Respondent in the amount sought in the notice.

4. The demand for payment of an alleged debt first made by the Respondent to the Applicant on 6 March 2019 (the **reassessed alleged debt**) was not validly made because the information before the decision-maker acting on behalf of the Respondent was not capable of satisfying the decision-maker that:

   (a) a debt was owed by the Applicant to the Respondent, within the scope of s 1222A(a) and s 1223(1) of the *Social Security Act 1991* (Cth) in the amount of the reassessed alleged debt; or that

   (b) any of the necessary preconditions for the addition of a 10% penalty to such a debt, as prescribed by s 1228B(1)(c) of the *Social Security Act 1991* (Cth) were present.

THE COURT ORDERS BY CONSENT THAT:

5. The Respondent is to pay the Applicant the sum of $92.06, being interest pursuant to s 51A(1) of the *Federal Court of Australia Act 1976* (Cth) for the period during which the Respondent retained the moneys paid to the Respondent pursuant to the garnishee notice given to the ATO referred to in the declaration in paragraph 3 above.

6. The Respondent is to pay the Applicant's costs.

A succinct statement of the matters justifying the making of the consent declaration and order appears in the 'notes' section below.

Date that entry is stamped: 27 November 2019

Registrar

NOTES

1. The alleged debts demanded by the Respondent from the Applicant that are the subject of this proceeding were alleged to arise under s 1223(1)(b) of the *Social Security Act 1991* (Cth) (the **SS Act**), which relevantly provides that, if a social security payment is made and 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.

2. The Respondent's subsequent review of the alleged debts after the commencement of this proceeding led it to conclude that, while a debt was owed by the Applicant to the Respondent, it was different and very substantially smaller than the amounts sought on 2 March 2018 and 6 March 2019.

3. The Respondent was only entitled to seek to recover such a debt that it considered to be owed to it by the Applicant if there was a proper basis for a decision-maker acting on behalf of the Respondent to form the view that a debt in the amount sought was owed by the Applicant.

4. The conclusion that the Applicant had received social security benefits to which she was not entitled in the amount of $2,924.28 (the **Alleged March 2018 Debt**) was based on "Pay-As-You-Go" (**PAYG**) income data information obtained from the Australian Taxation Office (the **ATO**), which recorded the Applicant's income for income tax purposes during the 2012 financial year (the **ATO Information**), which included the fortnights for which the Applicant was paid Austudy (the **relevant fortnights**, which together were the **Relevant Period**).

5. The quantum of the Alleged March 2018 Debt was calculated by:

    5.1 dividing the total income specified in the ATO Information ($24,811) by the total number of days in the employment period specified in the ATO Information (1 July 2011 to 30 June 2012), being 366 days, to produce a daily income figure of $67.79;

5.2 multiplying that averaged daily income figure ($67.79) by 14 to produce an apportioned fortnightly income figure of $949.05 (the **Apportioned Fortnightly Income**);

5.3 substituting the amount of income declared by the Applicant for each fortnight as her actual income for each of the relevant fortnights with the Apportioned Fortnightly Income;

5.4 calculating the amount of Austudy to which the Applicant would be entitled for each fortnight in the Relevant Period on the basis that the Apportioned Fortnightly Income represented the Applicant's actual income for that fortnight;

5.5 for each fortnight in the Relevant Period, calculating the difference between:

(a) the amount of Austudy to which the Applicant would be entitled on the basis of the Apportioned Fortnightly Income; and

(b) the amount of Austudy the Applicant was paid based on the income the applicant reported for that fortnight as her actual income; and

5.6 aggregating the differences for the fortnights in the Relevant Period so calculated to produce the amount of the Alleged March 2018 Debt.

6. The decision-maker made the calculations referred to above at paragraph 5 by reference to general instructions to decision-makers developed by the Respondent.

7. A penalty was then added to the Alleged March 2018 Debt, purportedly pursuant to s 1228B(1)(c) of the SS Act. The decision-maker applied the penalty by reference to general instructions to decision-makers developed by the Respondent.

8. The conclusion that the Applicant had received social security benefits in 2012 to which she was not entitled in the amount of the Alleged March 2018 Debt was not open on the material before the decision-maker, because:

8.1 the assumption underlying the use of Apportioned Fortnightly Income to calculate the Applicant's Austudy entitlement during the relevant fortnights was that the total amount earned by the Applicant in the financial year ending on 30 June 2012 was earned in equal fortnightly amounts;

8.2 there was no probative material before the decision-maker, in the ATO Information or otherwise, to support the assumption in paragraph 8.1; and

8.3 there was probative material before the decision-maker, being the Applicant's reported earnings, which indicated that the Applicant had not earned the Apportioned Fortnightly Income amount during the relevant fortnights.

9. In the circumstances, there was no material before the decision-maker capable of supporting the conclusion that a debt had arisen pursuant to s 1223(1)(b) of the SS Act. The conclusion that a debt had arisen was therefore irrational, in the requisite legal sense.[1]

10. Because there was no debt due to the Commonwealth under Chapter 5 of the SS Act:

10.1 there was no foundation for the application of a penalty pursuant to s 1228B(1) of the SS Act;

10.2 a letter sent to the Applicant dated 2 March 2018 was not a valid notice for the purpose of s 1229(1) of the SS Act; and

10.3 the decision made on or about 31 August 2018 to give a garnishee notice to the ATO pursuant to s 1233 of the SS Act was invalid.

11. In addition to there being no foundation for the imposition of a penalty pursuant to s 1228B(1) because no debt arose, there was also not sufficient material before the decision-maker capable of supporting the conclusion that any of the conditions in s 1228B(1)(c) were satisfied.

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[1] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [40] (Gummow A-CJ and Kiefel J), [130]-[132], [135] (Crennan and Bell JJ); *Tisdall v Webber* (2011) 193 FCR 260 at [126] (Buchanan J, Tracey J agreeing at [93]), cited with approval in *P v Child Support Registrar* (2014) 225 FCR 378 at [53]-[54] (Perram, Perry and Gleeson JJ); *Rawson Finances Pty Ltd v Commissioner of Taxation* (2013) 296 ALR 307 at [84]-[85] (Jagot J, with whom Nicholas J agreed at [142]).

12. On or about 22 February 2019, a decision-maker on behalf of the Respondent undertook a quality compliance check of the Alleged March 2018 Debt, the outcome of which was that the amount of the debt was reduced to $2,504.42 (the **Alleged Reassessed March 2019 Debt**). The penalty that had been added to the Alleged March 2018 Debt was retained by the decision-maker, save that the quantum of the penalty was reduced in accordance with the amount of the Alleged Reassessed March 2019 Debt.

13. The conclusion that the Applicant had received social security benefits to which she was not entitled in the amount of the Alleged Reassessed March 2019 Debt was based on the assumption that the Applicant had earned the Apportioned Fortnightly Income each fortnight during a slightly different period, otherwise calculated as set out in paragraphs 5.1 to 5.6 above. There being no additional material available to the decision-maker than that which had been before the decision-maker who determined the Alleged March 2018 Debt, there was, for the reasons set out in paragraphs 8 and 9 above, no foundation for the conclusion that a debt had arisen in the amount of the Alleged Reassessed March 2019 Debt pursuant to s 1223(1)(b) of the SS Act. For the reasons set out in paragraph 11 above, neither was there sufficient material before the decision-maker capable of supporting the conclusion that any of the conditions in s 1228B(1)(c) were satisfied, such that a penalty could be added to the Alleged Reassessed March 2019 Debt.

14. Because (as noted in paragraph 10.3 above) the decision to give a garnishee notice to the ATO was invalid, the Applicant is entitled to recover interest in the amount of $92.06 pursuant to s 51A(1) of the *Federal Court of Australia Act 1976* (Cth) in respect of the period for which the Respondent retained the Applicant's moneys, which were paid by the ATO to the Respondent pursuant to that invalid garnishee notice.[2]

[2] *State Bank of New South Wales v Commissioner of Taxation (Cth)* (1995) 62 FCR 371 at 384-385 (Wilcox J); *Elsinora Global Ltd v Commissioner of Taxation* (2006) 155 FCR 413 at [49], [52]-[59] (Young J); *Thakral Fidelity Pty Ltd v Commissioner of Stamp Duties (Qld) (No 2)* [2001] 1 Qd R 428 at [13]-[15] (McPherson JA); cf *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 2)* (1991) 32 FCR 243 at 266-267 (Hill and Heerey JJ).

15. Given the nature of the errors conceded, it is appropriate for the Respondent to pay the Applicant's costs of this proceeding.