However, the Tribunal noted that s.163 of the *Social Security Act* provides a contrary intention because it sets out the manner in which a notice is to be given to a person under the section: 'personally or by post'. Accordingly, the DSS could not rely on s.28A of the Acts Interpretation Act since s.163 —

> 'limits the ways in which notice may be given more narrowly than section 28A. It follows that section 28A is not applicable to the interpretation of section 163 and the ways in which service may be effected are limited therefore to personal service or service by post.'

(Reasons, para.20)

With regard to s.29, the AAT stated that in order for the DSS to succeed, the AAT must be satisfied on the balance of probabilities that the letter was properly addressed, pre-paid and posted as a letter.

While the AAT found that the notice was sent as a letter and that it was pre-paid, the Tribunal determined that it was not properly addressed since the DSS had been notified by Todd that she was leaving that address.

This was despite the fact that there was no evidence from which the Tribunal could find that Todd had given another address to the DSS. But neither could the Tribunal find any obligation upon a person receiving family allowance to notify details of an address.

This was in contrast to provisions such as s.92 of the *Social Security Act*, which require notification of events such as a dependent child ceasing to be dependent, ceasing to be in Australia, or the death of a dependent child. The Tribunal noted that, in practical terms, an address for family allowance recipients was of little consequence since the allowance was paid into a bank account and payment continued regardless of a residential address.

Despite the Tribunal's finding that there was no obligation upon Todd to inform the DSS of a change of address, the Tribunal said that it had already found that Todd did notify the DSS that she would be travelling. The Tribunal also said that it was satisfied on the evidence that Todd and her husband had asked what else they had to do for Departmental purposes and they were not advised to take any further steps.

Accordingly, on the basis on these findings of fact, the AAT found that the notice sent under s.163(2) was not properly addressed. This was because the Tribunal was not satisfied that a notice addressed to a place which the DSS knew Todd had left could be properly addressed. It followed that Todd did not receive the notice sent by the DSS requiring that she furnish information relating to payment of family allowance. Consequently, Todd had not refused or failed to comply with a notice issued pursuant to s.163(2). On that basis, family allowance should not have been cancelled.

Formal decision

The AAT set aside the decision to cancel payment of family allowance from 15 October 1987 to 14 August 1988 and substituted for it a decision to pay family allowance from 15 October 1987.

[R.G.]

Family allowance: whether arrears payable

SILVER and SECRETARY TO DSS (No. 5424)

Decided: 28 September 1989 by R.C. Jennings.

The AAT set aside a DSS decision not to pay arrears of family allowance to Dennis Silver from 15 June 1986, after his son M came into his custody.

The facts

M had lived with his mother until May 1986. Since that time, he had been in the care of his father. No application was made by Silver for family allowance until January 1988, as he had previously assumed (incorrectly) that his former wife was receiving the allowance.

After he made the claim, the DSS determined that he was eligible for payment from 15 January 1988. Silver sought arrears to May 1986 but he was advised that the allowance could only be paid for a period prior to the lodgment of a claim if there were special circumstances and it was not considered that there were any special circumstances in his case. Silver was also advised of his appeal and review rights, but was not informed that there was any time limit for seeking review. He lodged an application for review on 14 June 1988.

The legislation

As at the time of the decision of 10 February 1988, s.88(2) of the *Social Security Act* provided:

> '(2) Where —
>
> (a) a family allowance is granted to a person because the person has a dependent child in respect of whom a family allowance was, immediately before the child became a dependent child of the person, payable; and
>
> (b) the Secretary decides that, in the special circumstances of the case, a family allowance should be payable to the person in respect of the child from and including the day on which the child became a dependent child of the person,
>
> the family allowance is payable from and including that day.'

(This section was repealed as from 29 December 1988.)

Section 168(3) provides that the Secretary may, in certain circumstances, grant a claim or increase a rate of payment.

Section 168(4) specifies the date when a determination under s.168(3) comes into effect. By s.168(4)(a) (as it provided in February 1988), the determination takes effect, if a person sought review of a decision under s.16 within 3 months from the day on which notice of the decision was given, from the day of the original decision.

However, s.168(4)(b) provides that, if a review has been sought outside the 3-month period, the decision takes effect from the day the person sought the review. [Section 168(4)(a) now refers to seeking review under s.173(1), rather than s.16, which previously provided for review by the Secretary.]

The Department's argument

The DSS argued that s.168(4) limited the Department's power to pay family allowance from the day Matthew became Silver's dependent child, since he had not sought review of the February 1988 decision until 14 June 1988.

While the original reason for the decision was that there were no 'special circumstances' as would warrant payment of arrears, the Tribunal noted that there was no dispute at the hearing as to the existence of special circumstances. The sole issue was as to the payment of arrears, under s.168(4).

The AAT's decision

The AAT noted paras (ca) and (d) of s.168(4) and the replacement of the reference to s.16 by a reference to s.173. After stating that the 'date a determination to grant an allowance takes effect is controlled in some cases by s.168(4)', the AAT continued:

> 'However, the limitation or control applied only if the determination was made following

an application to the Secretary under Section 16 (review or appeal to the Secretary against the decision of an officer of the Secretary).'

Dealing with the fact that Silver had not completed an appeal form to the SSAT until 14 June 1988 (more than 3 months after being notified of the decision), the AAT stated that the appeal to the SSAT —

'had no statutory basis at that time. It did not purport to be an appeal under s.16(2) of the Act. Even if it was treated as such, s.168(4) says nothing of the express discretionary power conferred by s.88(2)(b).'

The Tribunal decided that —

'the restriction on back dating a determination in s.168(4) is not intended to detract from the specific discretion which existed pursuant to s.88(2)(b) at the time of the decision of 10 February. Moreover, no events had occurred at the time of that decision which could bring s.168(4) into operation. Thus no failure to comply with the time limit there referred to could inhibit the power to backdate the family allowance for special circumstances.'

The Tribunal noted that, since the only problem faced by the delegate in making a decision with effect prior to the appeal was s.168(4), given its view that s.168(4) did not have this effect, the AAT determined that Silver was entitled to receive family allowance from the date it was last paid to his former wife (15 June 1986).

Formal decision

The AAT set aside the decision and remitted the matter to the Secretary with a direction that allowance be paid from 15 June 1986 to 15 January 1988.

[R.G.]

Family allowance supplement: income test

SECRETARY TO DSS and MEADOWS

(No. 5406)

Decided: 1 November 1989 by R.N.J. Purvis, G.R. Taylor and T.R. Russell.

The DSS appealed against an SSAT decision that Meadows was entitled to full rate of Family Allowance Supplement (FAS) from 29 December 1988.

Meadows was employed between May and September 1987, with an income of $2516 for the 1987-88 tax year. She married in November 1987, after living with her husband in a *de facto* relationship for two months. His income for the 1987-88 tax year was $16 025.

In fixing the rate of FAS, the SSAT had applied the FAS income test to the 1987-88 income of Meadows' husband. But the DSS argued that the *Social Security Act* required the FAS income test to be applied to the combined incomes of Meadows and her husband during 1987-88, even though they were not married (legally or de facto) for part of that tax year.

The legislation

According to s.74B of the *Social Security Act*, the rate of FAS payable to a person is determined by an income test based on the person's preceding year's taxable income (the 'base year of income'). This system replaced a 'rolling' income test based on the person's income in the preceding 4 weeks. The replacement took effect from 29 December 1989.

Section 72(1)(a) defines the taxable income of an unmarried person as the person's taxable income for the year of income.

Section 72(1)(b) defines the taxable income of a married person as the sum of the taxable incomes of the person and the person's spouse for the year of income.

The AAT's approach

According to the AAT:

'[Section 72(1)] makes no reference to whether a "person" is married or otherwise in the "base year" - and this, in our view, is where the SSAT fell into error, for the SSAT determined the matter on the basis of Mrs Meadows as a married person — she left her employment in September 1987 and did not marry until November 1987 — having a nil taxable income during the 1988 financial year. Thus the income of Mr Meadows alone for that year was considered to be the ingredient for the formularisation . . .

No reference is made in the Act, and it is not relevant to consider, whether the parties were married or not in the base year.'

(Reasons, p.16)

The AAT concluded that, as Mrs Meadows was married, 'the relevant taxable income' was the sum of her income and her husband's income, and calculated that she was entitled to a weekly rate of FAS of $10.72.

The AAT commented on the consequences of the 1988 amendments to the Act, when the FAS income test changed. Prior to the amendments, the rate of FAS was based on a married couple's income for the previous 4 weeks. For Meadows the 1988 amendments meant a reduction in FAS (and rent assistance) from $74 to $31.24 a fortnight. The AAT commented that, in the case of a single mother with 3 children, there could have been a reduction of over $100 a fortnight:

'This type of reduction, coming as it could without any changes in overall financial circumstances, could place families most in need in quite distressing and unmanageable situations . . . .

The December 1988 amendments did not include any protective transitional provisions (as is frequently done in Welfare and Veterans' legislation) in order that the changed administrative arrangements would not operate to reduce any assistance payment then being made to a need person.'

(Reasons, pp.19-20).

The AAT considered the limited protection afforded by s.74B(3), which allows the current year of income to be used if that income is at least 25% below the income in the base year of income. The Tribunal could not see the logic in the 25% threshold. It concluded:

'Despite the administrative reasons for the change in the base of income testing, the Tribunal believes that the concept of the "base year" for all income testing will affect many young couples (both previously employed), who marry and have a child soon afterwards. It will act to reduce the assistance otherwise payable to them at the very time they are probably most in need of it, compared to the assistance that would have been payable if current income (presumably of a husband only in most cases) was used as the basis for determining assistance, this unless special transitional provisions apply for the first year of entitlement.'

(Reasons, pp.21-2)

Formal decision

The Tribunal determined that Mrs Meadows should receive FAS at the rate of $10.72 during the year ending on 30 June 1989.

[J.M.]