(not all detailed here), then the determination can take effect up to 3 months prior to the determination.

The argument: a policy on eating?

The Nevilles argued that they were entitled to the single rate of pension from August, or at least November, 1985 as the DSS had by then all the information required to exercise the discretion in s.33.

It was argued that the SSAT had erred when it decided that the relevant date for the commencement of the single rate was 1 August 1989, when the DSS was, through the letter to the then Minister, notified of the changed circumstance. The relevant date should be determined by s.168(4)(c), giving a date of 16 August 1985, when the Nevilles moved into the nursing home, or November 1985 when the DSS was notified of the Nevilles' address and the charges for rent, board and lodging.

The DSS argued that their policy of allowing married nursing home residents who were eating in a communal dining room to receive the single rate was just that: a policy unsupported by the legislation. Even if the AAT took the view that the Nevilles should have the discretion in s.33 exercised in their favour, s.168 meant that the determination could only take effect from the date of application (presumably August 1989), or 3 months from that date (presumably invoking s.168(4)(d)).

The DSS argued that, whilst it may have been unfortunate that the Nevilles did not get to take advantage of the then Deparmental policy on communal eating, the policy had been subsequently withdrawn when it was found to be unsupported by the legislation, so they were not being deprived of an entitlement.

The SSAT had apparently suggested that the DSS had been negligent: the DSS drew the AAT's attention to various decisions including *Turner v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388, *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 and *Sing (Heer) v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4. It argued 'that the decision maker is entitled to act on the information before it and is not compelled to go beyond this material in reaching a decision': Reasons, para 16.

The DSS accepted that the SSAT decision to date payment from the date the then Minister for Social Security was 'first made aware of the applicants' situation', 1 August 1989, was reasonable.

The decision

With the following discussion, the Tribunal concluded:

> 'The Tribunal sympathises with the predicament of the applicants in that they were forced to resort to their personal savings to make up the difference between what they received for their pensions and their rent and board expenditure. It is to their daughter, Mrs Trestrail's credit that she undertook on their behalf to discover the true situation, and it can be seen that the Department responded quickly once the facts were made known to it.
>
> The Tribunal, in arriving at its conclusion has taken into account the evidence as a whole and the law applicable at the time. The Tribunal is satisfied and so finds that the applicants are not entitled to arrears of pension back-dated to 1985, and accordingly, affirms the decision of the SSAT ...

(Reasons, paras 17-18)

Formal decision

The AAT affirmed the decision under review.

[J.M.]

Service of notice by post

SECRETARY TO DSS and DOSSIS (No. V90/592)

Decided: 20 November 1990 by J Handley.

Helen Dossis was in receipt of family allowance in October 1989. The DSS then arranged for the posting to her (and to approximately 400 000 other Victorian persons receiving the allowance) of a review form. This form required Dossis to furnish information to the DSS.

When Dossis did not respond to this notice, the DSS suspended payment of her family allowance on 28 December 1989. The allowance was reinstated from 23 May 1990, following the provision by Dossis of the required information.

On review, the SSAT decided that Dossis should be paid allowance from the date of the suspension. The DSS asked the AAT to review that decision.

The legislation

Section 163 of the *Social Security Act* allows the Secretary to require a person receiving a pension, benefit or allowance to provide information to the DSS, by giving a notice 'personally or by post'.

Under s.168(1) the Secretary is authorised to cancel or suspend a pension, benefit or allowance where the recipient does not comply with any provision of the Act.

Section 29 of the *Acts Interpretation Act* provides that, where an Act authorises the service of a document by post,

> 'service of the document shall be deemed to be effected by properly addressing, pre-paying and posting the document as a letter, and unless the contrary is proved to have been effected at the time at which the letter would have been delivered in the ordinary course of post.'

Was notice given?

A DSS officer gave evidence that approximately 400 000 notices, addressed to family allowance recipients in Victoria, were delivered to a mailing agency which had contracted to post the letters by bulk postage on behalf of the Department; and that the number of completed review forms returned by family allowance recipients to the DSS was consistent with the full number of the forms having been posted.

The Department's computer records included a record of the review form prepared and sent to Dossis, and referred to 14 October 1989 as the anticipated date of posting of the review form.

Dossis gave evidence to the AAT that she did not receive the review form. She said that, in late 1989, some mail may have been removed from her letter box.

The AAT noted that s.29 of the *Acts Interpretation Act* deemed documents which had been posted to have been delivered, not received:

> 'Receipt of documents is a personal act whereas mail delivered means no more than the depositing or leaving of mail at the place indicated by the address appearing on the envelope.'

(Reasons, p. 5)

The Tribunal went on to say that the DSS 'can hardly be made liable for the non-receipt of mail if it has been properly addressed and pre-paid': Reasons, p. 5. The High Court had decided in *Fancourt v Mercantile Credits Ltd* (1983) 48 ALR 1 that non-receipt of a posted notice did not prevent a court or tribunal deeming that the notice was delivered at the time when it would have ordinarily have been delivered in the ordinary course of post.

The AAT said it was satisfied that the notice to Dossis was one of the more than 400 000 notices posted by pre-paid post, that it was properly addressed and, in the absence of evidence to the contrary, had been delivered in the ordinary course of the post to Dossis.

The decision in *Todd* (1989) 52 *SSR* 691 was distinguished because the notice posted in that case had not been properly addressed.

It followed that Dossis had failed to respond to a notice, deemed to have

been given to her, and that suspension of her family allowance was supported by s.168(1) of the *Social Security Act*.

Formal decision

The AAT set aside the decision of the SSAT and reinstated the DSS decision that family allowance was not payable to Dossis from 28 December 1989 to 22 May 1990.

[P.H.]

Sickness benefit: backdating

SECRETARY TO DSS and DODSON
(No. A90/62)
Decided: 28 November 1990 by K.L. Beddoe.

The DSS asked the AAT to review a decision of the SSAT that Dodson be paid sickness benefit from 31 October 1989, being 4 weeks prior to the lodging of her claim for benefit.

The facts

On 14 October 1989 Dodson was injured by a horse on her property on the south coast of New South Wales. This resulted in fractures to her left leg. She was severely limited in her movement over the next month, staying first with her parents in Canberra for 2 weeks before returning to the home she shared with her spouse. She returned to Canberra for treatment in the middle of November. She was suffering considerable pain throughout this time.

Dodson had and contacted the DSS in Canberra City in the second half of October to request the claim form for sickness benefit. These forms were never received. When she returned to her home at the end of October she contacted the DSS office at Nowra to request the forms. When she did not receive them she contacted the Nowra office again and was told that she should contact the Bega office of the DSS.

An officer of the DSS at the Bega office undertook to send the forms and also explained to Dodson the time limits under s.125 of the Act. This occurred on or about 9 November 1989. The forms arrived after Dodson had returned to Canberra for treatment but her spouse took them to Canberra and they were completed on 18 November 1989. However, the necessary medical certificate was not obtained until 21 November and, although the form could have been lodged prior to that certificate being obtained, the forms were not lodged until 28 November 1989 with the DSS visiting service at Bateman's Bay. The 5-week period within which the forms should have been lodged under s.125 ended on 20 November 1989.

Of the failure to lodge the documents earlier the AAT commented:

> 'The evidence of [the officer of the DSS at Bega] established that although there is not a normal office of the DSS in Bateman's Bay there is a visiting service which attends Bateman's Bay each Tuesday and Wednesday, closing at 12 noon on Wednesday. The respondent and/or [her spouse] must have been aware of this visiting service because on Wednesday 22 November 1989 [her spouse] attempted to lodge the claim with the visiting service at Bateman's Bay. He failed to do so because the office had closed prior to his attendance. The reason he was late in attending is that he had driven the respondent in their truck from Canberra; the respondent was suffering severe pain because of the rough ride in the truck and he took her directly to [their home] without stopping at Bateman's Bay. Having driven the respondent to [their home], he then returned to Bateman's Bay for the purpose of lodging the claim only to find that the office was closed. It was sought to suggest to me that the office had in fact closed early on 22 November but there is no evidence before the Tribunal which would allow me to make any finding as to when the office closed or as to when [the spouse] in fact attended upon the office.'

(Reasons, p.5)

The AAT could only speculate as to why Dodson had failed to lodge her claim by 20 November or to post it to the Bega office before that date. It seemed, said the Tribunal, that parts of the DSS considered it necessary for claimants to deal with particular offices of the DSS on a geographical basis and that Dodson had accepted this view.

The legislation

Section 125(3) of the *Social Security Act* provides that sickness benefit is payable 7 days after the day on which the person became incapacitated where the claim is lodged within 5 weeks after the day on which the person became incapacitated. Section 125(4) provides that, where a claim for sickness benefit is not lodged within 5 weeks, the benefit is payable from the date of the lodging of the claim unless the sole or dominant cause of the failure to lodge is the person's incapacity. In those circumstances the benefit is payable from the date the Secretary considers reasonable in the circumstances, provided it is a date not earlier than 4 weeks before the date of the lodging of the claim.

Was delay in lodging due to incapacity?

The only issue in this case was whether the sole or dominant cause of the respondent's failure to lodge the claim for sickness benefit was her incapacity. The AAT said:

> 'The facts of this case reveal an unfortunate and avoidable breakdown in public administration in circumstances where the claimant was unable, due to her injury, to attend to her affairs and in particular to her claim for benefit. It seems to me to be most unfair that the respondent was required to make four telephone calls before she was fortunate enough to make contact with [the officer of the Bega DSS] . . . In a situation where the relevant claim forms are an essential prerequisite to the making of an application and, as I understand it, can only be obtained from an office of the DSS, the Department should endeavour to ensure that telephone requests for such forms are in fact met and are met punctually . . . It should be accepted without demur, that claimants are required to rely on the postal service by the sheer fact of their circumstances and they should not be prejudiced by excessive delay caused by bureaucratic inaction in meeting the most simple of requests to be provided with the necessary forms . . .'

(Reasons, p.6)

The Tribunal accepted that one of the reasons why Dodson could not obtain the forms was her inability, due to her incapacity, to attend the DSS office in person. However, while the AAT was prepared to find that the incapacity of the respondent was the sole or dominant cause of her failure to lodge the claim by 20 November, it was not prepared to come to the same conclusion for the period after that date. It appeared that the respondent was by that time frustrated by the inaction of the DSS and this might have led her to adopt 'a cavalier approach to the actual lodgment of the claim'.

Exercise of the discretion under s.125(4)

The AAT said that the discretion under s.125(4) could only be exercised if the sole or dominant cause of the failure to lodge the claim within 5 weeks of the date of incapacity was the incapacity. The failure of the DSS to supply the forms had therefore to be ignored as a relevant consideration. The Tribunal then concluded that the discretion could be exercised – it was clear that the incapacity of the respondent had prevented her from personally approaching the DSS office and that this was the dominant cause of her failure to lodge the claim in time.

In exercising the discretion, the AAT took account of the failure of the respondent to lodge the claim soon after 20 November. This unexplained delay of 1 week made it reasonable to commence payment of benefit 3 weeks before the day on which the claim was lodged.

Formal decision

The AAT set aside the decision under review and substituted a decision