Did Kondoulis receive the review forms?

After a lengthy discussion of the evidence, and of the inconsistencies in it, the Tribunal found on the balance of probabilities that a review of family allowance form was completed by Kondoulis (with the assistance of a friend) and mailed to the Department, but the Department had no record of its ever having been received. However, the Tribunal noted that it was not necessary to make a finding in respect of the receipt of this form because it was non-receipt of another form, an income and financial circumstances review form (FIR4), which had caused the cancellation of family allowance. On this form, the evidence was even less clear, but the Tribunal inclined to the view that it was probably never received by Kondoulis.

After considering comments of the Federal Court in *O'Connell and Sevel*, the Tribunal stated that it could only conclude here that the relevant notice went astray either in the post or on receipt. It was unfortunate that the Department did not attempt to communicate with Kondoulis rather than assuming that she had not returned the form because her income was over the limit, or, worse, cancelling the payment because of non-response.

> 'As was noted by the Full Federal Court, simple and inexpensive administrative exploration before cancellation of family allowance after non-receipt of the review form in general is justifiable and in this case it would also have been much less costly than the litigation which followed.'

(Reasons, para. 29)

The Tribunal then considered whether Kondoulis had been notified of the decision to cancel. Having found that the Department had sent her a computer generated notice of cancellation on 1 January 1990, the Tribunal decided that on the balance of probabilities, this was not received by Kondoulis. The evidence showed that as soon as she became aware of the discontinuation of family allowance, Kondoulis took action to have the payment restored. Accordingly, the Tribunal decided that family allowance for S should not have been cancelled, and affirmed the decision of the SSAT to set aside the cancellation and to restore payment from 28 December 1989.

Arrears where cancellation not set aside

The Tribunal also considered the issue of the date from which payments could be made under s.168 of the 1947 Act in the event that they had erred in finding that the decision under review was a decision to cancel family allowance. This flowed from the Federal Court's decision in *Garratt* (1992) 68 *SSR* 981. Taking into account the fact that Kondoulis, who is illiterate in English and in her own Greek language, had difficulties in communicating with the Department, her previous co-operative history of dealings with the Department, and the Tribunal's finding that any failure to comply with a requirement (ie to return her form) was not deliberate or the result of negligence and was beyond her control, it was held that this was an appropriate case in which to exercise the discretion under s.168(4)(ca). That section provided that where a determination was made to grant a claim under s.168(3) and none of paragraphs (a), (b) or (c) of s.168(4) applied, that determination had effect from a date specified. The determination at issue here was effective on and from 28 December 1989.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.G.]

Family allowance: cancellation

SECRETARY TO DSS AND WAY

Decided: 4 December 1992 by A.M.Blow.

(No. 8406)

The DSS asked the AAT to review a decision of the SSAT setting aside a delegate's decision to cancel Way's family allowance, and paying her arrears from the time her payments ceased at the end of 1988.

In December 1988, Way was sent a letter advising of a change in the method of payment of family allowance. The letter was sent to the address at which she had been living when she applied for family allowance for her children. As she had moved, the letter was returned to the Department with the endorsement 'MOVED' and payment of family allowance into her bank account was suspended.

On 18 June 1991, a delegate cancelled her family allowance (along with that of 22 other parents who had also had their allowances suspended), relying on s.168 of the *Social Security Act* 1947. Way was advised of this decision by a notice sent to the address from which she had moved. It, too, was returned to the Department, indicating 'MOVED'.

The power to cancel

The Department argued that it was empowered to cancel her family allowance in consequence of Way's failure to notify a change of address. Section 168(1) of the 1947 Act provided, inter alia, that if, having regard to any matter that affects the payment of a pension, benefit or allowance under the Act, or by reason of the failure of a person to comply with a provision of the Act, the Secretary determines that a pension, benefit or allowance should be cancelled or suspended, the Secretary may make such a determination with effect from a date specified in the determination.

The Tribunal stated that it was apparent from the determination of 18 June 1991 that the delegate's reason for cancelling Way's family allowance and the 22 others was that 'each client's whereabouts is unknown and has been unknown for 12 months': Reasons, para.4.

Accordingly, the Tribunal considered whether Way had failed to comply with a provision of the 1947 Act. Way had received a letter from the Department on 25 February 1983 when she was first granted family allowance, but the Tribunal found that nothing in that letter imposed any legal duty upon her to notify the Department if she changed her address. In the letter sent to her on 15 December 1985 (after the birth of her second child), she was advised to notify the Department if she changed her address as, if correspondence is returned unclaimed, family allowance payments may be stopped. The letter also referred her to the back of the notice which stated, inter alia, 'you should also tell us when you . . . decide to change your address . . .'

The Tribunal held that neither the letter of 15 December 1985 nor any part of it constituted a notice *requiring* Way to notify of a change of address for the purposes of sub-section 163(1). That section permitted the Secretary to serve a notice on recipients requiring certain information be provided and created penalties for failure to supply it. The Tribunal noted that as s.163 was a

penal provision, the use of the word 'requiring' must be taken to mean something more definite than 'requesting' or 'suggesting'. It was held that, for the purposes of s.163, the notice at the bottom of the letter of 15 December 1985 amounted to a request rather than a requirement, and the use of the words on the back 'you should also tell us . . .' amounted to no more than a suggestion. Therefore, the Tribunal concluded that Way did not contravene the 1947 Act in failing to notify her change of address to the Department.

The Tribunal then considered whether an exercise of the discretion to cancel or suspend under s.168(1) was warranted. In her favour, it was noted that no attempt was made to contact Way when it was discovered that she had moved, even though she could have been contacted by telephone (she remained listed in the telephone directory at all material times). Alternatively, she could have been contacted through the bank through which family allowance was paid.

The letter which resulted in the suspension was not a review form and had required no response. Had the letter been destroyed rather than returned, payments would not have been suspended. It was also considered 'highly likely that [she] remained eligible to receive family allowance at all material times': Reasons, para. 9. Finally, Way was not under any legal obligation to notify the Department of a change of address.

For the Department, it was noted that the letters Way had received indicated that if correspondence was returned unclaimed, family allowance payments may be stopped. The failure to notify the Department of a change of address extended from December 1988 to early 1992 and the AAT commented:

> 'A line has to be drawn somewhere as to how much trouble and expense, if any, the Department should go to in attempting to contact family allowance recipients who have moved without notifying their changes of address, prior to the cancellation of allowances.'

(Reasons, para. 10)

Finally, Way had not noticed that the payments had stopped and apparently did not need the instalments of family allowance to maintain her children.

Date of effect of the decision

Even if Way's family allowance was restored, the Department submitted that any such decision could take effect from no earlier than the day on which the application was made to the SSAT for review. The tribunal disagreed, stating that it could find no basis for distinguishing the decision of the Full Federal Court in *Secretary to DSS v O'Connell and Sevel* ((1993) 71 SSR 1029). The tribunal held that it had not been necessary for the SSAT to set aside the decision to cancel the payment.

It had been open to that tribunal:

> 'simply to vary the decision of 18 June 1991 to cancel family allowance by excluding the respondent from its operation, and to set aside the decision to suspend payments of family allowance to the respondent that took effect from the 29 December 1988'.

(Reasons, para.12)

Formal decision

The decision under review of 1 June 1991 was set aside and Way excluded from the operation of this decision. A recommendation was made to the Department that it contact the other 22 people who had had their allowances cancelled by the decision of 18 June 1991, and advise them of this decision. The decision to suspend payments was also set aside.

[R.G.]

Periodical payments or lump sum compensation?

SECRETARY TO DSS and KINCAID

(No. 8452)

Decided: 22 December 1992 by B.A. Barbour

On 19 October 1990 the DSS decided that $43 540.34 should be recovered from Kincaid, because he had received a lump sum of compensation representing a series of periodic payments for the same period for which he had received unemployment benefits and sickness benefits.

Kincaid requested review by the SSAT which set aside the DSS decision, and sent the matter back to the DSS with directions that the compensation amount received by Kincaid was a lump sum and not a series of periodic payments, and the compensation part of the lump sum is the amount set out in the Award of the Compensation Court.

The DSS requested review of the SSAT decision by the AAT, and sought a stay of the SSAT decision. This was granted. The substantive matter was heard on the papers at the request of both parties.

The facts

Kincaid was injured at work on 1 October 1980, and was paid weekly payments of compensation from 2 March 1981 until approximately July 1983, when he began performing temporary work.

On 20 December 1989 the Compensation Court of New South Wales awarded weekly payments of compensation from 30 June 1984 to 28 May 1990, totalling $59 068.10 and $6025 for a 25% loss of use of his left arm. A further order on 16 October 1990 backdated weekly payments to 30 June 1983. Interest on these amounts was also awarded. The total award was $92 492.28 and weekly payments were made from 22 October 1990.

Kincaid had received unemployment benefits and sickness benefits at various times between 18 July 1983 and 3 October 1990 including $43 540.34 (later amended to $43 539.94) between April 1987 and October 1990.

The issues

The AAT decided that the issues in this matter were:

- whether Kincaid received compensation as a lump sum payment or as a series of periodic payments; and
- if he received a lump sum, how should the compensation part be calculated.

The law

The AAT referred to the decision *Re Cirkovski* (1992) 67 *SSR* 955 to determine that the *Social Security Act* 1947 applied in this case. Section 153(3) provides that where a person has received a series of periodic payments, and payments of pension/benefit for the same period, the DSS may require the person to repay either the amount of pension/benefit paid, or the periodic payments, whichever is less. Sub-section 153(2) provides that where a person has received a lump sum of compensation and payments of pension/benefit for the preclusion period, DSS may require repayment of an amount equal to the compensation part of the lump sum, or the pension/benefit