The legislation

The relevant provisions of the *Social Security Act 1991* are ss.878, 887(3) and (4) and 843.

Section 878 provides for a redetermination of the rate of family payment if the rate being paid is less than the rate provided for in the Act.

Section 887 details the date of effect of determinations. Subsection 3 states that if a notice is given to the recipient of the making of the previous decision and the recipient applies for a review of the decision more than 13 weeks after the notice is given, a favourable determination takes effect from the day the recipient sought review. Subsection 4 addresses the situation when no notice of the previous decision is given. It states that if a favourable decision is made, it takes effect from the day on which the previous decision took effect.

Section 843 states that payment commences on the day on which a claim is lodged unless it is a claim for a new born baby.

Was there notice of a decision?

McAllan argued that she had not been given notice that Joshua's family payment was stopped because he was now receiving AUSTUDY. She understood the contents of the letter of 6 October 1995 to mean the family payment was reduced because their income was over the limit. The letter did not indicate clearly that Joshua was no longer entitled to family payment because he was on AUSTUDY. McAllan submitted that the letter of 6 October 1995 was ambiguous and should not be considered a notification of the decision in relation to Joshua.

The Department relied on the previous payment history of McAllan, including various occasions when additional family payment had been reduced. The Department submitted that 'on a reasonable objective reading, the information contained in the letters was clear and included reference to review rights and how to exercise them': Reasons, para. 18.

The Tribunal found that the letter of 6 October 1995 made no reference to Joshua and that it was intended to be a notification of 2 different, albeit related, decisions: the decision to terminate family payment for Joshua and secondly, the decision to terminate additional family payment. The Tribunal found that McAllan understood, from this letter, that family payment would no longer be paid for Joshua. She understood the reason was that the Department had re-examined her family's income to see whether she was eligible for AUSTUDY or family payment.

The Tribunal considered whether the letter of 6 October 1995 constituted a notice advising McAllan of the Department's decision to terminate family payment for Joshua. It considered what will constitute proper notice. It looked at the decisions of *Department of Social Security and Moully* (1992) 69 *SSR* 986 and *Department of Social Security v O'Connell* (1992) 110 ALR 627.

> 'In the Tribunal's view, the first requirement of a notice is that it must inform the recipient of what the decision is. Secondly, the notice must include enough information for the recipient to understand what the main reason for the decision is . . . This information is required so that a reasonable person in similar circumstances to those of the recipient is in a position to decide whether or not to exercise their right to seek a review . . . This second requirement is supported by the working of s.887(3)(b) which requires notice be given 'of the *making* of a previous decision', not merely notice of the decision itself. 'Making' a decision involves reasoning, and, consequently, notifying a person of the making of a decision involves notifying the person of the reasons (or at least the main reasons) for the decision.

(Reasons, para. 26)

The Tribunal considered what a reasonable person would have understood the contents of the Department's letter of 6 October 1995 to mean. The Tribunal noted that the system of social security payment provided for in the Act is complex.

> 'In such cases as the Applicant's the distinction between Family Payment and Additional Family Payment and when a person is eligible for each is not easy to understand. Understanding such complexity is made more difficult by letters which are inconsistent in their terminology':

(Reasons, paras. 28 and 29)

The Tribunal concluded that the letter of 6 October 1995 was ambiguous and misleading. It also concluded that the information contained in the letter was insufficient to enable a reasonable person to understand the main reason for the decision and decide whether to exercise their right of review. As a result the letter of 6 October 1995 could not be considered a notice for the purposes of the Act.

Formal decision

To set aside the decision under review and substitute a new decision that arrears of family payment in respect of Joshua McAllan be paid for the period 12 October 1995 to 23 December 1996.

[M.A.N.]

Family payment: proper notice of decision

McCAUGHAN and SECRETARY TO THE DSS (No. 13128)

Decided: 24 July 1998 by L.S. Rodopoulos.

The background

McCaughan completed and returned a 'Family Payment Childcare Assistance' form to the Department on 27 February 1997. On 4 March 1997 the Department advised McCaughan that she would be paid $23.40 each fortnight for her daughter Lauren. This was based on McCaughan's estimated figure of taxable income for the financial year 1996/97 of $43,677.

On 24 October 1997 McCaughan completed another form to review her family payment. In this she provided a figure of $19,629 as her taxable income for 1996/97. On 26 October 1997 the Department advised McCaughan that her family payment would be increased to $132.60. McCaughan's circumstances had not changed. After discussions with the Department McCaughan realised she had provided an estimate of her calendar year income not financial year in the form completed in February 1997. McCaughan sought arrears of family payment. The Department refused on the basis that her request for a review of a decision was more than 13 weeks after notice of the decision given.

The issue

The issue before the AAT was whether arrears of family payment could be paid. The answer to this question depended on whether proper notice of the decision was given as to McCaughan's rate of family payment. The relevant provisions of the *Social Security Act 1991* (the Act) are ss.878, 887(3) and (4) and s.843. They are discussed in *McAllan & Secretary, Department of Social Security* (reported in this issue).

No discretion on compassionate grounds

The AAT noted that McCaughan had returned to work in February 1997 after the death of her husband in 1993 and birth of daughter Lauren; that she had suffered ill health and had mistakenly completed details of her annual salary rather than anticipated earnings between

February and June 1997. However, the AAT accepted the Department's submission that the legislation gave the decision maker no discretion to take into account factors of a compassionate nature when deciding whether or not to pay arrears.

Was a proper notice of decision given?

McCaughan submitted that the letter of 4 March 1997 should not be regarded as notice of a decision. She stated that the letter did not state that $43,677 was being used as an estimate for 1996/97 nor that s.1069-H18 of the Act was being applied in calculating her rate.

McCaughan suggested that the Department had made an error in not noticing her mistake which would have been obvious if they had compared the information on her payslips (provided with her child care assistance form) with that provided on the form itself.

The Department responded to this issue by undertaking to take these 'good customer service' issues up with the manager of the relevant office. The Department submitted that McCaughan did not challenge the decision transmitted in the letter of 4 March 1997 until November 1997. Consequently she could only be paid the higher rate from the date she sought review.

> 'The letter informs her that the family payment amount has been worked out using her estimated income, which is recorded at the back of the letter as being $43,667.00 for the family payment and $39,169.00 for the child care assistance payment. It advises that on receipt of her Taxation Notice Assessment, pursuant to s.873 of the Act she should tell the Department of the amount of taxable income on the return. Further details relating to her childcare assistance payment follow and the final paragraph invites her to:
>
> "Please read the back of this letter. It will tell you about your future fortnightly payments and the income used to work out how much we can pay you. It will also tell you about your Social Security rights and when you have to contact us".'

(Reasons, para. 11)

The AAT referred to the decision *McAllan & Secretary, Department of Social Security* (reported in this issue) which addressed the same matter. The AAT found that unlike the situation in *McAllan* the Department's letter of 4 March 1997 to McCaughan did inform her of the decision to pay her family payment for Lauren. The AAT found that the letter of 4 March 1997 did provide enough information about the figures upon which the family payment and child care assistance were calculated. In contrast to *McAllan*, where the AAT found that the Department had erred in not referring to a decision to terminate payment for one of the affected children, in McCaughan's situation the AAT found that the Department acted on mistaken information provided by McCaughen.

The AAT concluded that the letter of 4 March 1997 was a notice of a reviewable decision and that s.887(3) of the Act applied.

The AAT recognised that

> 'the Act gives no discretion to the decision-maker to rectify a mistake on the part of the applicant due to personal circumstances and an alleged "customer service" oversight on the part of the Department. Both aspects have disadvantaged payment of an entitlement and, in this Tribunal's view, constitute vital aspects of the administrative process in ensuring that recipients receive their current entitlement.'

(Reasons, para. 22)

The AAT referred to several decisions which have commented on this point: *Lythall & Secretary, Department of Social Security (1997)* AAT 12144; *Secretary, Department of Social Security & Bone-Thompson* (1993) 31 ALD 207; *Secretary, Department of Social Security & Sting* (1995) 2 (1) *SSR* 3 .

Formal decision

The AAT affirmed the decision under review.

[M.A.N.]

Family payment debt: request to be paid on an estimate; form approved by the Secretary; waiver and good faith

SECRETARY TO THE DSS and ABEYRATNE
(No. 13081)

Decided: 10 July 1998 by R.C. Gillham.

The background

Abeyratne and her family were absent from Australia between August 1995 and January 1996. In January 1996 Abeyratne sought to have family payment recommenced. When completing the appropriate form, Abeyratne estimated the family taxable income for 1995/96 would be $28,000. Their taxable income for 1994/95 was $32,656. Family payment recommenced on 1 February 1996 on the basis of the estimated income of $28,000. Their taxable income for 1995/96 was $43,306. Abeyratne advised the DSS of this taxable income in October 1996. In May 1997, the DSS notified Abeyratne that, as her family income for the financial year 1995/96 was not within 110% of the estimate of $28,000, she had been overpaid family payment and owed a debt of $2,270.90. The ARO affirmed the decision to raise and recover the debt, but the SSAT decided that the debt should be waived on the basis of administrative error on the part of the DSS.

The issues

In determining whether a debt existed and should be recovered, the AAT considered whether the form completed by Abeyratne in January 1996 constituted a request to the Secretary to assess her entitlement to family payment on the basis of the estimated income given for the tax year in which the request was made, that is 1995/96, rather than the base tax year. If there was no proper request, did the debt arise as a result of administrative error on the part of the DSS and did Abeyratne receive the payments in good faith?

The legislation

Under ss.1069-H13 and 1069-H14 of the *Social Security Act 1991* (the Act) the base tax year for a family allowance payday is the tax year that ended on 30 June in the calendar year that came immediately before the calendar year in which the payday occurs.The appropriate tax year to be taken into account for the purposes of assessing entitlement to family payment for such a payday is ordinarily the base year for that payday. However, a person can request the Secretary to make a determination under s.1069-H21 that the tax year in which the person makes the request be used as the appropriate tax year, rather than the base year, if their current year income has reduced below that of their base year. The form of the request is provided for in s.1069-H22 which states that the request must be in writing in accordance with a form approved by the Secretary.

Section 855 of the Act sets out what is to happen if estimated income is used as the basis for assessing entitlement to family payment and the estimate varies from actual taxable income. If the taxable income is found to be more than 110% of the estimate, the rate of family payment has to be recalculated on the basis of the actual income. Further, s.1223(3) of the Act states that if an amount of family payment has been paid to a person and the person's rate has been