

hand, that specific notification by Bartlett of actual receipt of AUSTUDY was required after the notice issued. Bartlett's husband submitted that having advised of the likely claim for AUSTUDY in March, the necessary action should then have been taken by the Department to follow up the outcome of the claim. He pointed to the Department's own indication in the letter of 26 March that there were cross-matching procedures in place for checks to be made.

The AAT held that the existence of data-matching programs did not relieve Bartlett of the responsibility to notify in accordance with the provisions of the Act. As to the requirements of the notice itself, the AAT held that if a claim for AUSTUDY was made after 26 March 1997 or AUSTUDY was granted after 26 March 1997, either event would need to be notified to comply with the statutory responsibility. In this instance the claim predated the notice on 26 March but the grant of AUSTUDY postdated it. The 'specified event or change of circumstance' that the applicant was required to notify was the grant of AUSTUDY. That notification did not occur until 1 September 1997 when the information was provided on the newstart claim.

Special circumstances

The AAT said that though the failure to advise the grant was not intentional it meant that the debt which arose could not be waived on any basis that it was caused solely by administrative error (s.1237A). The AAT then turned to s.1237AAD, which could be considered because the Bartletts genuinely believed that they had fulfilled the requirements under the Act by telling the Department about the claim for AUSTUDY.

The AAT looked at the relevant authorities dealing with the issue of 'special circumstances' including *Beadle and Director General of Social Services* (1984) 20 SSR 210, *Director General of Social Services v Hales* (1983) 13 SSR 136, and *Secretary Department of Social Security v Coralie Hales* (1998) 3(3) SSR 37. The Tribunal found that financial hardship was present and that the real health difficulties of the applicant in regard to trauma associated with the mastectomy operation, her dependence on her husband during that year, and the psychiatric illness of her husband were matters relevant to both 1237AAD(a) and (b). These were matters 'unusual, uncommon and, in all probability, exceptional even among recipients of social security benefits': Reasons: para. 48.

The Tribunal further found that for reasons of financial hardship it was more

appropriate to waive than write off the debt.

Formal decision

The AAT set aside the decision under review and substituted the decision that the whole of the debt should be waived.

[M.C.]

Family payment: notifiable event

SECRETARY TO THE DFaCS and
DAY
(No. 990009)

Decided: 12 January 1999 by D.P. Breen.

Background

Day had for some years been receiving family payment and child care allowance. Until August 1997 she worked as an administrative officer in the Department of Defence. Due to her taking maternity leave during the 1995/96 financial year, Day and her husband's combined income for that year was only \$31,665.

'During 1997, Day was paid family payment and child care allowance on the basis of a 1996/1997 estimated income of \$57,947 when in fact she ought to have been paid on the basis of their actual 1995/96 income of \$31,665. This was due to the fact that whilst their combined income in the 1996/97 financial year was greater than in the 1995/96 financial year, the rate of payment can only be changed when a notifiable event has occurred, and returning to work after maternity leave is not classified as a notifiable event.

... She received payment of arrears ...'

(Reasons, paras. 6 & 7)

However, following this, the Department re-assessed Day's entitlement, on the basis that she had changed jobs — the change in jobs being a transfer at the same level from Department of Defence to Centrelink. The SSAT decided that the inter-departmental transfer was not a notifiable event for the purposes of the Act.

The issue

Day should have been paid on the basis of the 1997/98 estimated income only if there had been a 'notifiable event'. The question for the AAT, therefore, was whether a transfer from one Department to another was a notifiable event.

The legislation

The AAT looked at s.872(1) of the Act, which requires a person to give notice of a 'specified' event.

The discussion

The AAT held that while the transfer involved some alteration of duties and a different working environment, Day's salary was identical and she maintained the same public service ranking and employee number. She continued to work for the same employer, the Commonwealth of Australia.

The AAT referred to *Secretary to the DSS and Hoy* 1998, unreported, No.13078, where it was held that:

'[T]he expression 'change jobs' in the notice, strictly construed, is not synonymous with the expression 'changed employment circumstances' but instead, has a narrower meaning.'

Formal decision

The AAT affirmed the SSAT decision.

[K.deH.]

Family payment cancelled while overseas, wrongful cancellation

FADEL and SECRETARY TO THE
DSS
(No. 13530)

Decided: 11 December 1998 by R.P. Handley.

Fadel sought arrears of Family Payment (FP) from 4 August 1994 to 2 July 1997. An authorised review officer (ARO) and the SSAT decided that she had no entitlement to arrears of FP. Fadel sought review of this decision by the AAT.

On 8 August 1994, Fadel notified the DSS that she, her husband, and her children were travelling to Lebanon for family reasons. Fadel could not read or write English. She signed a form which was completed by a DSS employee, nominating her older sister's address in Lakemba as her address for correspondence whilst absent from Australia. On 11 August 1994, the DSS wrote to her sister's address notifying her that her FP was cancelled. Her sister could not read or write English. Fadel's niece opened the letter, read it and decided it was not important. It was placed with Fadel's bankbook and given to her when she returned to Australia.

Fadel told the AAT she did not understand the significance of the form nominating her sister's address as her address

for correspondence. She said she trusted the DSS officer when he told her that her FP would continue.

Fadel returned to Australia on 1 July 1997 and lodged a claim for FP. She requested that FP be backpaid from 9 August 1994. An ARO decided that arrears could not be paid, as she had not sought review of the cancellation of family payment within 13 weeks of the cancellation on 11 August 1994.

The DSS conceded that the decision to cancel her FP was incorrect, but argued that arrears could not be paid because she did not seek review of the decision within 13 weeks. The main issue for determination was whether proper notice of the cancellation was given. The DSS submitted that appropriate notice was given, as a letter was sent to the address Fadel had nominated for correspondence during her absence from Australia.

The legislation

Section 887(3) of the *Social Security Act 1991* provides that where a recipient of FP seeks review of a decision about their entitlement more than 13 weeks after the decision has been made and notified, then any positive determination shall only take effect from the date he or she sought a review. Section 887(4) deals with the situation where a decision is made about FP and no notice is given to the recipient. If the decision is overturned on review, this will take effect as from the date of the original decision.

The AAT accepted Fadel's evidence that she did not complete the departmental form nominating her sister's address as her address for correspondence. The AAT accepted that she merely signed a form when it was completed by a DSS employee. The AAT found that the officer had made an incorrect assumption that Fadel wanted all correspondence to be sent to that address. Fadel had given her address in Lebanon believing that this was where all correspondence would be sent. She simply wished her sister to have access to her bank account

should Fadel require money to be sent over to Lebanon.

The AAT found there was a failure of communication and that the responsibility should lie with the DSS. The AAT concluded that the notice of cancellation was sent to an address selected by the DSS without Fadel realising what had occurred. The notice was not sent to an address nominated by Fadel. Hence there was no proper notice of cancellation and s.887(3) did not apply. Had the letter been sent on to Fadel in Lebanon, then she would have had notice of the cancellation.

The AAT referred to *Secretary, DSS v O'Connell* (1992) 28 ALD 626 which states 'an interpretation of the Act leading to a loss of allowance by qualified people should be adopted only in the clearest of cases'.

Fadel's FP was incorrectly cancelled without proper notice.

The decision

The decision was set aside. Fadel was entitled to arrears of FP from 4 August 1994 to 2 July 1997.

[H.B.]

Family payment: provisional commencement date

MATTOCK and SECRETARY TO
THE DFaCS
(No. 13555)

Decided: 24 November 1998 by E.K. Christie.

The facts

Mattock's child was born on 16 September 1997 and she lodged a claim for family payment on 18 February 1998, 22 weeks

later. Mattock said that her claim was lodged at this late date because there were surgical complications after the birth, she suffered from postnatal depression, she had to make a number of visits to her terminally ill mother in hospital, and the fact that she lived in a rural area without public transport. She was also confused about the completion of the form and her dyslexic husband could not help her.

The legislation

The legislation relevant to the date on which family payment can commence to be paid is set out in ss.842, 843 and 844 as follows:

'842. Subject to sections 846 and 847, family payment is not payable to a person before the provisional commencement day (identified under section 843).

843.(1) Subject to this section and to sections 844, 844A and 845, the provisional commencement day is the day on which the person or approved care organisation claims family payment.

...

844. If:

- (a) a person has a dependent child; and
- (b) the person lodges a claim for family payment in respect of the dependent child within 13 weeks of the birth of the dependent child;

the person's provisional commencement day is the day on which the dependent child is born.'

No discretion to backdate family payment

The AAT said that it had no alternative but to apply the legislation, and there was no discretion to vary the 'provisional commencement date', although it acknowledged that Mattock had plausible reasons for late lodgement of her claim. The AAT suggested that legislative reform would be appropriate, giving the Department the discretion to back date the provisional commencement date for the birth of a child.

Formal decision

The decision under review was affirmed.

[A.T.]