

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.]