

3 months. Subsection 80(2) of the *Social Security Act 1991* (the Act) provides that if notice of a decision is given and the person applies within 3 months for a review of the decision, then, if a favourable determination is made as a result of that review, it takes effect on the day on which the previous determination took effect. Subsection 80(3), however, provides that if notice of a decision is given and the person applies for a review more than 3 months later, then a favourable determination takes effect on the day on which the person sought the review.

#### Notification of a decision

The AAT found that:

'... the Department set out to assess Mrs Wills for an age pension on the basis that she was a non-homeowner, and I am satisfied that was the decision which had been made in the process of assessing Mrs Wills' eligibility for a pension. The notification of 27 April that was sent to Mrs Wills ... was not ... notification of a decision but rather a computer generated notification of a continued application of the former coding to the rate calculator. This notification did not involve any consideration by a Departmental officer as to whether or not the advice generated correctly notified a decision within the terms of the Act.'

(Reasons, para. 10)

The AAT held that the date of effect was determined by s.80(4). This provides that where no notice of a decision is given and a person applies for review of the decision, a favourable determination takes effect on the day on which the previous decision took effect. As the DSS had not given Mrs Wills notification of the decision to treat her as a non-homeowner, the rate of pension could be increased retrospectively from the date it was incorrectly reduced.

#### Formal decision

The AAT set aside the decision under review and substituted a new decision that Mrs Wills was entitled to be paid age pension as a non-homeowner with effect from 16 May 1996.

[K.deH.]

## Family payment: arrears following cancellation

SECRETARY TO THE DSS and  
HARTMANN  
(No. 13323)

Decided: 28 September 1998 by B. Gibbs.

#### Background

Hartmann was receiving family payment (FP) for 2 children when a review form was sent to her last known address on 2 January 1992. She had moved in June 1991 but had not informed the DSS. She did not receive the form and it was not returned to the DSS. FP was suspended from 9 January 1992, and on 14 January 1993 the DSS sent to Hartmann a notice advising that it had been cancelled. She did not receive the notice.

It was not until mid 1996 that her husband noticed that bank deposits of FP had stopped in 1992. On 19 November 1996 a new claim for FP was lodged and it was granted from 21 November 1996. A request made on 25 February 1997 for arrears from 1992 was refused. The SSAT decided that arrears were payable from the date of suspension, and the DSS sought a review by the AAT.

#### The law

It was apparently not in dispute that under the present provisions of the *Social Security Act 1991* (the Act), payment of FP could not resume from a date before Hartmann sought a review of her entitlement on 25 February 1997.

The AAT noted, however, that the facts were similar to those in *Secretary to the DSS v Sevel & O'Connell* (1991) 71 SSR 1029. In that case the Full Federal Court had agreed that once the decision to cancel FP was set aside, the entitlement which had existed until cancellation would continue until some other event or act in law terminated that entitlement. This meant that full arrears were payable, despite provisions in the *Social Security Act 1947* similar to s.887(3) of the 1991 Act which is in the following terms:

'If:

- (a) a decision (the "previous decision") is made in relation to a family allowance; and
- (b) a notice is given to the recipient advising the recipient of the making of the previous decision; and
- (c) the recipient applies to the Secretary under section 1240, more than 13 weeks after the notice is given, for review of the previous decision; and

- (d) a favourable determination is made as a result of the application for review; and
- (e) subsections (6), (7) and (8) do not apply to the determination;

the determination takes effect on the day on which the recipient sought the review.'

The AAT noted that two legislative changes had been made in response to *Sevel & O'Connell*. The first was the insertion of s.1302A, with effect from 24 December 1992, which deemed a notice of a decision to have been given to a person if it had been posted to the address of the person last known to the DSS.

The second change was to insert s.1243A of the Act with effect from 24 December 1993. The relevant parts are:

'1243A.(1) If:

- (a) the Secretary makes a determination (the "first determination") that:
  - (i) a social security payment is granted or is payable to a person; or
  - (ii) a social security payment is payable at a particular rate to the person; and
- (b) the Secretary makes a determination (the "second determination"):
  - (i) to cancel the social security payment; or
  - (ii) to reduce the rate at which the social security payment is payable; and
- (c) notice of the second determination is given to the person; and
- (d) the person applies under s.1240 for review of the second determination; and
- (e) the application is made more than 13 weeks after the notice is given; and
- (f) a decision (the "review decision") is made by the Secretary, the CEO, an authorised review officer, the Social Security Appeals Tribunal or the Administrative Appeals Tribunal; and
- (g) the review decision, or the effect of the review decision, is:
  - (i) to set aside the second determination; or
  - (ii) to affirm a decision setting aside the second determination;

the following provisions have effect:

- (h) the second determination does not become void from the time when it was made;
- (i) the mere setting aside of the second determination does not of itself revive the first determination.

1243A.(2) In this section, a person is taken to have applied for review of a determination (the "primary determination") if:

- (a) the person applies for review of another determination or decision; and
- (b) an examination of the primary determination is necessary to resolve the issues raised by the review of that other determination or decision.

Note 3: This section does not apply to a determination by the Secretary to suspend a social security payment. If the Secretary's determination to suspend a social security payment is set aside on review, the recipient is placed in the position that he or she would have occupied if

the determination to suspend had not been made.'

### Which law applied?

The AAT held that as s.1302A was inserted before the cancellation notice was sent to Hartmann, the section applied to the notice so that it was validly served.

It also held that the effect of s.1243A was to remove any accrued rights to have the cancellation decision reviewed in accordance with the law prior to 23 December 1994, that is the law applied in *Sevel & O'Connell*. This meant s.1243A applied in this case.

It concluded that the combined effect of ss.1302A and 1243A prevented payment of arrears to Hartmann.

### Formal decision

The AAT set aside the SSAT decision and decided that Mrs Hartmann was not entitled to be paid FP prior to 21 November 1996, the date she lodged a claim for FP.

[K.deH.]

[Contributor's Note: It would seem the AAT did not consider setting aside the 1992 suspension decision which was possible under s.883. Note 3 to s.1243A suggests that the effect is different from setting aside a cancellation decision. Also, there was no mention of a notice of the suspension decision having been sent to Mrs Hartmann, and it was made long before s.1302A was inserted, so s.887(3) would have played no role.]

## Payment of arrears: whether notice given of decision

SECRETARY TO THE DSS and AUSTIN  
(No. 13420)

Decided: 30 October 1998 by J.A. Kiosoglous.

### Background

Mr and Mrs Austin were in receipt of newstart allowance and partner allowance respectively. Over a number of years they had made enquiries with the DSS about their rate of payment. Ultimately these enquiries led to a recalculation of their rate of payment, but in so doing a critical error was made, to the Austin's disadvantage. Rent being received fortnightly was coded as received weekly. The DSS acknowledged the error was theirs. It was conceded that the Austins were underpaid benefits to which they were fully entitled over a period of

years directly as a result of this error, but the DSS said that there was no provision under the legislation that would allow the arrears now to be paid to them.

The SSAT, however, decided that arrears were payable to the Austins. The SSAT said that no notice of a decision had been given to the Austins at the time they queried their rate of payment, nor till some 2 years later. When letters were then issued, the SSAT said these 'conveyed the bare facts related to actual changes in the rate'. The SSAT said they were defective as notices in that they did not give the detail of the basis on which the rate was assessed, nor advise of appeal rights and time limits.

The DSS sought review of the SSAT's decision.

### The issue

The essential issue for the AAT was whether arrears were payable from the date at which the rates of payment were incorrectly calculated. The AAT expressed this issue as being dependent on when decisions regarding rates of payment were notified to the Austins and on consideration of what constitutes sufficient notice of a decision under the *Social Security Act 1991* (the Act).

### The legislation

The Act provides, in regard to each of the different payment types, that different consequences will flow when review is sought where a decision has been notified to a person as against where no notice of the decision has been given. Essentially, where a person has received notice of a decision, they have 3 months in which to seek review in order to have the benefit of a corrected decision backdated to the earliest possible time. Where review of a notified decision is not sought within 3 months, the date of effect of a corrected decision is the date on which review was sought. However, where a decision has not been notified, a person can seek review at any time and have the benefit of backdating.

The provisions that applied in this regard to Austin's newstart allowance are found at s.660K of the Act as follows:

'660K.(1) The day on which a determination under section 660G or 660J (in this section called the "favourable determination") takes effect is worked out in accordance with this section.

660K.(2) If:

(a) a decision (in this subsection called the "previous decision") is made in relation to a newstart allowance; and

(b) a notice is given to the person to whom the allowance is payable advising the person of the making of the previous decision; and

(c) the person applies to the Secretary under section 1240, within 3 months after the notice is given, for review of the previous decision; and

(d) a favourable determination is made as a result of the application for review;

the determination takes effect on the day on which the previous decision took effect.

660K.(3) If:

(a) a decision (in this subsection called the "previous decision") is made in relation to a newstart allowance; and

(b) a notice is given to the person to whom the allowance is payable advising the person of the making of the previous decision; and

(c) the person applies to the Secretary under section 1240, more than 3 months after the notice is given, for review of the previous decision; and

(d) a favourable determination is made as a result of the application for review;

the determination takes effect on the day on which the person sought the review.

660K.(4) If:

(a) a decision (in this subsection called the "previous decision") is made in relation to a newstart allowance; and

(b) no notice is given to the person to whom the allowance is payable advising the person of the making of the previous decision; and

(c) the person applies to the Secretary under section 1240, for review of the previous decision; and

(d) a favourable determination is made as a result of the application for review;

the determination takes effect on the day on which the previous decision took effect.'

Identical provisions applied for partner allowance.

### Notice of a decision

The resolution of the issues in this matter rested on consideration of what constitutes proper notice of a decision. On this question there were conflicting authorities in AAT decisions, notably between the approach taken in *McAllan and Secretary to the DSS* (1998) 3 SSR 62 and that taken in *Secretary to the DSS and Sting* (1995) 39 ALD 721.

The former decision took the view that proper notice of the making of a decision must encompass giving sufficient information to the recipient to enable them to understand the main reason for the decision and sufficient so that a reasonable person in similar circumstances would be in a position to decide whether or not to exercise rights of review:

"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. 18, citing *McAllan* para. 26)