

The Tribunal is satisfied that special reasons exist in this case by reason of the lack of financial resources Mrs Cocks brings to the marriage, the lack of financial prospects available to her, the lack of financial benefit experienced by Mr Cocks when he is living with his wife and child in the Philippines and the fact that the present situation is — compared to the residence of Mr Cocks' wife and child in Australia — a benefit rather than dis-benefit to the Australian tax-paying community.

(Reasons, para. 34)

Formal decision

The AAT set aside the decision under review and decided that Cocks should, for a special reason, not be treated as a member of a couple.

[K.deH.]

Disability support pension: pre-departure certificate — retrospective effect

KOSTOMLASKY and SECRETARY TO THE DFaCS
(No. 2000/10400)

Decided: on 14 May 2001 by M.D. Allen, Senior Member.

The issue

The principal issue before the AAT was whether, having left Australia without a pre-departure certificate, such a certificate could be issued retrospectively by Centrelink.

Background

Kostomlatsky was in receipt of disability support pension (DSP) when he decided to travel overseas to visit his mother. He advised Centrelink of his intended travel but, as his intention was to be absent from Australia only temporarily and for less than six months, no pre-departure certificate was issued to him. His health deteriorated whilst overseas, and his DSP was cancelled in April 1992 after he had been absent from Australia for six months. It was not disputed that Kostomlatsky had advised Centrelink of his intended travel, and that no pre-departure certificate had been issued.

The law

The *Social Security Act 1991* (the Act) provides by s.1218 that where a person leaves Australia and has not received a pre-departure certificate prior to depart-

ure, then after six months absence the person ceases to be qualified (inter alia) for DSP. Under s.1219 of the Act where a recipient of DSP notifies Centrelink of a proposed departure from Australia, then the person **must** be given a certificate that '... acknowledges that the person has notified the proposed departure ...' (emphasis added). It was accepted by the respondent at the AAT that its practice had been not to issue such certificates where the absence was expected to be temporary and for less than six months, as was agreed to be the case with Kostomlatsky.

Discussion

The Tribunal concluded that the respondent was seeking to uphold the cancellation of DSP because of '... the lack of a Departure Certificate brought about by the [its] own breach of the law' (through failure to issue a pre-departure certificate as required to do by s.1219 of the Act), a position the Tribunal described as 'unconscionable'.

Nevertheless, the Tribunal concluded that s.1218 of the Act was mandatory, self-executing, and absolute in its terms, and that s.1219 did not permit the issuing of a certificate retrospectively. Even though the Tribunal 'stood in the shoes' of the original decision maker, and could therefore issue a certificate, any such certificate could only operate from the date of the Tribunal's decision.

The Tribunal further noted the provisions of s.179(4) of the *Social Security (Administration) Act 1999*, which provides that, if the AAT sets aside a decision of the SSAT and '... is satisfied that an event that did not occur would have occurred if the decision had not been made ... [then] the Secretary may... direct that the event is to be taken, for the purposes of the social security law, to have occurred'. That is, this section deems an event to have occurred if it would have occurred but for the (now) set aside decision. However, the Tribunal concluded that s.179(4) addressed the opposite circumstances to those faced by Kostomlatsky, whose situation arose because of an event which should have occurred (the issuing of a pre-departure certificate) but did not, and which pre-dated the decision in dispute (to cancel the DSP).

The Tribunal noted that it remained open for Kostomlatsky, subject to an application to extend time, to seek review of the decision not to issue him a pre-departure certificate which would, once the required appeal process was

exhausted, be a decision that could itself be considered by the Tribunal.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]

Sole parent pension: lump sum compensation; disregard of part of lump sum

KIRKBRIGHT and SECRETARY TO THE DFaCS
(No. 2001/0480)

Decided: 4 June 2001 by W.H.Eyre, Senior Member.

The issue

Kirkbright sought review of a decision to recover an amount of Sole Parent Pension (SPP) due to the imposition of a lump sum preclusion period, arguing that there were 'special circumstances' in his case.

Background

The AAT on 22 March 2000 had affirmed a decision of the Social Security Appeals Tribunal in respect of the recovery of an amount of SPP due to the imposition of a lump sum preclusion period. By order made on 21 December 2000, the Federal Court remitted this matter to the Tribunal for further consideration according to law (*Kirkbright v Secretary, Department of Family and Community Services* (2000) 32 AAR 120).

Kirkbright, who has two children, separated in 1985 and from 1986 to 1997 received SPP from time to time and in varying amounts, as he worked in seasonal and casual employment and when his child care responsibilities would allow. From May or June 1992 he worked casually as a labourer with Ausco, and had hoped to be offered full-time permanent work. In July 1993 he was injured in the course of his employment, in which he received knee, neck and back injuries and suffered psychological difficulties in consequence. In 1999 Kirkbright was awarded a compensation payment of \$121,463 including \$70,000 for past loss of earning capacity and \$5000 for future such loss, the latter described as 'nominal' in the award judgment. The award for loss of past earning