> 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

KOSTOMLATSKY 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 departure, 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

capacity represented an allowance of about $14,000 a year from the date of the accident to the date of the judgment.

The compensation preclusion period

Notwithstanding Kirkbright's argument that, as he could but for his injury have worked for some periods after the accident occurred, the compensation payment should be treated as more akin to 'periodic' payments, the Tribunal found that the amount awarded was clearly a lump sum compensation payment. As the amount was in part '... in respect of lost earnings or lost capacity to earn' (*Social Security Act 1991*, s.17(2)), a preclusion period applied (s.1165(1A)), and an overpayment of SPP existed (s.1166). The Tribunal found that the preclusion period and the amount of the overpayment had been correctly calculated.

Special circumstances

The *Social Security Act 1991* (the Act) by s.1184 provides that the whole or part of a compensation payment may be treated as not having been made, if it is considered 'appropriate to do so in the special circumstances of the case.' The Tribunal noted the seminal definition of 'special circumstances' in *Beadle and Director-General of Social Security* (1984) 6 ALD 1 that to be so characterised such circumstances need to be 'unusual, uncommon or exceptional'. It further noted the comments in *Secretary, Department of Social Security v Hulls* (1991) 13 AAR 414 that such circumstances could occur where '... strict enforcement of the liability created by the section would be unjust, unreasonable or otherwise inappropriate'.

The Tribunal noted several particular circumstances in Kirkbright's case. It accepted that he continued to suffer from several physical conditions, a consequence of which was an inability to work. Although this in turn caused financial problems and personal anxiety, the Tribunal concluded that his ill-health did not constitute special circumstances. It reached a similar view in relation to his financial situation, noting that his position was better than that of many other social security applicants.

The Tribunal then considered Kirkbright's relative position had the compensation amount been received as income from employment over the same period, and concluded that assuming earnings of about $14,000 a year he would have retained some entitlement to SPP and so 'would have been very much better off had the amount received as compensation for lost earning capacity been received as earnings'. The Tribunal accepted that it was not appropriate to adopt the approach of maximising the payments available to a person injured in compensable circumstances. Nevertheless, it agreed that:

> ... it is appropriate, if faced with alleged unfairness of the strict application of the law, to look at the extent to which the individual is financially worse off than he or she would have been had more general principles applied.

(Reasons, para.58)

Where there is a 'large variation' between the two amounts, the Tribunal concluded, there may be resultant unfairness or injustice such that special circumstances exist. The Tribunal concluded that, in Kirkbright's situation, such a variation had been demonstrated and that special circumstances did in consequence exist.

Formal decision

The Tribunal determined that it was appropriate in the special circumstances of the case to treat the $5000 awarded in respect of loss of future earnings as not having been made.

[P.A.S.]

Family allowance: notification; administrative error

McDONALD AND SECRETARY DFaCS (No. 2001/0589)

Decided: 27 June 2001 by J.T.C. Brassil.

Background

McDonald received family allowance in 1999 and 2000. She provided an estimate of $64,400 at claim and was paid on the basis of this.

McDonald and her husband attended Centrelink on 14 September 1999. The interview was in relation to parenting payment received by McDonald. They took with them various financial documents in relation to their income.

Notices were sent by Centrelink to McDonald on 6 and 24 December 1999. Both notices required McDonald to advise Centrelink if her combined income in 1998/99 exceeded $67,134.

Following a data match in March 2000, McDonald's combined income was found to total $69,935.

A debt of $ 215.85 was raised for payments received between 1 January and 26 April 2000.

McDonald appealed to the SSAT which affirmed the decision.

Evidence

McDonald told the Tribunal that when they attended Centrelink for an interview in September 1999 the notices of assessment for 1998/99 were provided to the Centrelink officer.

McDonald also told the Tribunal that they did not receive letters dated 6 and 24 December. There had only been one prior case of letters not being received but a recent letter promised to be sent by Centrelink had not arrived.

McDonald went on to say that even if the letters had been received, the information requested had already been provided to Centrelink.

Submissions

The submission of McDonald was that there was no evidence that the December letters had been sent by Centrelink and they had certainly not been received. It was further submitted that the information requested by Centrelink was already on the file, that Centrelink had handled the whole matter poorly and that they should not be penalised because of this.

The Department submitted that the two December letters had been sent and that McDonald had not responded and provided information about their 1998/99 financial year income.

Section 29(1) of the *Acts Interpretation Act 1901* provided that the notice is given even if it is not received and consequently there is a debt. It was further submitted that there was no documentary or computer evidence confirming that the 1998/99 taxation information had been lodged as suggested by McDonald.

The law

The debt

The first issue addressed by the AAT was whether there was a debt for the period.

The Tribunal concluded that McDonald was a credible witness and that income details were provided to Centrelink in September 1999. The Tribunal commented that it had been frustrated in that the Centrelink officer who conducted the interview at that time had not been presented to give evidence to the Tribunal.

In relation to the letters sent by Centrelink, the Tribunal referred to