

any kind'. The Tribunal accepted that the best and safest way for Watson to be paid was by way of direct debit to a bank account. The Tribunal was satisfied that the Department had acted reasonably in rejecting Watson's application. The Tribunal found that the Department had made no error of any kind in the consideration of Watson's application.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Newstart allowance: information required to assess payability

DOS SANTOS and SECRETARY TO THE DFaCS
(No. 2003/432)

Decided: 13 May 2003 by M. Allen.

Background

Dos Santos had been intermittently unemployed over several years and received social security benefits during several of the periods when he was not working. In September 2002 Dos Santos made an application for newstart allowance (NSA) and completed relevant forms. He also provided details of his current financial situation. The Centrelink delegate wanted information from Dos Santos about how he had supported himself in the previous three-month period when he had not been working. The delegate asked for access to bank statements to obtain information about his bank accounts. At that interview Dos Santos signed a statement refusing to provide Centrelink with any information regarding the time before he made a claim for a benefit. Dos Santos understood that his claim for NSA could not be assessed without the information. Dos Santos sought review of the rejection of his claim for NSA (in advance of the decision to reject). The delegate rejected Dos Santos' application in the absence of the information sought, relying on s.67(2) and s.67(3) of the *Social Security Administration Act 1999* (the Administration Act). At the Tribunal hearing Dos Santos conceded that a form SS241, requiring information, must have been received by him at the 17 September 2002 interview.

The legislation

Section 37(1) provides that the Secretary must grant the claim if the Secretary is satisfied that the claimant is both qualified for the payment and that the payment is payable. Section 37(2) deals specifically with NSA claims. The Secretary must grant a claim for NSA if the Secretary is satisfied that the claimant is both qualified for the payment and that the NSA would be payable apart from five specific periods.

Section 63 of the Administration Act provides that if the Secretary is of the opinion that a person who has made a claim for NSA should give information to the Secretary then the Secretary can notify the person that he or she is required, within a specified time, to give that information: (s.66(3)(d) and (h)). If the Secretary notifies such a person and the request is reasonable and the person does not comply, then NSA is not payable: (s.63(5)). The notification may be made by sending a written notification by prepaid post to the last known postal address of the person — but the Secretary may also give the notification in any other way: (s.63(8)). The Secretary may determine that a person who does not receive NSA because of a failure to comply with such a notification can receive that allowance if the Secretary is satisfied that the person had a reasonable excuse for not complying with the requirement: (s.63(9)). The notification to the person must inform the person of the effect of s.63: (s.63(11)).

The submissions

Dos Santos submitted that Centrelink already knew a great deal about his circumstances at the time of his application because of his past dealings with it; that he provided all that he usually provided and that the forms appeared to require; and that he did not see how information regarding his bank statements for the previous three months would be relevant to any assessment of his benefit. He believed such a request was an infringement on his privacy.

The Department conceded that Dos Santos was qualified for NSA but the question was whether any payments were payable to him. Section 37(2) required the delegate to make decisions about whether the payments of NSA to Dos Santos were payable at all and whether any of the five specified or other factors in s.37 were applicable and would affect the rate of payment or the date of its commencement.

The Department submitted that information regarding prior financial transactions is relevant in considering

an NSA application. For example, it is relevant to any consideration of whether a liquid asset waiting period (under s.598 of the *Social Security Act 1991* (the Act)) should apply and, if so, for how long; and any other regular or intermittent income that might be disclosed needs to be taken into account when making the fortnightly calculations about how much benefit an applicant is entitled to receive (under module G of s.1068 of the Act).

Additionally the Department argued that if the Secretary cannot determine with certainty the correct rate of payment of a benefit then the Secretary is entitled to decide that the payment rate is nil. The applicant has at least a *prima facie* obligation to satisfy the Secretary that there is a reasonable possibility of entitlement to a benefit. In Dos Santos' case the Secretary (or the delegate) could not properly determine the claim and therefore the claim was properly refused.

Was the request for information valid?

The Tribunal found that Dos Santos was asked orally for certain information concerning his bank statements and it was explained why the information was needed. Dos Santos refused to provide the information, despite knowing that it was needed for an assessment of his claim and that a failure to provide the information would result in rejection of the claim. The request was made in writing.

The Tribunal found that the formal requirements of s.63 were complied with, except that the notification given to Dos Santos may not have required the information within a sufficiently 'specified time' as required by s.63(3). The document contained in the printed part a statement that 'failure to provide the information requested within 14 days after this notice is given' may result in various consequences to the recipient of the notice. However, it had stamped on it a notice stating 'please return by 24 September 2002'. To that extent, the document was contradictory in relation to the time within which Dos Santos was to provide the information sought, although it was quite clear that he was in no doubt that he had to provide the information by 24 September 2002.

Was the decision to reject the claim for NSA the correct or preferable decision?

The Tribunal considered that in order to make the correct and preferable decision it did not have to decide whether the

written notification given to Dos Santos was an effective legal requirement under s.63 of the Administration Act.

If the notice was effective under s.63, as Dos Santos consciously failed to comply with the requirement in full knowledge of what the consequences would be, it was correct to refuse the application because the request was a reasonable one and s.63(5) provides that in such circumstances the NSA was not payable.

Alternatively, the Tribunal considered that if the request was not a legally effective request under s.63, it remained the case that Dos Santos knew explicitly that Centrelink required further information in order to make an assessment of his claim and that he consciously declined to provide the information. The delegate could not be satisfied that Dos Santos was both qualified for the benefit claimed and that the benefit was payable to him in the circumstances.

If the delegate was left in that state of uncertainty then it could not be said that Mr Dos Santos had provided all the information needed to establish his entitlement to NSA and the correct or preferable decision was to reject the application: see *MacDonald and Director General of Social Security* (1984) 6 ALD 6.

(Reasons, para. 27)

The Tribunal also referred to the decision of *Glazebrook and Secretary, Department of Social Security* (1996) 41 ALD 478.

The Tribunal concluded that, whether or not the request for information was an effective request under s.63 of the Administration Act, the correct or preferable decision was that the Tribunal could not be satisfied that Dos Santos was eligible to receive NSA.

Decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Compensation: parenting payment; assessment of partner's periodic compensation payments

NICHOLLS and SECRETARY TO THE DFaCS
(No. 2003/341)

Decided: 14 April 2003 by S. Webb.

Background

Nicholls was in receipt of parenting payment (PP) when her partner was injured at work on 19 February 1997. At the time, he was not qualified for, or receiving, a 'compensation-affected payment'. He was made redundant on 22 October 1997 and received newstart allowance (NSA) until 13 April 1998. He received periodic compensation payments from 14 April 1998 to March 2002 when his periodic payments were commuted to a lump sum. During that period, he was partially incapacitated for work and undertook light farm duties on a casual basis. The periodic compensation payments were assessed as ordinary income for the purposes of striking Nicholls' rate of PP.

Legislative changes took effect from 20 September 2001 and on 11 October 2001, Nicholls was advised by Centrelink that the computer system was encountering problems and to avoid her PP being cancelled in error, it was necessary for her partner to lodge, and have rejected, a claim for NSA as a 'work around'. Nicholls' partner lodged a claim on 22 October 2001 which was promptly rejected given his periodic compensation payments of \$473.50 per week precluded any entitlement.

Nicholls lodged a fresh claim for PP on 22 October 2001 and was verbally advised she would be paid PP. She received a telephone call the next day informing her she would not in fact be paid and was offered an apology. Nicholls received a letter dated 22 October 2001 notifying her that her PP had been cancelled because her combined income exceeded the allowable limit. Centrelink decided that from 20 September 2001, the legislative amendments had the effect of removing the dollar for dollar exemption, and as a consequence, Nicholls was no longer entitled to PP.

The law

Section 1173 of the *Social Security Act 1991* (the Act) deals with the effect of

periodic compensation payments on a person's compensation-affected payment. In the case of Nicholls' partner, s.1173 required entitlement to NSA to be assessed on the basis that his compensation payments reduced his entitlement on a dollar for dollar basis.

More relevantly, s.1174 deals with the effect of periodic compensation payments on the rate of a person's partner's compensation affected payment. Section 1174(1) provides as follows:

(1) If:

(a) a person receives periodic compensation payments; and

(b) the person is a member of a couple; and

(c) the person was not, at the time of the event that gave rise to the entitlement of the person to the compensation, qualified for, and receiving, a compensation affected payment; and

(d) the person is qualified for a compensation affected payment in relation to a day or days in the periodic payments period but, solely because of the operation of this Part, does not, or would not, receive the payment; and

(e) the person's partner receives or claims a compensation affected payment in relation to a day or days in the period payments period;

...

The issues

The central issue for the Tribunal was whether the requirements of s.1174 of the Act had been satisfied, and in particular, s.1174(1)(d). If that was so, Nicholls was no longer entitled to have the compensation payments treated as ordinary income. In the event the Tribunal was satisfied s.1174 was enlivened, consideration needed to turn to s.1184K and whether there were any special circumstances to disregard some or all of the compensation payments.

Discussion

The Tribunal was satisfied that ss.1174(1)(a), (b), (c) and (e) were satisfied and that the matter therefore turned on the proper construction of paragraph (d).

The Department argued s.1174 applied because Nicholls' partner had claimed NSA and his rate was reduced to 'nil' pursuant to s.1173. Furthermore, paragraph (d) would still have applied even if Nicholls' partner had not claimed NSA because he would not have been entitled to receive payment due to the operation of Part 3.14 of the Act, which included s.1173.

The Tribunal had regard to the explanatory material placed before