

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

Parliament on the introduction of the changes and could find no support for the Department's approach. The Tribunal expressed the view that it was not correct to assume that paragraph (d) was satisfied merely because Nicholls' partner lodged a claim for a compensation-affected payment and the rate of his payment was reduced to nil by operation of s.1173. The Tribunal observed that in contrast to s.1174(1)(d), there was nothing in s.1173 which required the decision maker to establish the claimant was actually qualified for the compensation-affected payment. The Tribunal found there to be no evidence before it that Centrelink had turned its mind to whether Nicholls' partner was qualified for NSA and noted that it appeared, on its face and on the evidence before it, that the NSA claim exercise was conducted solely for the purpose of calculating Nicholls' PP rate. Whilst not being satisfied there was sufficient evidence before it to make a finding about whether Centrelink actually properly contemplated the NSA qualification requirements, the Tribunal accepted Nicholls' submission, conceded by the Department, that Nicholls' partner was not qualified for a compensation-affected payment during the periodic payments period. It followed that s.1174 had no operative effect for the purposes of calculating Nicholls' rate of PP.

Finally, the Tribunal noted Nicholls' submission that Centrelink's interpretation of the legislation was unfair and discriminatory and that misleading advice had been provided. The Tribunal did not accept that Centrelink's incorrect interpretation of s.1174 was unexceptional and found Centrelink's error caused the cancellation of Nicholls' PP. Centrelink's advice caused Nicholls' partner to lodge a claim for NSA which he would not have otherwise lodged. The Tribunal found that the lodgement of a claim for NSA may have led to a finding that Nicholls' partner was qualified for a compensation-affected payment, potentially affecting Nicholls' PP rate in accordance with s.1174. The Tribunal held that Centrelink's error, albeit deriving from erroneous policy advice, was exceptional and resulted in consequences that were unfair, unintended and unjust. The Tribunal found that, were it necessary, it would have found special circumstances existed within the meaning of s.1184K.

#### Formal decision

The AAT set aside the decision under review and directed Nicholls' PP entitle-

ment be recalculated from 20 September 2001 on the basis that her partner's periodic compensation payments be treated as ordinary income.

[S.L.]



## **Compensation: special circumstances; loss of earnings after retirement age**

**CRITTENDEN and SECRETARY  
TO THE DFaCS  
(No. 2003/506)**

**Decided:** 30 May 2003 by N. Bell.

#### Background

Crittenden was injured as a result of a workplace accident on 22 February 1999. He sought legal advice and damages were claimed with a final settlement payment of \$140,000 (including costs) on 20 December 2001.

On 8 January 2002 Centrelink calculated a preclusion period on the basis of a lump sum figure of \$110,000 and advised the applicant of this. This decision was affirmed by an authorised review officer, and in turn, the Social Security Appeals Tribunal.

At the hearing before the AAT it was accepted that the preclusion period should have been based on the amount of \$140,000 rather than \$110,000, however, the Department indicated at the hearing that it did not propose to recalculate the preclusion period.

#### The issue

The issue was whether part or all of the compensation payment be treated as not having been made under s.1184K of the *Social Security Act 1991*.

#### The evidence

Crittenden outlined to the Tribunal the expenditure of the lump sum, which included repayment of debts, gifts to children and repayment of social security payments received during the preclusion period.

The applicant continued to suffer from various medical conditions including diabetes and right knee pain.

His main argument was that he continued to spend money after receiving notification from Centrelink about the preclusion period because his solicitor

told him that he thought he would be able to get the pension back for him.

The applicant told the Tribunal that he had investigated selling his house but as the building of the house was not complete he could not obtain the necessary certificates. The land was on 22 acres, and he had investigated subdivision but was unable to get approval. He had three daughters and two sons who were all working and his wife was receiving age pension.

The applicant also argued that the lump sum payment related only to loss of wages until the age of retirement and that there was no element in the settlement for future economic loss.

Evidence was given that the applicant was unsure whether he would have continued working beyond the age of 65.

#### Findings

The Tribunal found that there were not sufficient grounds to warrant the exercise of the discretion under s.1184K(1).

The Tribunal accepted the applicant's evidence in relation to his expenditure of the lump sum and the advice given by his solicitor.

In relation to the claim that the lump sum only covered entitlement to retirement age, the Tribunal concluded that it was not possible 'to dissect, with any accuracy, the lump sum settlement received by the applicant, given the ambit of his claim'.

It found that the applicant's medical conditions were unfortunate but not unusual. It also found that the applicant's use of settlement moneys was not unusual and that, although the applicant had no savings and was dependent on his children, some of the settlement money had been gifted to the children.

No specific findings were made in relation to the advice given by the solicitor.

#### Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]