

of mortgage, was a further example of inconsistent evidence by Morel.

The Tribunal concluded that given the long-term nature of the debts and Morel's financial history, that the Department had made genuine attempts to negotiate an alternative arrangement but that the offer of Morel to pay \$5 per fortnight towards the debt due to the Commonwealth was not a reasonable arrangement.

Whether a garnishee notice was issued to Ms Morel and the Bank in accordance with prescribed procedures

The Tribunal accepted Departmental evidence that a garnishee notice was delivered to the Bank and Morel on the same day.

Whether the garnishee notice was issued within six years of the debt arising

The Tribunal found this statutory requirement was met as the garnishee notice was issued on 14 November 2002 and the two overpayments in question were raised in March 1997 and April 1997.

The Tribunal found there was no error in fact or law to prevent the Department from deciding to issue a garnishee notice. The Tribunal found that the garnishee notice was correctly issued in accordance with the requirements as prescribed by the legislation.

Formal decision

The decision under review was affirmed.

[M.A.N.]

Age pension: underpayment; date of effect of decision about arrears

SECRETARY TO THE DFaCS and CASPERSZ
(No. 2003/1300)

Decided: 18 December 2003 by
M.J. Carstairs.

Background

Mr and Mrs Caspersz each received age pension. Their rates of age pension were affected by their financial investments. In 1995 they advised the Department

that they had purchased two annuities which would mature in five years (February 2001). The Department made a computer record of the annuity and the date of maturity and the Caspersz' rates of pension were recalculated. When the annuities matured, the Casperszs purchased different financial investments with the proceeds. Centrelink continued to assess the annuities as assets because it was unaware of the different financial investments. About July 2002, the Casperszs with the assistance of their accountant made enquiries about their rates of pension. As a result the rates were adjusted. The Department decided that the new rate of pension could not be retrospectively adjusted from 1 February 2001.

The issue

The issue was what should be the effective date of decision about the new rate of pension, that is, whether arrears of pension should be paid back to February 2001.

The legislation

Section 78 of the *Social Security (Administration) Act 1999* ('the Act') states:

If the Secretary is satisfied that the rate at which a social security payment is being, or has been, paid is less than the rate provided for by the social security law, the Secretary must:

- (a) determine that the rate is to be increased to the rate provided for by the social security law; and
- (b) specify the last-mentioned rate in the determination.

Section 108 defines a decision under s.78, correcting the rate of pension, as a *favourable determination*. Section 109 and 110 set dates of effect for *favourable determinations* of this kind. Section 109 of the Act provides:

109(1) ... If:

- (a) a decision (the original decision) is made in relation to a person's social security payment; and
- (b) a notice is given to the person informing the person of the original decision; and
- (c) within 13 weeks after the notice is given, the person applies to the Secretary, under section 129, for review of the original decision; and
- (d) the favourable determination is made as a result of the application for review;

the favourable determination takes effect on the day on which the determination embodying the original decision took effect.

109(2) ... If:

- (a) a decision (the *original decision*) is made in relation to a person's social security payment; and

- (b) a notice is given to the person informing the person of the original decision; and
- (c) more than 13 weeks after the notice is given, the person applies to the Secretary, under section 129, for review of the original decision; and
- (d) the favourable determination is made as a result of the application for review;

the favourable determination takes effect on the day on which the application for review was made.

109(3) ... If:

- (a) decision (the *original decision*) is made in relation to a person's social security payment; and
- (b) the person is not given notice of the original decision; and
- (c) the person applies to the Secretary, under section 129, for review of the original decision; and
- (d) the favourable determination is made as a result of the application for review; the favourable determination takes effect on the day on which the determination embodying the original decision took effect.

Section 110 of the Act provides for the setting of dates of effect where claimants provide information about changed circumstances:

110(1) ... Subject to subsections (2) to (11) (inclusive), if a favourable determination is made following a person having informed the Department of the occurrence of an event or change of circumstances, the determination takes effect:

- (a) on the day on which the person so informed the Department; or
- (b) on the day on which the event or change occurred;

whichever is the later.

Letters from Department

The following letters to both Mr and Mrs Caspersz were relevant to the Tribunal decision: letters dated 27 June 1996 ('the first letters') stating that the rate of pension 'will be \$195.90 per fortnight starting from 11 July 1996'. In the part headed 'How we have assessed your combined yearly income', the letters stated that the Casperszs' financial investments were assessed at \$627.20; superannuation/annuities were assessed at \$13,474, and total income was assessed at \$14,101.20; and letters dated 19 June 2001 ('the third letters') stating the rates of payment of age pension between three periods 6 June 2001 and 19 June 2001, 20 June 2001 and 3 July 2001 and from 19 July 2001 onwards. The third letters went on to state, under the heading 'Information used for calculating your regular payment', that the rate of age

pension was based on a combined annual income amount of \$13,934.56.

The first and third letters set out what information must be provided to the Department (Centrelink). The first letters, under the heading 'What you must tell us', stated that under the legislation (both the first and third letters refer to s.68 and s.69 of the *Social Security Act 1991*) the Caspersz must advise: 'if you or your partner buy or sell any shares or managed investments; if you or your partner's combined financial investments go above \$16,344 (this is \$1000 more than the value of financial investments we have recorded for you); if you or your partner start any new accounts'.

Valid notices of decision

The Department submitted that the first letters and third letters were valid notices under the legislation, and the Caspersz were under an obligation to notify the Department that they had purchased different investments. There was no record they had done this until July 2002. Although the Caspersz had advised the Department in March 1995 that they had annuities due to mature in February 2001, this was not sufficient to discharge their obligations. Many possible events could have affected the maturity of the annuities between 1995 and 2001.

The Department argued that the information provided in July 2002 about the change to investments came within the expression 'an event or change of circumstances', and s.110 of the Act applied to it, limiting the date of effect of the decision to the date (19 July 2002) when the Department was notified of the change of circumstance. The Caspersz were told of this decision on 19 August 2002, and this notice of decision was the 'original decision' referred to in s.109 of the Act. As the Caspersz sought review of the decision within 13 weeks, it followed that the date of effect of any favourable decision on review was limited by s.109(1) of the Act, to 19 July 2002.

The Department submitted that there was no decision made in February 2001. Therefore, s.109 of the Act cannot apply earlier than July 2002.

The Department referred to the Federal Court case *Austin v Secretary, Department of Family and Community Services* (1999) 57 ALD 330 and *Secretary, Department of Family and Community Services v Rogers* (2000) 65 ALD 185 which interpreted sections of the *Social Security Act 1991* which are essentially the same as s.109 and s.110 of the Act. The Federal Court decisions

have been applied in decisions of the Tribunal, including *Secretary, Department of Family and Community Services and Plug* [2000] AATA 744 and *Peura and Secretary, Department of Family and Community Services* [2003] AATA 1123.

The Caspersz submitted that it is difficult for pensioners to understand the calculations used by the Department to assess income. The Caspersz believed that the amount that they were receiving was calculated correctly. When the annuities matured in February 2001, Mrs Caspersz was very ill. Nevertheless, Mr Caspersz was confident that he had sent the information to Centrelink in February 2001. They submitted that s.109 of the Act allowed the requests in July 2002 to be treated as requests for review, and s.109 then allowed arrears to be paid in certain circumstances. The Caspersz were entitled to be paid more after the annuities matured.

The Tribunal considered the first letters and third letters had two functions. The letters advised the Caspersz about decisions made about the rates of their pensions. The letters also set out their obligations under the Act. The Tribunal noted the later repeal of s.68 and s.69 of the *Social Security Act 1991* referred to in these letters did not affect the ongoing nature of the respondents' obligations.

The Tribunal was satisfied that the first and third letters were valid notices about the Caspersz's obligations. They were required to notify of their changed circumstances in February 2001, when they purchased new financial investments and the change to their 'combined income'.

The Tribunal was satisfied that specific obligations were set out in the first and third letters and could not be met merely by having told the Department five years earlier that the investment in the annuities would mature in 2001. The Caspersz had a positive obligation to advise Centrelink of the new information about the investments. On the balance of probabilities the Tribunal was satisfied that the Caspersz did not notify Centrelink of the change of circumstances. Centrelink did not have knowledge of the change, and continued to assess the rate of the pensions taking into account the income from the annuities.

The Tribunal noted that the Federal Court decisions of *Austin* and *Rogers* established there is no requirement, for a notice of decision to be valid, that the reasons for decision be given. The

Tribunal found that the first and third letters were valid notifications of decisions about the rate of the Caspersz's pensions and they provided information about income being used as the basis of the assessment of the rates of pension. The decisions also provided full information about appeal rights in regard to the decisions, a matter addressed by the Federal Court in *Rodgers*. After the annuities matured in February 2001, and Centrelink continued to assess the rates of pension including the annuities, the Caspersz were told of this in the third letters.

The Tribunal noted that an enquiry about the rate of payment may sometimes be characterised as both a request for review and the giving of information about changed circumstances. It concluded when both s.109 and s.110 of the Act apply and produce different dates of effect, then logic and good administration dictate that the earlier date prevails.

Applying s.109 of the Act to the facts of this case, the first and third letters were notices of 'original decisions' within the meaning of that section. The Caspersz did not seek review of either decision within 13 weeks of the notices being given to them. It follows that the date of effect was the date the Caspersz made an application for review, which the Tribunal found was 16 July 2002, the date when the Caspersz advised the Department the investment information was incorrect. This contact was treated as a request by the Caspersz for review of the decisions about the rates of their age pensions.

Formal decision

The Tribunal set aside the decision under review and substituted the decision that the date of effect of the favourable determination increasing the rate of the Caspersz's age pension was 16 July 2002.

[M.A.N.]