veyed Patrick's younger child to school when Patrick was unavailable due to her own studies, and he had some ongoing interaction with his son Leigh, although their bond was described as not strong. As to the *social aspects* of their relationship, the Tribunal noted that Patrick and Rendell had some mutual friends, but also separate ones, and that they did not hold themselves out as married to each other. There had been no *sexual relationship* between them since 1986. They did not consider that the relationship would last indefinitely, but rather that *the nature of their relationship* was one of companionship and support and, more importantly, of financial necessity. Their housing arrangement would have ended had suitable alternative accommodation been made available to either Patrick or Rendell by the South Australian Housing Trust.

The Tribunal noted the decision in *Secretary, Department of Social Security and 'SRJ'* (AAT 10970, 29 May 1996) that the continuing role of a biological parent in the life of his child is not indicative of a marriage-like relationship, and concluded that the relationship between Rendell and Patrick was 'consistent with that found in friendship of long standing' (Reasons, paras 43-44). Thus Patrick and Rendell were not members of a couple nor in a marriage-like relationship.

Formal decision

The Tribunal set aside the decision under review.

[P.A.S.]

Carer allowance: meaning of 'special reasons'

SECRETARY TO THE DFaCS and WALKER
(No. 2004/381)

Decided: 16 April 2004 by A. Cunningham.

Background

Since 1998 Walker had received carer allowance (CA) for her son. From January 2002 until September 2002, he was spending three nights a week at a youth service home. From 14 September 2002 he spent four nights a week at the home. Centrelink was advised of this arrangement in May 2002. Walker's son had been diagnosed with autism, severe epilepsy, attention deficit hyperactivity disorder (ADHD) and intellectual disability, and required the necessary level of care for the purposes of a person qualifying for CA. In May 2002 Centrelink reduced Walker's CA. The SSAT referred the matter back for reconsideration with a direction that Walker did not cease to be qualified for CA for her son while he was resident at Devonfield, and therefore temporarily absent from her care for a period of up to 173 days in the 2002 calendar year. The Secretary sought a review of the decision of the SSAT.

The issue

The issue was whether there were any special reasons to extend the 63-day limitation period contained in s.957(3).

The legislation

The qualification provisions for CA are set out in s.957 (1) of the *Social Security Act 1991* ('the Act').

> **957(1)** Subject to subsection (3), if:
>
> (a) a person is qualified for carer allowance because a care receiver or care receivers are receiving care and attention on a daily basis; and
>
> (b) the care receiver or care receivers temporarily cease to receive care and attention that would qualify the person for carer allowance;
>
> the person does not cease to be qualified for carer allowance merely because of that cessation ...
>
> **957(3)** However, the period, or the sum of the periods, for which subsection (1) or (2), or a combination of those subsections, can apply is:
>
> (a) 63 days in any calendar year; or
>
> (b) another period that the Secretary, for any special reason in the particular case, decides to be appropriate.

Whether special reasons?

Walker submitted that the special circumstances of her case justified the extension of the 63-day limitation period and that there should not be a pro rata reduction of her CA. Walker had cared for her son on her own since April 2001. She was subjected daily to some kind of physical and verbal abuse from her son. She reluctantly took the advice of medical specialists and placed him in respite care three nights a week in January 2002. The care of her son became progressively worse and Walker increased his period in respite to four nights a week. Walker paid the cost of respite care and had other additional costs which left her with between $30 and $50 each week from her Centrelink benefits.

The Tribunal considered various medical reports that confirmed Walker's son's behaviour and the results of the physical assaults upon her. The medical reports recommended that her son spend time in care.

The Tribunal considered the term 'any special reasons'. It referred to a range of decisions that have considered similar terms and how the discretion should be exercised. The decisions include:

- *Zomaya and Secretary, Department of Family and Community Services* (2002) AATA 1190
- *Radmilovich and Secretary, Department of Family and Community Services* (2002) AATA 779
- *Secretary, Department of Social Security v Le-Huray* (1996) 138 ALR 533
- *Beadle v Director-General of Social Security* (1985) 7 ALD 670
- *Ivovic and Director-General of Social Services* (1981) 3 ALN N95
- *Krzywyk and Secretary, Department of Social Security* (1988) 15 ALD 690
- *A and Director-General of Social Services* (1982) No A81/36
- *Secretary, Department of Social Security and Porter* (1997) AATA 11804
- *Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634.

The Tribunal noted that there must be a factor or factors which justify an exception to the principle of liability which the Act otherwise establishes. Essentially the decision maker in exercising its discretion must make a decision which is consistent with achieving the objectives of the relevant legislation. The Tribunal also noted that the decision maker must be prepared to respond to the special circumstances of any case by reason of which a strict enforcement of the legislative provisions would produce an unjust, or unreasonable or otherwise inappropriate result.

The Tribunal referred to the purpose of a carer allowance as stated in the Centrelink guide to payments: carer allowance helps parents or carers to care for children and adults with a disability at home. The Tribunal also noted the various examples of how the discretion was to be exercised contained in the Social Security Guide.

The Tribunal in referring to *Drake and Minister for Immigration and Ethnic Affairs* (No. 2) 1979, 2 ALD 634 noted that in reviewing the exercise of a discretionary power, ordinarily any

relevant ministerial policy would be applied, unless there are cogent reasons for a departure from policy. For instance where its application tends to produce an unjust decision in the circumstances of a particular case, the Tribunal in exercising its function to reach the correct or preferable decision may depart from that policy.

The Tribunal concluded that while the Social Security Guide offers examples of where this discretion may be exercised, it did not prohibit the exercise of a discretion in the current circumstances of this case.

The Tribunal found that Walker's particular circumstances when considered together justified the exercise of discretion and considered that to refuse the extension of the 63-day period would produce an unjust and an unfair result contrary to the intent and spirit of the Act.

The Tribunal found that the special circumstances of Walker's case were: (1) she was a sole parent caring for a severely disabled child on her own; (2) she suffered from depression which required treatment with medication; (3) she was unable to work because of the difficulties with her health and the fact that she was required to be on call to care for her son from time to time; (4) she reluctantly accepted the advice of medical specialists to place her son at the home; and (5) she had considerable expenses associated with her son's care, and in particular the sum of $80 a week that was paid to the home.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Disability support pension: portability; definition of 'severely disabled'

SECRETARY TO THE DFaCS and GONCALVES (No. 2004/4)

Decided: 7 January 2004 by P.A. Staer.

Background

Goncalves came to Australia in 1990 and worked as a cleaner until 1997. She was granted a disability support pension in May 2001. In August 2002 Goncalves advised Centrelink she wished to return to Portugal permanently. Centrelink carried out an assessment and a decision was made in September 2002 that she was not 'severely disabled'. Accordingly, the maximum period she could be paid disability support pension while overseas was 26 weeks from the date of departure from Australia. In October 2002 Goncalves departed Australia for permanent residence in Portugal. Goncalves, through her son, sought review of the decision. In April 2003 her disability support pension was cancelled.

The issue

Whether Goncalves was severely disabled at the time the original decision was made and if she continued to be severely disabled.

The legislation

Section 1217 of the *Social Security Act 1991* ('the Act') provides that for a person to receive disability support pension for an indefinite period while overseas they must be classified as 'severely disabled'. Section 23(4B) defines a severely disabled person as someone who is suffering from;

(a) a physical impairment, a psychiatric impairment, an intellectual impairment, or 2 or all of such impairments, of the person make the person, without taking into account any other factor, totally unable:
  (i) to work for a least the next 2 years; and
  (ii) unable to benefit within the next 2 years from participation in a program of assistance or a rehabilitation program; or
(b) the person is permanently blind.

Centrelink's Guide to Social Security Law at 1.1.S110 states:

> A customer is accepted as being severely disabled if their impairment prevents them from:
>
> Doing any work for 8 hours a week or more for the next 2 years, and
>
> Benefiting from training, education or rehabilitation to the extent of being able to work at least 8 hours a week.

What constitutes 'severely disabled'?

The Tribunal received oral evidence from Goncalves' son and written evidence from four doctors and an occupational therapist.

The Department submitted that s.24(4B)(a) specifically provides that the determination whether a person is unable to benefit within two years from participation in a program of assistance or rehabilitation is to be made without taking into account any factor, other than physical, psychiatric or intellectual impairments. The decision of the SSAT was incorrect as they considered irrelevant factors. They took into account Goncalves' age, her limited use of English, her semi illiterate status in her native language, her lack of skills and her medical impairments.

The Tribunal found that the SSAT had taken into account 'other factors' in reaching their decision.

The Tribunal then considered the definition of 'severely disabled' and relied on the Departmental Guide. The Tribunal followed the reasoning of the Federal Magistrates Court in *Materek v DFACS* [2003] FMCA 14:

> 17. It is clear from the reading of that section that the legislation does not in fact define what is meant by 'severely disabled' in the manner described by the tribunal; that is, the legislation does not define 'severely disabled' as being 'unable to work for the next two years *up to eight hours per week*. [emphasis added]
>
> 18. The reference in fact to the concept of 'up to eight hours per week' was introduced by a policy of the respondent referred to by the decision of the respondent which appears at page 84 of the appeal book. In that document the author correctly, in my view, sets out what **section 23(4)B** defines as being 'severely disabled' and goes on to say the following:
>
> The policy that Centrelink uses says that if you can't do any type of work for 8 hours a week, then you can be accepted as severely disabled (Chapter 1.S110 of the Guide to the Interpretation of **the Act**).
>
> 19. I accept for the purposes of the present application that that policy was in existence at all relevant times and that it was a policy that is indeed relevant to the consideration of the present application. Indeed, if the policy of the respondent had not been taken into account or had been misapplied, then the failure to recognise the existences and the content of that policy may well constitute a relevant fact which the tribunal would otherwise be bound to consider. Indeed a misconstruction of terms or misunderstanding of any policy may, in my view, constitute a failure to take into account a relevant factor which certainly would have the potential of vitiating the tribunal's decision. I refer to *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) (Fed C of A Full Court 62 of 1992, 29 April 1994 unreported).

The Tribunal found that all of the doctors and the occupational therapist agreed that at the time of her leaving Australia Goncalves was, because of her medical disabilities, unable to work eight hours a week.

The Tribunal relied on the documentary evidence to decide whether the inability to work for at least eight hours a