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

week would continue for the next two years and whether Goncalves would benefit within the next two years from participation in a program of assistance or a rehabilitation program.

The Tribunal found that Goncalves was severely disabled at the time of her leaving Australia, continued to be so and would remain so indefinitely.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Disability support pension: what is 'work'?

SECRETARY TO THE DFaCS and MARTIN
(No. 2004/569)

Decided: 3 June 2004 by M. Sassella.

Background

Martin was granted disability support pension from February 1997 and his wife was granted newstart allowance from December 1997. Martin's disability support pension was suspended in September 2002 on the grounds that his combined earnings exceeded the allowable limit. In November 2002 a Centrelink delegate raised a debt of $28,299.59 in relation to disability support pension paid to Martin and $1445.99 in relation to newstart allowance paid to Mrs Martin.

On review, the authorised review officer varied the amount of the debts and decided that Martin owed $44,236.24 and Mrs Martin owed $1321.69.

The matters were appealed to the Social Security Appeals Tribunal which affirmed the decision in relation to Mrs Martin, but found that the amount of Martin's debt was less than $44,236.24.

The facts

Martin was a partner in a news agency business. He left this business and commenced part-time employment as a high school teacher.

Martin gave evidence that his actual hours were less than 30 hours a week. The principal of the high school gave evidence that when Martin worked five days a week he was expected to complete 18 hours of face-to-face teaching. He had no planning or marking duties and was not expected to attend meetings.

Documents before the Tribunal suggested that Martin worked seven hours a day, five days a week during periods when he was 'temporary full-time'. The principal stated that these hours reflected the actual hours of opening for the school rather than the hours worked by Martin.

The Department argued that based on the hourly remuneration that Martin must have, at certain times, worked six hours a day. The principal provided information showing that part-time teachers could be paid for hours not actually worked and that he was not required to do additional work in the form of 'yard duty' etc.

Martin contacted Centrelink to advise of his change of employment and provided details of his earnings. He continued to report earnings on a fortnightly basis for a period of time. However, because of the variance between payment cycles for newstart allowance and his earnings, there was an understatement of income which gave rise to Mrs Martin's debt.

The Department's case

The argument put forward by the Department was that when Martin commenced his work as a casual teacher, he was able to work for at least 30 hours a week and was therefore no longer qualified for disability support pension.

Both the Department and Martin agreed that he had never been told to inform Centrelink if he found he could work for at least 30 hours a week.

The law

The relevant legislation is contained in s.94 of the *Social Security Act (1991)*:

> **Qualification for disability support pension — continuing inability to work**
>
> **94.(1)** A person is qualified for disability support pension if:
>
> (a) the person has a physical, intellectual or psychiatric impairment; and
>
> (b) the person's impairment is of 20 points or more under the Impairment Tables; and
>
> (c) one of the following applies:
>
> (i) the person has a continuing inability to work;
>
> ...
>
> (5) In this section:
>
> 'educational or vocational training' does not include a program designed specifically for people with physical, intellectual or psychiatric impairments;
>
> 'on-the-job training' does not include a program designed specifically for people with physical, intellectual or psychiatric impairments;
>
> 'work' means work:
>
> (a) that is for at least 30 hours a week at award wages or above; and
>
> (b) that exists in Australia, even if not within the person's locally accessible labour market.

The findings

The Tribunal found that the income declared by Martin understated his actual earnings.The Tribunal then went on to consider the main issue, whether Martin was working at least 30 hours a week.

The Tribunal suggested that there were two interpretations of the term 'work'. The first, is that the work must be for at least 30 hours a week and involve physical and/or intellectual effort for the period. The second, is that the work can be for a period less than 30 hours if work is paid on the basis that the person undertook 30 hours or more work.

The Tribunal found that the first interpretation complied with the policy behind disability support pension in limiting this payment to people who are unable to do physical or intellectual work 30 hours a week, whereas the second interpretation may reflect policy based on disability support pension as an income support payment.

The Tribunal favoured the first interpretation, finding that the policy rationale for the second interpretation was reflected through the application of the income test. The Tribunal also found that the *Social Security Act 1991* was beneficial legislation and that the first interpretation was more consistent with this principle.

The Tribunal concluded that Martin had not worked for at least 30 hours a week which meant that his debt was to be recalculated on the basis of his earnings, rather than a lack of qualification.

Formal decision

The AAT affirmed the decision of the SSAT and sent the matter back to Centrelink for recalculation of Martin's debt in accordance with the direction that Martin did not lose qualification for disability support pension through his work as a teacher.

[R.P.]