(c) a payment (with or without admission of liability) in settlement of a claim for damages or a claim under such an insurance scheme; or

(d) any other compensation or damages payment;

(whether the payment is in the form of a lump sum or in the form of a series of periodic payments and whether it is made within or outside Australia) that is made wholly or partly in respect of lost earnings or lost capacity to earn resulting from personal injury.

The decision

Sladen argued that the Tribunal should look to the purpose behind the legislative provisions and contended that the legislation was designed to prevent double-dipping in compensation payments. In this matter, however, the accrued employment entitlements were not compensation and therefore Sladen could not be accused of double-dipping. It was submitted that the employment entitlements were in fact only included with the lump sum compensation for convenience and normally they would have been divided into different entitlements. They should therefore be regarded as separate for the purposes of determining the preclusion period.

In determining whether the employment entitlements were compensation for the purposes of s.17(2) the Tribunal noted various documents including the terms of settlement of the dispute between Sladen and the ASB in the Magistrates Court, the deed of settlement and a letter from the ASB's solicitors to Sladen's solicitor.

The Tribunal referred especially to the cases of *Fuller and Secretary, Department of Family and Community Services* [2004] AATA 615, *Secretary, Department of Social Security v Banks* (1990) 23 FCR 416 and *Secretary, Department of Social Security v Cunneen* (1997) 78 FCR 576. Although these cases concerned different factual situations, the Tribunal was satisfied that it could not excise Sladen's accrued employee entitlements of $13,393.85 from her lump sum compensation payment. The Tribunal considered that the total figure of $150,000 was properly characterised in terms of s.17(2)(c) of the Act.

The Tribunal therefore found that the total figure of $150,000 was compensation for the purposes of the Act and that it was a lump sum compensation payment.

The next issue considered by the Tribunal was whether there were any special circumstances which would allow for part of the compensation payment to be disregarded. The Tribunal in considering s.1184K(1) looked at a number of cases including *Kottakis and Great Barrier Reef Marine Park Authority* [2001] AATA 807, *Fuller and Secretary, Department of Family and Community Services* [2004] AATA 615, and *SDFaCS v Sammut* (1998) 58 ALD 691.

The Tribunal considered there were circumstances that took the case out of the ordinary and made it exceptional. The Tribunal considered that the payment of the lump sum including the employment entitlements could be characterised as unfair to Sladen and could justly be regarded as leading to an arbitrary result because:

- the $13,393.85 was included in the settlement to cover accrued employment entitlements;
- these entitlements were a matter of right for Sladen, not a matter of discretion;
- in many if not most circumstances such entitlements would have been dealt with quite separately from compensation for an injury; and
- in those circumstances they would not have been considered by Centrelink in determining a lump sum preclusion period.

Formal decision

The Tribunal set aside the decision and sent the matter back to Centrelink with a direction to disregard the sum of $13,393.85 when calculating the compensation part of the lump sum and the lump sum preclusion period in the special circumstances under s.1184K(1) of the Act.

[S.P.]

Rent assistance: are fortnightly forms requests for review?

LAURENT and SECRETARY TO THE DFaCS (No. 2004/683)

Decided: 18 June 2004 by J. Cowdroy.

Background

Laurent was in recept of newstart allowance and rent assistance until 16 September 1999 when Centrelink cancelled his payments on the basis that he had failed to respond to their requests for information. However, Centrelink had sent correspondence to an incorrect address. The correspondence was returned undelivered. On 20 September 1999, Centrelink updated its records with Laurent's correct address and restored his newstart allowance. A letter was sent advising him that his payments from 12 October 1999 would be $392.70, which included an amount of $76.00 for rent assistance. On 27 September 1999, Centrelink wrote to Laurent advising that his payments for the period 14 September 1999 to 27 September 1999 would be $386.75. No mention was made of rent assistance. Between 28 September 1999 and 4 December 2000, Laurent was sent a number of letters advising him of his rate of payment. These letters did not mention rent assistance. Throughout this period Laurent lodged a number of 'Application for Payment of Newstart Allowance' forms. Laurent contacted Centrelink in January 2001 advising that he had not been paid rent assistance since August 1999. Centrelink determined that arrears of rent assistance could only be paid from 4 December 2000, which is the date of the last letter sent to Laurent setting out its decision about the rate of pension payable to him.

This decision was before the Tribunal in January 2002 (*Laurent and Secretary, Department of Family and Community Services* [2002] AATA 202). The Tribunal set aside the decision under review and substituted its decision that arrears of rent assistance be paid from 27 September 1999. The Tribunal found that rent assistance was a social security payment, in that it was an allowance under the *Social Security Act 1991* ('the Act') and therefore fell within the definition of 'social security payment' in s.23(1) of the Act. The Tribunal further found that s.109(3) of the *Social Security (Administration) Act 1999* ('the Administration Act') operated to entitle the applicant to arrears of rent assistance from 27 September 1999.

The Department appealed this decision to the Federal Court. In September 2003 the Federal Court (see *Secretary, Department of Family and Community Services v Laurent* (2003) FCA 1017; (2003) 5(11) *SSR* 150) set aside the Tribunal's decision and remitted the matter to the Tribunal for re-hearing. The Court found that rent assistance has no independent existence from, nor is it payable otherwise than as a part of, a benefit to which s.1068 of the Act applies. The Court held:

> **33.** In my opinion, the AAT erred in holding that 'rent assistance' fell within par (c) of the

> definition of 'social security payment' and that it was thereby a payment in its own stead for the purposes of s.109 of the Administration Act. For the purposes of s.109 of the Administration Act, the relevant decision was that made on 27 September 1999 with respect to the payment of newstart allowance. It was the decision to use Pension Rate Calculator B without including in the calculator anything for rent assistance as Module F.
>
> **34.** The error of the AAT as to the nature of rent assistance was central to its reasoning that no sufficient notice was given to Mr Laurent of a decision to terminate the payment of rent assistance thereby requiring s.109(3) of the Administration Act to be applied to determine the date from which to restore payment of rent assistance ...
>
> **35.** The existence of such an error requires that the decision be set aside ...

This was the rehearing of that application.

The issues

The issue was whether the lodging of the 'Application for Payment of Newstart Allowance' forms on a fortnightly basis amounted to requests for a review of the department's decisions regarding the non-payment of rent assistance.

The legislation

Section 109 of the Administration Act sets out when payment of arrears of a social security benefit can be paid. Section 129 of the Administration Act details how requests for review of decisions can be made. Section 126 details when the Secretary may review a decision.

Entitlement to arrears of rent assistance

The Tribunal noted that the Federal Court had found that rent assistance is not a 'social security payment' as defined in s.23(1) of the Act. It is a notional amount to be added to a person's maximum basic rate of pension (*Laurent* at par 30). In Laurent's situation, the relevant social security payment was newstart allowance. The Tribunal found that as Laurent was notified (by letters from the Department sent during the period September 1999 to December 2000) of the Department's decisions regarding his entitlement to newstart allowance, s.109(3) of the Administration Act had no application in this case.

The issue remaining was whether the lodging of the 'Application for Payment of Newstart Allowance' forms by Laurent, on a fortnightly basis during the period September 1999 to December 2000, amounted to requests for a review under s.129 of the Administration Act of the Department's decisions regarding the non-payment of rent assistance.

Each fortnight during the relevant period, Laurent lodged 'Application for Payment of Newstart Allowance' forms. The information provided on these forms was utilised by the Department in determining whether the allowance should be paid and, if so, at what rate. The Tribunal accepted that each time an application form was lodged, the Department was obliged to consider the information in the application and make a fresh determination as to whether Laurent was entitled to newstart allowance and, if so, the rate of allowance payable to him.

The Tribunal referred to *Secretary, Department of Family and Community Services and Rogers* [2001] AATA 94, where the purpose of Sole Parent Review forms was considered. In that case the Tribunal found:

> it reasonable to infer that a person returning a completed Sole Parent Review form to the applicant would expect that the person's entitlement to a pension was being reviewed ... The word 'Review' appears in the bold type heading of the form. Review was its stated purpose. What was being reviewed? The answer must be the person's entitlement to a pension, whether the pension was payable and the amount payable.

(Reasons, para. 61)

Laurent submitted that the absence of the word 'review' from the title of the 'Application for Payment of Newstart Allowance' form did not change its nature, it merely made its review function less obvious. Laurent relied on the decision in *Frost and Secretary, Department of Social Security* (AAT No 10360, 17 August 1995).

However, the Tribunal considered that the 'Application for Payment of Newstart Allowance' was not an application for review of a prior decision of the Department. The Tribunal accepted that a person completing an 'Application for Payment of Newstart Allowance' form would expect that their entitlement to newstart allowance was being reviewed and that the Department would review the information provided in the form to decide whether the person is entitled to the allowance, whether the allowance was payable and the amount that was payable. The Tribunal found that the Department was making a fresh decision as to the person's entitlement at that date based on the information contained in the application form.

Consequently, the Tribunal found that the lodging of the 'Application for Payment of Newstart Allowance' forms by Laurent on a fortnightly basis during the relevant period, could not be considered requests for review of the previous decision regarding the non-payment of rent assistance, pursuant to s.129 of the Administration Act.

The Tribunal found that Laurent's first request for a review of the decision not to pay rent assistance was made in the telephone call of 16 January 2001. Pursuant to s.109(2) of the Administration Act, the earliest date that arrears of rent assistance was payable to Laurent was 4 December 2000, being the date of the last decision of the Department as to the rate of newstart allowance payable to Laurent.

The Tribunal further considered whether the 'Application for Payment of Newstart Allowance' forms amounted to reviews under s.126 of the Administration Act. But as the Department did not make a 'favourable determination' as to the rent review issue during the period September 1999 to December 2000 the section was not applicable.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]