(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.

(3) If:

(a) 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.

The Tribunal concluded that the issue before it was whether the letters sent to Tangney constituted 'notices' for the purposes of this section.

The requirements of a valid notice are set out in s.72 of the Act:

72(1) A notice under this Subdivision:

(a) must be given in writing; and

(b) may be given personally or by post or in any other manner approved by the Secretary; and

(c) must specify how the person is to give the information or statement to the Department; and

(d) must specify:

(i) in the case of a notice under section 68 that requires the giving of more than one statement, each relating to the payment of the social security payment in respect of a period — the date by which the person is to give each statement to the Department; or

(ii) in any other case — the period within which the person is to give the information or statement to the Department; and

(e) must specify that the notice is an information notice given under the social security law.

Tangney argued that she was under considerable pressure at the time the letters were sent to her: she had been involuntarily hospitalised with bi-polar disorder for some of the relevant period and was subsequently trying to avoid being readmitted. She was also defending a custody claim in relation to her child. Tangney admitted that she normally gave Centrelink correspondence only a cursory examination, noting the amount payable.

The Tribunal considered *Secretary, Department of Social Security and Sting* (1995) 39 ALD 721, *Austin v Secretary, Department of Family and Community Services* (1999) 92 FCR 138, and *Department of Social Security and Plug* (2000) AATA744 before concluding that the letters did amount to 'notice' for the purpose of s.109 of the Act. Consequently, arrears were limited to the date that Tangney applied for a review of the decision to reduce her payment.

The Tribunal also suggested that Tangney should have been given an opportunity to address Rafter's statement that he paid rent to her, before that amount was included in her annual income by Centrelink.

Formal decision

The decision of the Social Security Appeals Tribunal was set aside and in substitution the Tribunal decided that Tangney did receive notice of a decision by Centrelink to reduce her Parenting Payment Single (PPS). There having been notice, the back-dating of the correct rate of PPS could only be to the date of the application for review of the decision, that is 16 July 2002.

[E.H.]

Arrears: notice of decision; requirements

PEURA and SECRETARY TO THE DFaCS (No. 2003/1123)

Decided: 7 November 2002 by D.G. Jarvis.

The facts

Mr and Mrs Peura operated accounting and fencing contracting businesses through a trust, with a private company, of which they were the sole shareholders and directors, acting as the trustee. From 1991, Mr Peura suffered from increasing ill health and required increasing care, such that both he and Mrs Peura were unable to continue to work. The trust consequently became inactive from June 2001. At that time, the trust owed Mrs Peura $24,965.

In August 2001, the company decided to cease acting as the trustee of the trust. Mrs Peura was appointed as trustee, and her shares in the company were transferred to her daughter, Anita. These shares had not been registered at the time of the hearing, as the stamp duty on transfer had not been paid.

Mrs Peura received a letter from Centrelink dated 6 September 2001, in which she was advised of her regular wife pension payment, and that a 'Combined Annual Income' of $4751.94 was used to determine her rate. On the same date, a similar letter was sent to Mr Peura, including the same amount as the 'Combined Annual Income'.

In November 2001 Mrs Peura was advised of the changes to the assessment of private trusts and companies that would commence from 2002. On 10 December 2001, Mr and Mrs Peura each received letters advising them of the payments they would receive from 17 January 2002. Those letters stated that Mr and Mrs Peura's 'Combined Annual Income' was $7647.94.

Mrs Peura told the Tribunal that she believed the amount listed as 'Combined Annual Income' was a summary of the payments made to her in that financial year. She argued that the letter did not advise that a decision had been made to attribute the income and assets from the trust to her and did not provide a reason for the reduction in the rate. She subsequently became aware of the attribution, and contacted Centrelink on 15 May 2002, advising that the trust had become inactive in June 2001. Centrelink ceased attribution from 15 May and Mr and Mrs Peura's rate increased.

The issue

The issue before the Tribunal was whether arrears were payable to Mr and Mrs Peura for the period from 1 January 2002 to 15 May 2002.

The Tribunal first considered the operation of s.109 of the *Social Security (Administration) Act 1999* ('the Act'). If the notice sent to Mr and Mrs Peura in December 2001 was adequate, then the date of effect of the decision to increase the rate of payment would take effect on the day the request for review was made. If it was deficient, the increase in payment could be backdated to 1 January 2002.

The Tribunal was referred to various decisions. The applicant relied on *Wills and Secretary, Department of Social Security* (1998) 54 ALD 271, in which the Tribunal noted that the failure to correctly code Mrs Wills as a non-homeowner resulted in the payment of a reduced rate of benefit for over 12 months. The Tribunal found that letters sent to Mrs Wills did not outline the actual decision made (that being to record Mrs Wills as a non-homeowner) and consequently did not amount to 'notice' of the decision. In the current case, the

Tribunal agreed with the Respondent that the matter of *Wills* could be distinguished on the basis that it did not amount to 'an error on the face of the letters'.

The Tribunal also considered the decision of Drummond J in *Austin v Secretary, Department of Family and Community Services* (1999) 92 FCR 138 when it rejected the respondent's argument that the letters of February and November 2001 put the applicants 'on notice' that the changes to the assessment of private trusts and companies may affect their rate. The Tribunal noted His Honour's reasoning (*Austin* at 146) that notice recipients should not be expected to draw an inference from a range of information supplied over a period of time regarding a decision.

In the matter of *Secretary, Department of Family and Community Services v Rogers* (2000) 104 FCR 272, Cooper J considered the constitution of a proper notice. The Tribunal found that case to be precedent for the argument that a proper notice consists of two limbs: 'the fact that a decision has been made and the contents of that decision' (para. 34).

The Tribunal distinguished the decision in *Department of Social Security and Plug* (2000) AATA744 from the current matter. It held that in failing to act on advice of a change in the circumstances of Mrs Plug, the Department had not made a decision about which notification was required.

Based on its consideration of *Austin and Rogers*, the Tribunal held that the letters to Mr and Mrs Peura of December 2001 should have given notice that a decision had been made. The Tribunal found that these letters failed to do so. The letter of November 2001 provided that Mrs Peura would be advised of both the 'decision ... **and** its effects on entitlements'. The Tribunal held that the subsequent letter advised only of the effect of the decision, not the decision itself. While an inference can be drawn that a decision has been made, because of the notification of the effect of the decision, the Tribunal found that this was insufficient to satisfy the notice requirements of paragraph 109(2)(b) of the Act. Consequently, full arrears were payable to Mr and Mrs Peura.

Formal decision

The Tribunal set aside the decision under review and substituted a decision that arrears of age pension and wife pension be paid to the applicants from 1 January 2002 to 16 May 2002.

[E.H.]

Rent assistance: determining the amount of 'rent' paid to a residential facility

SECRETARY TO THE DFaCS and WALTERS
(No 2003/1234)

Decided: 5 November 2003 by M.D. Allen.

Background

Walters was a severely disabled man living in a supported group residence run by the Handicapped Children's Centre, New South Wales. The charity provided care 24 hours a day. A debt of rent assistance had been raised on the basis that Walters' rent was $87.30 per fortnight, and not a higher amount which had initially been used in calculating the rate of rent assistance. Recovery of the debt had been waived by the SSAT.

The issue

The question before the AAT was how much rent assistance Walters was entitled to, which required determining how much rent he paid.

The issue was a matter of statutory interpretation: whether the total fees paid to a charity by a severely disabled person amounted to 'rent' or whether 'rent' was restricted to the amount allocated to the purpose.

The evidence

A residential accommodation and service agreement set out the responsibilities of a resident:

> You will pay your share of the rent to Silvendale on a fortnightly basis in advance. You will be required to pay in advance your share of household costs, refer attachment 2, including food, rent, telephone, electricity, gas and any water usage, septic tank pump out, garbage and sanitary usage charges. If your home has a designated vehicle you will be required to pay your share of vehicle running costs, vehicle insurance, vehicle maintenance. You will also be required to make regular monthly contribution to a vehicle replacement fund. You will be expected to contribute equally with the other residents in the replacement of communal furniture, white goods and other household items necessary.

A schedule setting out fees and charges was provided, showing that a total sum of $278.25 per fortnight was paid on behalf of Walters.

The General Manager of the Handicapped Children's Centre, New South Wales, advised the AAT that the charity was entitled to charge up to 75% of a resident's pension. He further advised that if a prospective resident was not prepared to pay that fee they would not be accepted into the facility. A schedule setting out the components of the fee was provided to make the charges transparent to the occupants' carers.

The legislation

Section 1064-D1 of the *Social Security Act 1991* ('the Act') sets out qualification requirements for rent assistance. The rate of rent assistance depends upon the amount of rent paid.

'Rent' is defined in s.13. Of particular relevance is:

> **13.(2)** Amounts are rent in relation to the person if:
>
> (a) the amounts are payable by the person:
>
> (i) as a condition of occupancy of premises, or of a part of premises, occupied by the person as the person's principal home; or ...
>
> **13.(3)** Subparagraphs (2)(a)(ii) to (vi) (inclusive) do not limit the generality of subparagraph (2)(a)(i).

Discussion

The AAT referred to *Secretary, Department of Social Security and Knight* 72 FCR 115 in which Tamberlain J said:

> The latter sub-section (s.13(3)) supports the view that the term rent is to be given a broad construction.
>
> ...
>
> Furthermore if it had been intended that the expression rent in s.1064-D1 should exclude periodic payments relating to an entry contribution it would have been a simple matter to insert a qualification to that effect in the section in relation to rent. This was not done. The clear intention of the parties as evidenced by the license agreement and the correspondence in evidence before the Tribunal is that in substance the contribution payments were meant to be a condition of occupation of the premises.
>
> ...
>
> Further, the periodic contribution payments were to cease upon cessation of occupancy with no resultant residual debt or financial obligation subsisting on the part of either party. Moreover the fault in meeting the contribution payments would amount to breach of the license agreement with the consequence that the licensor is entitled under clause 14 of the License Agreement to terminate the license and the occupancy under it.

The AAT concluded that Walters' case was very similar to *Knight*: if the full amount was not paid there was no admission to the facility. Therefore all of the fortnightly payment of $278.25 constituted 'rent'.

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