

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'.

continued on p.8

Federal Court Decision

Carer payment: designated private trust; excluded trust

SECRETARY TO THE DFaCS v
GEEVES
(Federal Court of Australia)

Decided: 16 December 2003 by
Heerey J.

The Secretary requested review by the Federal Court of a decision of the AAT that Geeves was entitled to carer payment.

The facts

Geeves had been caring for Escott for some years. Escott had sustained a permanent brain injury in an accident and had been receiving care since 1995. In August 1998 the Supreme Court of Queensland sanctioned a settlement of Escott's claim for damages of \$900,000 plus costs. A term of the settlement was that the money was to be paid to the Public Trustee of Tasmania in trust for the maintenance, education and other needs of Escott.

Centrelink cancelled Geeves' carer payment on 24 January 2002 on the basis that Escott's assets exceeded the disqualifying assets level. The amount in trust was \$774,174.

The law

Section 198D(1) of the *Social Security Act 1991* ('the Act') provided (at the

relevant time) that a care receiver's assets must be less than \$376,750. According to s.198E:

For the purposes of subsection 198D(1), (1A), (1C) or (1E), the of is to be worked out in accordance with:

- (a) Part 3.12, except Divisions 2, 3 and 4 of that Part; and
- (b) sections 198F to 198MA (inclusive); and
- (c) Part 3.18, except Division 9.

Paragraphs (a) and (b) did not apply in this case, but paragraph (c) was relevant. Part 3.18 contains the means test for private companies and private trusts.

The explanatory memorandum accompanying the amending legislation that inserted the means test for private companies and trusts, stated that the purpose of the amendment was to ensure that persons who held their assets in a private trust or company were treated in the same way as those who held their assets directly. Section 1207 provides that a trust must be a *designated private trust*. According to s.1207P(1) a trust is a designated private trust unless it is excluded. Subsection 1207P(4) provides:

The Secretary may, by writing, declare that each included in a specified class of is an excluded for the purposes of this section.

The Secretary has made such a declaration in the *Social Security (Means Test Treatment of Private Trusts – Excluded Trusts) Declaration 2001*. Clause 6 states

- (1) Each trust that is a court-ordered trust is an excluded trust for s.1207P of the Act.

(2) A court-ordered trust is a trust created by an order of a court that

- (a) relates to a personal injury matter; and
- (b) provides for some or all of the proceeds of the judgement of the court, or of a settlement between the parties, to be held in trust for the benefit of the person in whose favour the judgement or settlement was made.

Excluded trust

The parties did not dispute that the trust created in favour of Escott by the Supreme Court of Queensland was a court-ordered trust within the meaning of the Declaration. Heerey J found that:

The clear words of the legislation lead unavoidably to the conclusion that the trust for Mr Escott is an 'excluded trust' and therefore not a 'designated private trust' for the purposes of Pt 3.18.

(Reasons, para 18)

The Court considered that the argument of the Secretary that this trust would have been caught by the ordinary rules regarding assets in the Act was doubtful. The trust was a discretionary trust over which Escott had no legal control.

The decision

The Federal Court decided to dismiss the Secretary's application with costs.

[C.H.]

AAT continued from p.7

Although not necessary to decide this, the AAT also commented that special circumstances existed such that any overpayment should be waived:

... where the payment was originally granted by the applicant department and then later over-ruled and given the severe disablement of the respondent and the good faith with which those acting for him acted, it would seem to me that ... special circumstances do exist ...

(Reasons, para. 4)

Formal decision

The matter was remitted to the Department with the direction that rent payable by Walters was \$278.25 per fortnight.

[H.M.]

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