

Family allowance

TODD and SECRETARY TO DSS (No. 5266)

Decided: 17 July 1989 by S.A. Forgie.

Rosemary Todd applied for review of a DSS decision to cancel payment of family allowance from 15 October 1987 to 14 August 1988 inclusive. She also sought review of a decision to recommence payments from 15 August 1988, rather than from an earlier date.

The facts

Todd's family allowance had been cancelled because she had not completed and returned a questionnaire relating to her family's income. She argued before the AAT that she had not received the questionnaire, nor had she seen any publicity relating to the imposition of a means test on the payment of family allowance in 1987.

The AAT stated the issue as 'whether the Delegate had correctly cancelled the payment pursuant to s.163 of the Act and whether s.168(4) should apply so that the Family Allowance is payable from 15 October 1987': Reasons, para.3.

Todd and her husband had decided to travel around Australia from November 1986 for about a year. They sold their house and bought a camperbus. Todd's husband was receiving unemployment benefit and he notified the CES and the DSS that he and his family were planning to travel. The DSS gave them a form to complete and they returned it by hand to the office.

It was their submission that, by going to the DSS office, they had done everything they needed to do in relation to their dealings with the DSS. They were not aware that the DSS might hold separate files for unemployment benefit and family allowance.

Todd and her husband had also arranged with Australia Post to have their mail redirected to Todd's mother who sent it on to them. Some time after their departure, mail had started to be sent to their old address in Tweed Heads and on a brief visit home in March 1987 they arranged with Australia Post to extend the redirection so that it would operate for approximately 12 months. From that time on, it apparently proceeded without any problem and was still operating in August 1987.

Todd realised that she was not receiving family allowance when she

returned home from the trip and noticed that her bank book showed that no payments had been made. When she contacted the DSS, she was told that the allowance had been cancelled as she had not replied to correspondence. However, she maintained that she had not received any correspondence from the DSS during their trip nor had her mother.

The new owners of their previous home at Tweed Heads said that they had received a letter for her from the DSS and had returned it. However, when Todd contacted the DSS in an attempt to locate the letter, she was told that it would have been disposed of or shredded.

Todd said that during her trip she had seen no publicity or advertisements relating to the imposition of a means test on family allowance.

A DSS officer told the AAT that some 300 000 letters were sent to family allowance recipients when the means test was introduced, and about 17 000 of these were returned to State Headquarters. Attempts were subsequently made to find changes of address on the electoral rolls for those people. If the returned letters could not be matched with a new address, they were simply stored. He also gave evidence of the advertising campaign which had taken place to notify people of the imposition of a means test and the need to return information to the DSS. He further stated that in March 1988 another letter was sent to all persons who had had their family allowance cancelled.

The AAT's findings

The AAT found that Todd and her husband had made every reasonable effort to ensure that they received all mail while they were on their extended holiday. The Tribunal was satisfied on the balance of probabilities that Todd and her husband did notify the DSS of their extended trip and that they had sought advice from the DSS about dealings with the DSS during the period.

Further, the efforts of Todd and her husband to advise the DSS of their plans, and to redirect the mail, lent weight to their evidence that Todd did not receive a letter from the DSS regarding the payment of family allowance.

The Tribunal concluded that, on the balance of probabilities, Todd did not receive the letter. Nor was there any specific evidence led to show that a letter was actually prepared for Todd,

stamped and posted to her in July 1987. Despite that, the AAT was satisfied that the DSS did send the letter to Todd in July 1987 and that the letter was addressed to her previous address in Tweed Heads. The Tribunal did not consider it necessary to determine whether or not the letter was received at that address.

The legislation

Todd's family allowance was cancelled pursuant to s.168(1) of the *Social Security Act*, which provides for the cancellation or suspension of a pension, benefit or allowance 'having regard to any matter that affects . . . payment . . . under the Act', or by reason of a refusal or failure to comply with a provision of the Act.

The central issue was whether or not, on the assumption that the respondent had sent a notice to Todd under s.163 requiring her to provide information as to her income, the notice had ever been given to Todd.

Serving notice

Todd relied on s.29 of the *Acts Interpretation Act* 1901, which deals with the serving, giving or sending of notices. Section 29 provides that notice shall be deemed to be effected by properly addressing, pre-paying and posting the document as a letter, and unless the contrary has been proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. It was Todd's contention that having established that she had not received the letter, service could not be deemed to have been effected by s.29.

By contrast, the DSS relied on s.28A of the *Acts Interpretation Act* and submitted that simply sending the letter by pre-paid post to Todd's address at Tweed Heads satisfied the provisions of s.28A, which provides that unless the contrary intention appears, where an Act requires a document to be served on a person, the document may be served by sending it by pre-paid post to the address of the place of residence of the person last known to the server of the document.

Accordingly, it was argued that notice had therefore been given to Todd pursuant to s.163(2) of the *Social Security Act* by sending the letter to Todd's last known address.

The Tribunal considered at length the provisions of s.28A and s.29 of the *Acts Interpretation Act* and concluded that s.29 applied to deem service of the notice if it had been sent to Todd by properly addressing it, pre-paying it and posting it as a letter.

However, the Tribunal noted that s.163 of the *Social Security Act* provides a contrary intention because it sets out the manner in which a notice is to be given to a person under the section: 'personally or by post'. Accordingly, the DSS could not rely on s.28A of the Acts Interpretation Act since s.163 —

'limits the ways in which notice may be given more narrowly than section 28A. It follows that section 28A is not applicable to the interpretation of section 163 and the ways in which service may be effected are limited therefore to personal service or service by post.'

(Reasons, para.20)

With regard to s.29, the AAT stated that in order for the DSS to succeed, the AAT must be satisfied on the balance of probabilities that the letter was properly addressed, pre-paid and posted as a letter.

While the AAT found that the notice was sent as a letter and that it was pre-paid, the Tribunal determined that it was not properly addressed since the DSS had been notified by Todd that she was leaving that address.

This was despite the fact that there was no evidence from which the Tribunal could find that Todd had given another address to the DSS. But neither could the Tribunal find any obligation upon a person receiving family allowance to notify details of an address.

This was in contrast to provisions such as s.92 of the *Social Security Act*, which require notification of events such as a dependent child ceasing to be dependent, ceasing to be in Australia, or the death of a dependent child. The Tribunal noted that, in practical terms, an address for family allowance recipients was of little consequence since the allowance was paid into a bank account and payment continued regardless of a residential address.

Despite the Tribunal's finding that there was no obligation upon Todd to inform the DSS of a change of address, the Tribunal said that it had already found that Todd did notify the DSS that she would be travelling. The Tribunal also said that it was satisfied on the evidence that Todd and her husband had asked what else they had to do for Departmental purposes and they were not advised to take any further steps.

Accordingly, on the basis on these findings of fact, the AAT found that the notice sent under s.163(2) was not properly addressed. This was because the Tribunal was not satisfied that a notice addressed to a place which the DSS knew Todd had left could be

properly addressed. It followed that Todd did not receive the notice sent by the DSS requiring that she furnish information relating to payment of family allowance. Consequently, Todd had not refused or failed to comply with a notice issued pursuant to s.163(2). On that basis, family allowance should not have been cancelled.

Formal decision

The AAT set aside the decision to cancel payment of family allowance from 15 October 1987 to 14 August 1988 and substituted for it a decision to pay family allowance from 15 October 1987.

[R.G.]



Family allowance: whether arrears payable

SILVER and SECRETARY TO DSS (No. 5424)

Decided: 28 September 1989 by R.C. Jennings.

The AAT set aside a DSS decision not to pay arrears of family allowance to Dennis Silver from 15 June 1986, after his son M came into his custody.

The facts

M had lived with his mother until May 1986. Since that time, he had been in the care of his father. No application was made by Silver for family allowance until January 1988, as he had previously assumed (incorrectly) that his former wife was receiving the allowance.

After he made the claim, the DSS determined that he was eligible for payment from 15 January 1988. Silver sought arrears to May 1986 but he was advised that the allowance could only be paid for a period prior to the lodgment of a claim if there were special circumstances and it was not considered that there were any special circumstances in his case. Silver was also advised of his appeal and review rights, but was not informed that there was any time limit for seeking review. He lodged an application for review on 14 June 1988.

The legislation

As at the time of the decision of 10 February 1988, s.88(2) of the *Social Security Act* provided:

'(2) Where —

- (a) a family allowance is granted to a person because the person has a dependent child in respect of whom a family allowance was, immediately before the child became a dependent child of the person, payable; and
 - (b) the Secretary decides that, in the special circumstances of the case, a family allowance should be payable to the person in respect of the child from and including the day on which the child became a dependent child of the person,
- the family allowance is payable from and including that day.'

(This section was repealed as from 29 December 1988.)

Section 168(3) provides that the Secretary may, in certain circumstances, grant a claim or increase a rate of payment.

Section 168(4) specifies the date when a determination under s.168(3) comes into effect. By s.168(4)(a) (as it provided in February 1988), the determination takes effect, if a person sought review of a decision under s.16 within 3 months from the day on which notice of the decision was given, from the day of the original decision.

However, s.168(4)(b) provides that, if a review has been sought outside the 3-month period, the decision takes effect from the day the person sought the review. [Section 168(4)(a) now refers to seeking review under s.173(1), rather than s.16, which previously provided for review by the Secretary.]

The Department's argument

The DSS argued that s.168(4) limited the Department's power to pay family allowance from the day Matthew became Silver's dependent child, since he had not sought review of the February 1988 decision until 14 June 1988.

While the original reason for the decision was that there were no 'special circumstances' as would warrant payment of arrears, the Tribunal noted that there was no dispute at the hearing as to the existence of special circumstances. The sole issue was as to the payment of arrears, under s.168(4).

The AAT's decision

The AAT noted paras (ca) and (d) of s.168(4) and the replacement of the reference to s.16 by a reference to s.173. After stating that the 'date a determination to grant an allowance takes effect is controlled in some cases by s.168(4)', the AAT continued:

'However, the limitation or control applied only if the determination was made following