SOCIAL SECURITY

Reporter

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Administrative Appeals Tribunal decisions

Late application

In this issue:

MESSINA and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/383)

Decided: 20 June 1983 by I.R. Thompson, H. Garlick, and R.A. Sinclair.

Frances Messina gave birth to her fourth child on 25 March 1979. She lodged a claim for family allowance in respect of this child on 1 December 1981. As this claim had not been lodged within six months of the birth of the child, family allowance was paid only from 15 December 1981 and not from the date of birth. The applicant appealed to an SSAT and then to the AAT.

The legislation

Section 102(1) of the Act provides:

> . . . a family allowance granted to a person (other than an institution) shall be payable–
>
> (a) if a claim is lodged within six months after the date on which the claimant became eligible to claim the family allowance, or, in special circumstances, within such longer period as the Director-General allows – from the commencement of the next family allowance period after that date; or
>
> (b) in any other case – from the commencement of the next family allowance period after the date on which the claim for family allowance is lodged. . .

What are 'special circumstances'?

The applicant claimed that her husband posted an application for family allowance within a few weeks of the birth. This form was probably lost in the post or mislaid by the Department. As s.98 requires the application to be lodged with a director, the AAT found that the mere posting of the claim did not comply with the section and so no claim had been lodged at that time.

The family allowance payments were credited to a bank account in the applicant's name. Neither she nor her husband concerned themselves greatly as to whether the amounts were being paid in and what amounts they were. The bank account was not operated very often. In late 1979 the applicant's husband noticed that the amount of allowance had increased by $4.90. He assumed that this was extra payment in respect of their fourth child. In fact it was due to a readjustment from four-weekly to monthly payments by the DSS. In November 1981 he discovered that he was receiving only the amount for three children. He made enquiries to the DSS which resulted in the present claim.

Did this sequence of events constitute 'special circumstances' for the purpose of s.102(1)(a)? The case had similar facts to those in *De Graaf* (1981) 3 *SSR* 26. However, in that case, while the applicant had thought she had made an application for child endowment, the legislated increase in payments in respect of her children for which she was already in receipt was so substantial 'as to mask from somebody ignorant of the reason for it the fact that no child endowment was being paid for the new child'. In the present case the increase was so small as to make it unreasonable to believe it was due to the payment in respect of their new child.

The AAT also referred to *Faa* (1981) 4

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SSR 41 where it was found that the failure of the DSS to forward an application form for student family allowance was not a special circumstance. Rather, the lateness of Faa's application was due to carelessness on her part to observe that child endowment payment had been stopped, or a lack of knowledge that she was eligible to claim an allowance for her student child after he attained 16 years.

'Fault' a factor?

The AAT considered that if the applicant (or her husband) had checked the bank account within a short time after the payments and the increase in payments were more substantial a different conclusion may have been reached. That had not occurred here. No follow up of the claim had been made by Messina or her husband.

> [T]he applicant herself took no action at all but left everything to her husband. We do not regard that in itself as unreasonable but a person who delegates to another his own responsibilities cannot shelter behind the failure of that person to carry them out. (Reasons, para.12)

There were thus no special circumstances to enable the period of lodgement of the claim being extended beyond the six month limit.

Formal decision

The AAT affirmed the decision under review.

'Q' and DIRECTOR-GENERAL OF SOCIAL SECURITY
No. V82/454)

Decided: 1 July 1983 by I.R. Thompson.

From 14 January 1980 B lived with the applicant and her husband. B was then 15 years old. At the end of that month the Community Welfare Services Department approved the fostering of B by the applicant and her husband. On 22 September they legally adopted B.

The Welfare Department informed Q of, and granted her, a benefit payable by the State Government known as a foster payment. She did not apply to the DSS for family allowance in respect of B, not having turned her mind to whether or not she was entitled to it.

On 7 November 1981 Q discovered her entitlement to family allowance and claimed it back to the date when B first came into her and her husband's custody, care and control, viz, 14 January 1980. The DSS refused this back payment and granted the allowance from 4 November 1981 (until 14 December 1981 when B ceased full-time study and no longer enabled the applicant to claim family allowance). The applicant applied to the AAT to review the decision not to grant allowance from 14 January 1980.

Late application: 'special circumstances'

The DSS relied on s.102 of the Act (set out in *Messina*, this issue) which provides that a claim for family allowance must be made within six months after the date on which the claimant first became elibible. However, in 'special circumstances' this period may be extended as the Director-General allows. The issue here was whether such 'special circumstances' existed.

Reliance on State department: lack of information

The Tribuanl saw three circumstances in this case which made it special and distinguished it from the ordinary case.

The first was that the parents were not the natural parents but the foster parents of the child. This led to the second circumstance which was that the Community Welfare Services Department in informing her of her entitlement to foster benefit had led the applicant to believe that that was the only benefit to which she was entitled.

> . . . the fact that the Welfare Department told her of one benefit to which she was entitled would, I am satisfied, have led a reasonable person in her circumstances to think that that was the only benefit to which she was entitled.

(Reasons, para.7)

The third circumstance was that given the saving to the community by fostering B, as opposed to State provision of institutional care, Q could reasonably expect that the State department would inform 'her of all her entitlements to support from public funds in her fostering of B'.

Thus the discretion in s.102 should be exercised to extend the period in which the claim could be lodged.

Formal decision

The AAT set aside the determination under review and remitted the matter to the Director-General with a discretion that a period extending from 14 January 1980 to 7 November 1981 is allowed for the applicant to lodge a claim for family allowance.

CASSOUDAKIS and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. S82/95)

Decided: 22 July 1983 by I.R. Thompson, J.T.B. Linn and F.A. Pascoe

The applicant applied for handicapped child's allowance on 17 November 1980 in respect of her son who was born in 1965. He was assessed as 'severely handicapped' by a Commonwealth Medical Officer and it was conceded by the DSS that he was a severely handicapped child on 30 December 1974 (that is, on the date the allowance came into force). Cassoudakis applied to have the allowance back dated to that date. This was refused by the DSS and she applied to the AAT.

'Special circumstances': cultural differences

Section 105R of the Act applies s.102(1) to handicapped child's allowances. Section 102(1) deals with late applications and provides that in 'special circumstances' a claim lodged after six months from the date the claimant first became eligible may be effective to have the allowance paid from that first date. (The legislation is set out in *Messina*, this issue.)

The AAT could not accept that the applicant's membership of the Greek community (where such disabilities are not discussed and thereby her access to information on the allowance being restricted), nor the nature of her son's retardation (it being intellectual and therefore not immediately apparent) were special circumstances so as to allow back-payment.

The applicant spoke English fluently and as a shopowner would meet many people from other cultural backgrounds. Apart from the ignorance of entitlement which is not sufficient to constitute a 'special circumstance' (see *Wilson* (1981) 3 *SSR* 27) there was no evidence here as to the applicant being a special case.

As to ignorance of her son's condition the AAT said:

> It is clear that from the time when Stanley was rejected for admission to the infants' school at the age of five the applicant was aware of his mental retardation . . . What she and her husband did was refuse to face up to the reality of the situation.

(Reasons, para.10)

Formal decision

The AAT affirmed the decision under review.

MANZINI and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N82/361)

Decided: 6 May 1983 by R.K. Todd.

Margaret Manzini was in receipt of child endowment (now family allowance) in respect of her daughter until 13 April 1979 when she turned sixteen. However, under s.103 of the *Social Security Act* endowment may continue beyond that age if the child continues in full-time education. The applicant's daughter did in fact continue to be a student after turning sixteen but Manzini did not know she was entitled to a continuation of the endowment nor did she receive a 'reminder' form posted by the DSS which would have alerted her to this entitlement. This was probably due to her having moved in 1969 even though she notified the DSS of her change of address.

'Special circumstances'

On hearing of her entitlement Manzini lodged a claim on 20 March 1981 for the student family allowance in respect of her daughter. As the six month limit on the lodgement of the claim had expried, 'special circumstances' had to be shown to permit extension of that claim period, as required by s.102(1) of the Act. (The legislation is set out in *Messina*. this issue.)

The AAT referred to its decisions in *Faa* (1981) 4 *SSR* 41 and *Michael* (1982) 10 *SSR* 98. Both of those cases indicated that ignorance of entitlements under the legislation or non-receipt of the review form did not consitute 'special circumstances' for the purposes of section 102. The AAT concluded that those decisions should be followed.

Reform

The AAT commented that the phrase

'special circumstances' was an unsatisfactory one and urged that consideration be given to the amendment of s.102(1). A more appropriate phrase may be 'sufficient cause' which is found in s.119(3) of the Act. Combined with a discretion as to the determination of the appropriate date from which payment shall be made, that criteria may resolve some of the difficulties such as encountered in the present case.

Formal decision

The AAT affirmed the decision under review.

CARMICHAEL and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/264)

Decided: 29 June 1983 by R. Balmford.

Connie Carmichael was granted family allowance from 15 September 1981 in respect of her stepson, B. She and her husband had taken custody of B from her husband's mother, on 1 January 1980. The latter had been in receipt of family allowance for B until Carmichael lodged her application for family allowance. The DSS wrote to the applicant on 15 October advising her that she may wish to claim arrears of family allowance. She subsequently claimed arrears from 1 January 1980. The claim was rejected on the basis that the claim had not been lodged within six months of the date she took custody of her stepson, as required by s.102(2) of the *Social Security Act*. Carmichael applied to the AAT for review of that decision.

The legislation

Section 102(2) reads:

> Where a family allowance is granted to a person by reason of that person having assumed the custody, care and control of a child who, immediately before that person assumed his custody, care and control, was a child in respect of whom a family allowance was paid, the family allowance shall be payable from and including the date on which the claim for family allowance is lodged, but, where the claim is lodged within six months after the date on which the first-mentioned person assumed the custody, care and control of the child, or, in special circumstances, within such longer period as the Director-General allows, the family allowance shall be payable from and including that date.

'Special circumstances'

The applicant thus had to show special circumstances to enable the Director-General to allow a longer period than six months from 1 January 1980 for the lodging of her claim.

The AAT referred to its decision in *Wilson* (1981) 3 *SSR* 27, *Faa* (1981) 4 *SSR* 41 and *De Graaf* (1981) 3 *SSR* 26 (see *Messina* this issue).

Carmichael had thought that the grandmother had been putting the family allowance payments into a bank account for her stepson. She also had felt that it was for her husband's mother to notify the department when B left her care, custody and control.

Neither of these factors amounted to 'special circumstances' according to the AAT.

Formal decision

The AAT affirmed the decision under review.

Cohabitation

CHAPMAN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/99)

Decided: 5 July 1983 by J.B.K. Williams.

Chapman was granted widow's pension on 15 June 1977. On 3 February 1981 that pension was cancelled on the basis that as she was 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him' she was no longer a 'widow' as defined in s.59(1) of the Act. (The legislation is set out in *Pearce*, this issue.) The DSS also claimed an overpayment of $5125.30 recoverable under s.140(2) as she had received her pension as a result of not informing the DSS of her *de facto* spouse. Chapman applied to the AAT to review the decision.

Having regard to the principle in *Lambe* (1981) 4 *SSR* 43 that 'all facets of the interpersonal relationship' need to be taken into account the AAT was satisfied that Chapman was living in a *de facto* relationship. She had moved into the same house with G in July 1979 and had resided with him until he left in August 1980. They shared a common bed and had a sexual relationship. She became known by his name and they went out together socially. He provided some financial support. (Chapman had her widow's pension reinstated when G left and the deductions under s.140(2) were made from that pension.)

Formal decision

The AAT affirmed the decision under review.

PEARCE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/54)

Decided: 23 May 1983 by I. R. Thompson, W. B. Tickle and H. E. Hallowes.

In December 1975 Barbara Pearce separated from her husband. She was granted a widow's pension on 11 August 1976. On 3 August 1977 she was divorced from her husband. She lived with her mother until at least 22 April 1979, when her mother died.

Sometime after her mother's death she moved, with her daughter, into a house with Mr A. They resided together until May 1980. Pearce then moved to her brother's house and three months later A also moved into that house. He left in February 1982.

On 16 June 1980 the DSS cancelled the widow's pension granted to Pearce and on 26 November 1980 sought to recover overpayment of that pension paid since 1979 when she first resided with A, presumably because she was 'living with a man as his wife on a bona fide domestic basis although not legally married to him' and so excluded from the definition of widow in s.59(1) of the *Social Security Act*:

> 'widow' includes—
> . . .
> (c) a woman whose marriage has been dissolved and who has not remarried;
> . . .
> but does not include a woman who is living with a man as his wife on a bona fide domestic basis although not legally married to him.

Pearce applied to the AAT for review of the decisions by the DSS.

Evidence of cohabitation

There was conflicting evidence before the Tribunal as to whether or not Pearce and A were cohabiting. Pearce had stated to a DSS field officer on 24 April 1980 that she was in a *de facto* relationship with A. She denied this was true at the hearing.

The Tribunal concluded, after hearing evidence by A and Pearce's younger sister, that while Pearce may have wanted her relationship with A to develop, he had no such intention.

In deciding whether that finding led to the conclusion that Pearce was living with A as his wife on a bona fide domestic basis the Tribunal referred to its earlier decisions in *Waterford* (1981) 1 *SSR* 1, *RC* (1981) 4 *SSR* 36, and *Lambe* (1981) 1 *SSR* 5. These cases establish the general principle that:

> in order to determine whether a woman comes within the expression 'living with a man as his wife on a bona fide domestic basis although not legally married to him', all facets of the interpersonal relationship of the woman and the man with whom she is allegedly living as his wife need to be taken into account. [*Lambe* (1981) 1 *SSR* 5 at 6]

The AAT found that certain necessary elements for the existence of a marriage in the present case were absent. They were:

(1) permanence;
(2) commitment by A to either the applicant or her child;
(3) financial support; and
(4) real emotional support for the applicant by A.

(Reasons, para. 24)

Thus they concluded Pearce was at no time living with A as his wife on a bona fide domestic basis and was at all times qualified to receive widow's pension.

Formal decision

The AAT set aside the decision under review with a determination that at all times throughout 1979, 1980, 1981 and 1982 the applicant was a widow for the purposes of Part IV of the *Social Security Act* and