

## Age pension or special benefit

### BAPTIST and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. N83/508)

Decided: 18 April 1984 by W.A.G. Enright, M. McLelland and J. McClintock.

Baptist migrated to Australia on 3 September 1982, when he was 58 years-of-age. He did not qualify for an age pension when he reached 65 in 1978; but had to wait until 3 September 1982 when he had completed 10 years continuous residence in Australia (as required by s.21(1)(b) of the *Social Security Act*).

In October 1980, Baptist had applied for a special benefit but the DSS rejected that claim. In May 1982, he attempted to lodge a claim for an age pension, in anticipation of completing his 10 years residence but the DSS refused to accept the claim.

Because of his wife's illness, Baptist did not lodge the claim for his age pension on 3 September 1982 but delayed lodgment until 15 October 1982. The DSS granted him an age pension with effect from 21 October 1982.

Baptist appealed to an SSAT, claiming that payment of his age pension should date from 3 September 1982 or that he should be paid special benefit for the period between 3 September 1982 and 21 October 1982. The SSAT recommended against this appeal and, on 3 June 1983, the DSS confirmed its earlier decision. Baptist then applied to the AAT for review of the DSS decision of 3 June 1983.

#### No retrospective payment of age pension

Section 39 of the *Social Security Act* provides that a pension

shall be paid from a date determined by the Director-General, but the date so determined shall not be prior to the date on which the claim for the pension was lodged

or later than the first pension pay day occurring after the date on which the claim was lodged . . .

The AAT said that, on the merits, Baptist had 'made out a strong case for payment of his pension to commence on 3 September 1982'. The merits included the 'quite unsatisfactory' response from the DSS, when he tried to lodge his claim in advance, and his wife's illness.

But, the AAT said, the law did not permit retrospective payment of the pension. However it did allow payment from the date of lodgment — 15 October 1982 — and the merits of this case warranted payment from that date.

#### Special benefit

Section 124 of the *Social Security Act* gives the Director-General a discretion to pay a special benefit to a person where the Director-General is satisfied that the person is unable, 'by reason of age' physical or mental disability or domestic circumstances, or for any other reason . . . to earn a sufficient livelihood . . .

The AAT first decided that Baptist's claim for special benefit lodged in October 1980 did not relate to a closed period, nor had it become stale. It was properly before the AAT, because the Director-General had confirmed, on 3 June 1983, his decision not to grant that benefit (after review by an SSAT); and so the jurisdictional requirements of s.15A of the *Social Security Act* were fulfilled.

The basic question was whether Baptist was, between 3 September 1982 and 15 October 1982 'unable to earn a sufficient livelihood'. That question, according to *Te Velde* (1981) 3 SSR 23, should be answered by considering whether he could reasonably be expected to earn a livelihood. The AAT said that it was not reasonable to expect Baptist to work at the age of 68:

31. As to working for a wage, we think that the thrust of the Act clearly rejects the view that a person over the age of 65 can be reasonably expected to work. Our general system of social security does not require that; indeed to require it might well be to impose a burden which is incapable of discharge.

Baptist had investment funds of about \$25 000. But these were not capable, the AAT said, of providing income for living at a fundamental level (although 'capital of generous proportions might require an exercise of discretion against the grant of a special benefit'). And a pension of \$10 a week, payable only in Sri Lanka (because of currency exchange restrictions) could not affect Baptist's entitlement.

Finally, the AAT rejected the DSS' argument that it should refuse special benefit because its grant would circumvent a refusal to back-date payment of the age pension. On this point, the AAT said:

We find this reasoning for the rejection unacceptable. It reflects confusion between the result of granting the special benefit and the purpose for which the application was made. It ignores too the fact that the Act is welfare legislation which should be administered beneficially . . . We see the purpose of the Act as a relief of social insecurity and the provisions of the Act as a mechanism by which the ends are achieved.

(Reasons, para. 26).

#### Formal decision

The AAT substituted, as the commencing date for payment of age pension to Baptist and his wife, the date 15 October 1982; set aside the decision not to grant special benefit to Baptist and ordered that he be granted special benefit from 3 September 1982 to 15 October 1982.

## Separation under one roof: 'married' or 'unmarried'

### O'BRIEN and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. V83/92)

Decided: 26 January 1984 by I.R. Thompson.

Jean O'Brien had been granted an invalid pension, because of asthma and alcoholism, in 1976. At that time she had been separated from her husband for four years and she was living with her four children.

In 1976, the children 'began to get into trouble with the police' and, in June 1977, O'Brien's husband moved into her house in order to try to keep them out of trouble.

At the end of 1978, the DSS learned that her husband was living in her house and decided that she should be paid at

the married rate, taking account of her husband's income (from unemployment benefits). The DSS also decided that she had been overpaid since June 1977 and the overpayment should be recovered by deducting \$10 a fortnight from her pension.

#### The legislation

Section 28 of the *Social Security Act* provides for an invalid pension to be paid to a 'married person' whose spouse has income at a rate lower than the rate for an 'unmarried person'.

'Married person' according to s.18(1), 'means a person in relation to whose income sub-section 29(2) applies'.

Section 29(2) provides that

the income of a husband or wife shall —

(a) except where they are living apart in

pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or

(b) unless, for any special reason, in any particular case, the Director-General otherwise determines,

be deemed to be half the total income of both.

#### 'Living as part of the same family unit'

The Tribunal found, on the evidence, that O'Brien and her husband had lived in the same house since June 1977. They had occupied separate rooms and had not had a sexual relationship. However, they had shared meals and responsibility for the children. At various times, each of them had paid the rent and done the family's washing. Household expenses had been pooled. They represented themselves to outsiders as a married couple