Administrative Appeals Tribunal decisions

Handicapped child's allowance: late application

BEADLE and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/79)

Decided: 28 May 1984 by Toohey J, I.A. Wilkins and J.G. Billings.

Rosemarie Beadle had been granted a handicapped child's allowance from November 1982 for her daughter who suffered from recurring urinary tract infections. The Director-General refused her request to back-date payment to February 1979 when the condition of her daughter had been first diagnosed.

Beadle then applied to the AAT for review of that refusal.

'Special circumstances'

Sections 102(1)(a) and 105R give the Director-General of Social Security a discretion to back-date payment of a handicapped child's allowance in 'special circumstances'. (The terms of s.102(1)(a) are set out in *Corbett*, in this issue of the *Reporter*.)

Beadle said that she had known of the existence of handicapped child's allowance but thought it was only available to children who were patently handicapped, that none of the staff at the children's hospital in Perth had suggested that she might qualify for the allowance although she had attended the hospital regularly since the beginning of 1979, that her financial position had been quite desperate before the grant of the allowance and she was 'still struggling'.

The Tribunal said that 'special circumstances' which were referred to in s.102(1)(a) related, not to the granting of the allowance (in this case in November 1982), but to the 'longer period' referred to in that provision (in this case the period between February 1979 and November 1982).

The Tribunal also said that, while some explanation for the delay in applying for the allowance was called for, the existence of 'special circumstances' was to be determined from all the circumstances surrounding the application and the time at which it was made.

The Tribunal discounted, as likely to confuse , judicial decisions dealing with compliance with limitation periods for the commencement of claims for compenstaion. Earlier Tribunal decisions, such as *Vasilellis* (1983) 17 *SSR* 167 had relied on those decisions. But, the Tribunal said,

> to apply decisions bearing on one to cases concerned with the other may well obscure the enquiry that the legislation demands. It must be remembered too that decisions on Limitation Act provisions are usually concerned with whether a claim may be made or an action brought. Sub-section 102(1) does not establish a time after which claims are excluded; it is concerned with the circumstances in which the allowance payable may ante-date the claim.

(Reasons, p. 7)

The Tribunal said that there was nothing 'special' in the circumstance of Beadle being aware of the existence of handicapped child's allowance but not appreciating its application to her child: this was 'a regular occurrence', as was Beadle's confusion about the type of handicaps which attracted the allowance. Turning to Beadle's financial position, the Tribunal said:

> It seems to us that the financial position of the applicant will not ordinarily constitute special circumstances of itself. Very many of those who seek the handicapped child's allowance are in straitened financial circumstances. That is not to say that some quite unusual expense incurred on behalf of the handicapped child during the period under consideration is not capable of constituting special circumstances. In a particular case it may do so.

(Reasons, p. 10)

However, the Tribunal said, it was not helpful to focus too closely on each particular circumstance of the applicant. The question was whether, when the applicant's circumstances were looked at 'in their entirety', they could –

> fairly be described as unusual, uncommon or exceptional so as to warrant payment of the allowance earlier than the date from which it would ordinarily be paid.

(Reasons, p. 10)

In the AAT's view neither the individual circumstances raised by Beadle nor her total situation could be described as 'special circumstances' within s.102(1)(a).

Formal decision

The AAT affirmed the decision under review.

CORBETT and DIRECTOR GENERAL OF SOCIAL SECURITY
(No. W83/58)

Decided: 5 July 1984 by J.D. Davies J, G.D. Clarkson, and J.G. Billings.

Ellen Corbett had been granted handicapped child's allowances from November 1981 for two of her children, A and M, who suffered from ear infections and substantial hearing loss. The allowances were paid on the basis that each of the children was a 'handicapped child': s.105JA of the *Social Security Act*. The Director-General refused Corbett's request to back-date payment of the allowances to January 1978 for A and January 1980 for M – the dates when their disabilities had first occurred.

Corbett asked the AAT to review the Director-General's decision.

The legislation

Section 102(1)(a) provides for the payment of family allowance. (That section is made applicable to the payment of handicapped child's allowance by s.105R of the Act.)

> 102. (1) Subject to sub-section (2), a family allowance granted to a person (other than an institution) shall be payable –
> (a) if a claim is lodged within 6 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.

'Special circumstances': misleading information

The AAT referred to the decision in *Beadle* (see this issue of the *Reporter*) and agreed that the 'special circumstances' referred to in s.102(1)(a) are 'circumstances which relate to the making of the claim at one time rather than at another': Reasons, p. 3.

The AAT also agreed with the observation in *Beadle* that it would be a 'special circumstance' if an applicant was misled by a DSS officer or some other responsible person as to the availability of the allowance. The Tribunal continued:

> However, we would go further. The structure of s.102 appears to contemplate that there will be adequate publicity given as to entitlement to the handicapped child's allowance so that, ordinarily, persons entitled will be able to make application shortly after becoming eligible. This publicity may not have occurred with respect to the handicapped child's allowance, though we make that comment without intending any criticism of the Department.

(Reasons, p. 9)

The Tribunal said that, in its publicity for handicapped child's allowance (including the claim form) between 1978 and 1981, the DSS had emphasised 'the extent of the child's handicap rather than the extent of the care and attention given by the child's parent or parents.' However, the AAT said, the only medical requirement was that the child suffered from 'a physical or mental disability' and, once that was established, eligibility for the allowance depended on the extent of the care and attention needed by the child. The Tribunal said:

> It follows from the terminology used by the Department in its publicity at that time that some persons who might otherwise have come to know of their entitlement may not [have] become aware of it because they did not regard their child to be either 'severely handicapped' or 'substantially handicapped' within the ordinary meaning of those terms.

(Reasons, p. 10)

The AAT said that the inadequate publicity may have led to the result that 'many doctors and social workers may not have understood or given proper ad-

vice about entitlement to the handicapped child's allowance': Reason, p. 11.

Indeed, several applications to the AAT had shown that some doctors and social workers at the children's hospital in Perth had not advised persons that were entitled to claim the allowance:

> Yet, this was an institution from which parents of handicapped children could reasonably have expected to have heard about the entitlement. Many parents who did not receive such advice from the hospital understandably did not seek advice elsewhere. Matters of this type may bear upon the existence of special circumstances or the exercise of the discretion.

(Reasons, p. 11)

A 'culture of poverty'

Turning the facts of this case, the AAT noted that Corbett was 'a woman of Aboriginal descent', who had lived in difficult circumstances for several years: she had suffered severe financial difficulties, she had been a victim of domestic violence and she and her children had suffered from ill health. Corbett told the Tribunal that she had known of the existence of handicapped child's allowance but had thought that it was only for 'kids who were crippled or something'.

The AAT said that

> it would be unduly simplistic to approach this review upon the footing that [it involved] the usual reasons why a claim is not lodged at an early date and therefore that there was nothing special about [Corbett's] lack of knowledge . . . Oscar Lewis has written on 'the culture of poverty' which he has described as 'adaptation and reaction of the poor to their marginal position in a class-stratified high[ly] individuated, capitalist society'. Much of what Mr Lewis had to say with respect to persons in the Americas has application to Aboriginal persons within the current sophisticated Australian society. The applicant and many Aboriginal persons like her have grown up subject to considerable disadvantages and their relationship with society has been affected thereby. In the present case, in our opinion, these disadvantages placed the applicant in special circumstances so far as the making of applications for a handicapped child's allowance is concerned. As we have said, the applicant is a person who needs not only information but also assistance if she is successfully to complete an application such as that for a handicapped child's allowance. Neither information nor assistance in this respect was given to her in the Princess Margaret Hospital to which she took her children for treatment or by the welfare workers at the Bishop's Road Camp or indeed, the officers of the Department of Social Security with whom she had dealings with respect to other benefits.

(Reasons, pp. 15-16)

The Tribunal concluded that Corbett's circumstances were special.

The exercise of discretion

The AAT then turned to the question whether the discretion conferred to by s.102(1)(a) should be exercised in favour of Corbett. The AAT had earlier made the point that –

> The longer the period of back-dating required, the more weighty must be the reasons for the exercise of the discretion. The exercise of the discretion to allow a back-dating for an additional 3 months is one thing, the exercise of the discretion to allow a back-dating for a period of 3 years is another matter entirely. In the exercise of his discretion, the Director-General may decline to back-date a payment for a lengthy period though there are special circumstances affecting the case.

(Reasons, p. 6)

The AAT noted that the period for which retrospective payment was sought with respect to Corbett's child M was approximately 22 months, and that Corbett planned to devote that money to improving conditions in her home and purchasing clothing and bedding for her children. The Tribunal decided that the discretion to make the retrospective payment in respect of M should be exercised.

> We think that the resultant backpayment will achieve a useful social welfare purpose and will recompense Miss Corbett for the lack of the allowance when she was entitled to it.

(Reasons, p. 17)

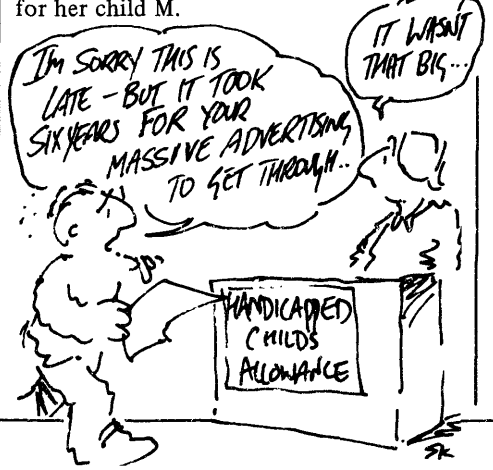
However, the AAT said, the period of back-payment sought for Corbett's other child A was almost 4 years. As this was a 'very much longer period', the AAT was 'not satisfied there [was] sufficient reason for making that grant'. The Tribunal noted that there was no requirement in the *Social Security Act* that handicapped child's allowance be applied towards care for a handicapped child. The Tribunal continued:

> Moreover, it is not shown that there is a financial loss or other detriment arising out of past care of the children by reason of their handicaps for which it would now be proper to reimburse Miss Corbett by a backpayment for 4 years.
>
> Neither Miss Corbett's lifestyle nor her expenditure was substantially affected by the care and attention which the children required by reason of their disabilities. Nor was she misled by an official's advice. Although we have expressed some dissatisfaction with the press publicity, the evidence does not suggest that.

(Reasons, p. 18)

Formal decision

The AAT affirmed the decision in relation to Corbett's child A; and set aside the decision in relation to Corbett's child M and decided that the discretion in s.102(1)(a) should be exercised so as to extend to 9 November 1981 the period of lodgement of Corbett's claim for her child M.



JOHNS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/60)

Decided: 5 July 1984 by J.D. Davies J, I.A. Wilkins and J.G. Billings.

Eliza Johns was granted a handicapped child's allowance from March 1982 for her son P on the basis that he was 'severely handicapped': s.105J of the *Social Security Act*. However, the Director-General refused her request to back-date payment of the allowance to April or May 1977 when P first became severely handicapped.

Johns asked the AAT to review that refusal.

The legislation

Section 102(1)(a) gives the Director-General a discretion to back-date payment of a handicapped child's allowance (to the date when the claimant became eligible) in 'special circumstances' (The terms of the section are set out in *Corbett* in this issue of the *Reporter*.)

'Special circumstances'

Johns, who was an Aborigine, was the mother of 12 children of whom P was the youngest. Her husband had been an invalid pension for the past 9 years. They were, the AAT said, 'substantially illiterate'. The family had frequently visited hospitals in Perth, sought help from the State Welfare Department, and visited local medical advisors over a period of many years; but no one had suggested to them that they might qualify for handicapped child's allowance.

During the period in question, the family had been in severe financial difficulties: for example, they had not been able to afford to replace P's spectacles for about 12 months (during which period he was, according to a specialist, 'very handicapped without them').

The AAT referred to its discussion in *Corbett* (in this issue of the *Reporter*) on 'the particular disadvantages from which many Aboriginal persons living in a sophisticated society suffer.' The AAT said that Corbett and her husband suffered from many of those disadvantages as well as being substantially illiterate:

> In the first place, their understanding of their rights is often less than that of better educated elements of the society. Secondly, many Aboriginal persons need positive assistance in obtaining, completing and lodging forms. We need not discuss their problems further. They were considered in *Re Corbett* . . . In our opinion, the circumstances of Mrs Johns, in relation to the lodgement of a claim for a handicapped child's allowance, were special.

(Reasons, p. 8)

The discretion

The Tribunal then turned to the question whether the discretion in s.102(1)(a) should be exercised in favour of Johns. The Tribunal said that it was one thing to say that the Johns family would have benefitted from the allowance had it been granted in 1977. But it was another thing to say that a retrospective grant

should now be made: 'the grant of a retrospective payment cannot change what is past', the AAT said.

The Tribunal pointed out that, in this case, the retrospective payment 'would amount to several thousand dollars' and that, if it were paid to Johns, she would not be obliged to apply it only for the benefit of P. The Tribunal continued:

> A handicapped child's allowance is a supplement paid to a parent in respect of the constant care and attention which the parent gives to the child. There will be many cases where the payment of a substantial sum to a parent by way of a retrospective payment will be appropriate. The parent may have been misled by wrong advice from an officer of the Department of Social Security. Or the parent may have lost income or expended money by reason of the care and attention given to the child such as to justify recompense by way of a lump sum of payment. The parent may have incurred debts by virtue of the constant care and attention given to the child over a number of years and it may be appropriate for the lump sum payment to be made so that these debts arising from that expenditure may be paid off. There will be other circumstances in which the making of a retrospective payment will be justified.
>
> But, as was said in *Re Corbett* . . . the longer the time which has elapsed between the date of entitlement to a pension and the date when the claim is lodged, the more weighty have to be the reasons for exercising the discretion favourably to an applicant. As a general rule, the *Social Security Act* turns its face against the making of lump sum retrospective payments. It is an Act which in general is concerned with income supplements. Thus, the greater the period to which the retrospective payment will apply the greater must be the reasons to justify that payment. Section 102(1)(a) confers no discretion to apportion the period between the date of entitlement and the date of claim.

(Reasons, p. 10)

Johns had told the AAT that, if the allowance were paid retrospectively, she would apply the money towards purchasing bed clothes, clothing and furnishings for her son. Evidence before the AAT showed that P was receiving and would continue to receive much care and attention. However, the AAT said, the discretion in s.102(1)(a)

> is concerned with what has happened in the past between the date of entitlement and the date of claim . . . We do not think it would be proper to exercise that discretion by reference to what has happened since the date of the making of the claim or what is likely to happen in the future . . . In summary we do not think that there is any matter arising out of the past, such as the incurring of debts or other detriment arising from past care and attention given to Paul, for which the applicant should now be reimbursed by a substantial lump sum payment. Nor was the applicant deprived of her entitlement by wrong advice.

(Reasons, pp. 12-13)

Formal decision

The AAT affirmed the decision under review.

HAMPTON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q83/45)

Decided: 16 May 1984 by J.B.K. Williams.

Ronald Hampton asked the AAT to review a DSS decision, refusing to back date payment of a handicapped child's allowance granted to his wife for their child.

The Hamptons had lived in Papua New Guinea from 1972 to July 1978, when they returned to Australia. Their child had been born in 1969. Both Hampton and his wife told the Tribunal that they had not known of the existence of handicapped child's allowance until immediately before lodging the claim in February 1982; and that, although their child had received regular medical treatment, none of their medical advisors had mentioned the existence of the allowance between the date of their return to Australia and February 1982.

Hampton argued that, because their child had been born before the introduction of the allowance in 1974, because he and his wife were out of Australia when the allowance was introduced and because they had not been informed about the allowance or their possible eligibility for some 3½ years after their return, their case involved 'special circumstances' so as to justify the exercise of the discretion in s.102(1)(a) of the *Social Security Act*.

The legislation

Section 102(1)(a) gives to the Director-General a discretion to back date, to the date of eligibility, payment of a handicapped child's allowance in 'special circumstances'.

The DSS had decided that these circumstances would not justify back payment over that period but had decided to make a back payment for 6 months in order to allow 'a settling in period' after the family's return to Australia.

'Special circumstances' and ignorance

The AAT referred to an earlier decision in *Cassoudakis* (1983) 14 *SSR* 138 and said that 'for circumstances to be special they must be such as to distinguish the particular case from the ordinary run of cases' and that ignorance of entitlement was not such a circumstance. The AAT said that both the Hamptons were articulate and literate; and that, whilst they might have been at some disadvantage because of their residence in Papua New Guinea, that disadvantage was not significant:

> I do not think that it can properly be said that non-residence in Australia at the time of the introduction of the allowance can in itself constitute a special circumstance.

(Reasons, p8)

Nor, in the opinion of the AAT, could the position of the Hamptons 'be distinguished from any other person, in regard to access to information concerning the allowance.' The Tribunal said that it appeared from 'a document in evidence' that the allowance was widely publicised through leaflets 'sent to over 3000 agencies in Queensland'; and, as the Hamptons were literate and articulate, 'there were . . . no problems of language or other communication difficulties which may have impeded their access to information': Reasons, p. 9.

Formal decision

The AAT affirmed the decision under review.

PARKYN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/74)

Decided: 21 June 1984 by G.D. Clarkson, I.A. Wilkins, and J.G. Billings.

The applicant, J.A. Parkyn, sought review of a DSS decision to refuse to back date payment of a handicapped child's allowance granted to her for her son, who suffered from cerebral palsy. Although she would have been eligible for the allowance from October 1977 (when her child was born), she had not applied for the allowance until March 1983, when her claim was granted.

Parkyn claimed that there were, in her case, 'special circumstances' which would justify back payment of the allowance under s.102(1)(a) of the *Social Security Act*: see *Corbett* in this issue of the *Reporter* for the terms of that section. Among the factors which, it was argued, contributed to these special circumstances was the fact that the applicant lived in a *de facto* relationship (creating a 'comparative lack of security [for] the applicant and her children'), and the geographical isolation in which the applicant had lived for many years, while her *de facto* husband worked on mining sites throughout Western Australia. These circumstances, it was argued, had contributed to the applicant's ignorance of her eligibility for the allowance.

The AAT referred to earlier decisions in *Beadle* (noted in this issue of the *Reporter*) and *Colussi* (1984) 19 *SSR* 194 and said that the 'special circumstances' must explain the applicant's delay in claiming the allowance.

The Tribunal conceded that the applicant had spent a great deal of time in small isolated places but, the AAT said, there was –

> no combination of circumstances which could suggest that the applicant was excluded to any material degree from the society in which she lived, or misled as to her entitlement. She finished first year at high school and has no language or literacy problems. She has lived in some of the larger country centres in the southern part of Western Australia . . . [S]he is a person who is quite able to cope with the pressures and problems of everyday life.
>
> Unfortunately her entitlement to an allowance was not brought to her notice for some years after [her child's] birth. The view consistently adopted by the Tribunal is that mere ignorance of the existence of the legislation is not of itself sufficient to constitute special circumstances and we propose to follow that view.

(Reasons, pp. 13-14)

Formal decision

The AAT affirmed the decision under review.

GARRETY and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N83/732)

Decided: 27 June 1984 by B.J. McMahon.

Judith Garrety's daughter, G, was born in September 1970. In October 1978, she was seriously injured when hit by a truck. Over the next 4 years, she spent substantial periods in hospital.

In August 1982, Garrety claimed a handicapped child's allowance in respect of her daughter but the DSS rejected that claim. She then applied to the AAT for review of the DSS refusal.

'Constant care and attention'

The Tribunal decided that, during the period between November 1979 and August 1982, Garrety had qualified for a handicapped child's allowance under s.105J of the *Social Security Act*, on the basis that her daughter was a severely handicapped child.

During that period, the AAT said, Garrety had provided 'constant care and attention' to her daughter in their private home. Her daughter's frequent absences in hospital for treatment did not affect the constancy of that care and attention for, as the Tribunal had said in *Yousef* (1981) 5 *SSR* 55, 'if the need for care an attention is continually recurring the statutory requirement is satisfied.'

The AAT suggested, without finally adopting, another approach to this question. After noting that Garrety had cared for and attended to her child even while the child was in hospital, the AAT said:

> [I]n the light of the purpose of the Act to relieve the burden of health care on institutions and to move it to private homes, it may well be that in the context of this section, *in* includes *from*. Thus while the applicant continued to be based at home and continued to assist the hospital staff and relieve them of burdens they might otherwise have, it might be said that she was providing care and attention *from* (and therefore, in this case *in*) a private home.

(Reasons, p. 9)

'Special circumstances' for back payment.

Garrety's claim for handicapped child's allowance had not been lodged until the end of the period for which she was qualified. Accordingly, the AAT considered whether there were 'special circumstances' to justify back payment of the allowance within s.102(1)(a) of the Act: see *Corbett* in this issue of the *Reporter* for the terms of that section.

Garrety told the AAT that, in December 1978, she had visited an office of the DSS and asked whether she was eligible for financial assistance for her daughter. A DSS officer had told her that, as her child did not 'go to a school for cripple children', Garrety was not eligible for handicapped child's allowance. She said that, as a result of that advice, she had not thought to make any further inquiries until, in August 1982, she had been told by a social worker that she would be eligible for the allowance.

The AAT accepted that Garrety had been given this advice by a DSS officer. (Indeed, the DSS did not deny that the conversation had taken place.) Accordingly, there were sufficient 'special circumstances' to justify back payment of the allowance in this case, even though Garrety's other circumstances (the fact that she was not geographically or culturally isolated, her access to professional advice and her general level of intelligence and literacy) would not have supported a finding of special circumstances:

> If one enquires at a regional office of the DSS and is told that one is not eligible to make application for an allowance, it seems to me to be a special circumstance that outweighs all other circumstances reviewed above.

(Reasons, p. 21)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Garrety be paid handicapped child's allowance for the period from November 1979 to August 1982.

Invalid pension: back-dated payment

DIXON and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V83/245)

Decided: 20 June 1984 by R. Balmford.

Beverly Dixon had two sons, S born on 9 September 1965 and D born on 9 September 1966. Both children suffered physical and intellectual handicaps and Dixon had been granted a handicapped child's allowance for each of them in 1977, on the bases that each of them was a 'severely handicapped child'.

In April 1981, as S's 16th birthday approached, a DSS medical officer reviewed S's file and concluded that he was suitable for vocational training. The medical officer then recommended that the DSS should not invite S to lodge a claim for invalid pension when he reached 16 years of age.

Shortly before S's 16th birthday, that is in August 1981, the DSS sent Dixon a claim form for continuation of family allowance for students aged 16 to 24 years. Dixon completed the form, stating that S would continue to be a full-time student after his 16th birthday. The DSS then decided that Dixon should continue to receive family allowance and handicapped child's allowance for S and she was paid accordingly. But the formal advice sent by the DSS to Dixon in September 1981 referred only to the continuation of family allowance for S.

In September 1982, when her second child turned 16, the DSS advised Dixon that both her children were eligible for invalid pension subject to a medical examination. S claimed and was granted an invalid pension in October 1982; but the DSS rejected Dixon's application for the grant of this pension to be back-dated to S's 16th birthday in September 1981.

Dixon then applied to the AAT for review of this refusal.

The legislation

Section 39 of the *Social Security Act* provides where an invalid pension is granted, the date from which it shall be paid 'shall not be prior to the date on which the claim for the pension was lodged . . .'

Section 145 of the Act carries the heading, 'Acceptance of claims for inappropriate pension, and c.'. It provides where a person claims some payment under this Act, and a claim might properly have been made under some other provision of this Act, the Director-General may treat the first mentioned claim as a claim for whatever payment is appropriate in the circumstances. (In effect, this section allows payment of a pension or other payment to be back-dated, so long as the claimant has lodged, at the appropriate time, a claim for some other payment.)

Standing

The AAT first decided that Dixon was an appropriate person to ask the Tribunal for review of the decision. She was a person 'whose interests are affected by the decision' of the Director-General within s.27(1) of the *AAT Act*. This was because S had signed an authorization appointing his mother to receive the pension on his behalf, he lived with her and she had the management of the household.

The purpose of s.145

The AAT said that s.145 was intended to enable the back-dating of payment of a claim in two situations: either where the original application had been for a payment to which the applicant was not entitled; or, as in this case, where the original application had been for a payment to which the applicant was entitled but there was a more substantial payment available to the applicant which had been overlooked at the time of lodging the application.

In other words, when an individual satisfied the requirements for more than one pension, allowance or benefit, s.145 should be used as a means of ensuring receipt of the more substantial payment where as in this case, the original claim had been for a less substantial payment. The AAT expressly rejected a DSS argument that s.145 should be restricted to situations where the initial claim had been for an inappropriate pension allowance or benefit: the heading to the section, the Tribunal said, should not be