Handicapped child's allowance: financial hardship

COLUSSI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. S83/4)

Decided: 17 August 1984 by R. C. Jennings.

This was an application brought to the AAT by the DSS following the decision in *Colussi* (1984) 19 *SSR* 194. In that case, the AAT had said that Gillian Colussi was eligible for handicapped child's allowance for her daughter under s.105JA of the *Social Security Act*—that is, on the basis that her daughter was a handicapped child and that Colussi was suffering 'severe financial hardship' because of the care provided by her to her daughter.

In reaching the decision that Colussi was suffering severe financial hardship, the AAT had noted that Colussi had been obliged to give up her employment in order to care for her daughter and had declined to take account of the general financial situation of Colussi's husband.

Following that decision, the DSS considered what rate of allowance should be paid to Colussi. Section 105L gives the Director-General a discretion to fix the rate of an allowance granted under s.105JA; and the DSS indicated that, if it were to follow the normal departmental guidelines, the rate of allowance paid to Colussi would be nil.

The DSS guidelines

A copy of the departmental guidelines produced to the AAT showed that, in fixing the rate of allowance for a handicapped child (that is, a child covered by s.105JA), the DSS applied an income test which took 'into account the family's income, special costs associated with the child's disability and the average minimum weekly wage'. This income test worked on the assumption that a person could not show 'severe financial hardship' unless that person's 'adjusted family income' fell below an income standard calculated by adding together—

- the current average minimum weekly wage, as measured by the Australian Bureau of Statistics;
- the maximum rate of handicapped child's allowance; and
- $6 for each dependant child in the family.

Guidelines rejected as illegal

The AAT noted that these DSS guidelines had been approved in *Sposito* (1983) 17 *SSR* 166 and *Yatmaz* (1984) 19 *SSR* 195. However, the Tribunal said the legislation dealing with handicapped child's allowance (Part VIB of the *Social Security Act*) did not demonstrate 'a legislative intention to apply a family means test to persons qualifying for a handicapped child's allowance by reason of their personal financial hardship': Reasons, p.11. Consequently, those parts of the DSS guidelines which made eligibility for the allowance dependant upon a family income test could 'no longer stand': Reasons, para. 13.

While the calculation of the rate of allowance to be paid was a separate question, the Tribunal indicated that the discretion given to the Director-General under s.105L should not be used so as to reimpose a family income test. That discretion could be used where, for example, the cost of caring for the child was less than the maximum allowance (currently $85 a month) or where the parent or guardian was also receiving money from another source such as an award of damages.

Looking at family income

It did not follow, the AAT said, that the income of Colussi's husband was irrelevant in determining the amount she should be paid by way of handicapped child's allowance:

> [H]is income may be relevant in determining the extent, if any, to which he was able to compensate her for her loss of income.

(Reasons, p.14)

In the present case, while Colussi's husband was receiving more than the average minimum wage, he had substantial commitments (including a wife and four children) and he was, in the opinion of the AAT, not able to compensate his wife for her loss of personal income.

Formal decision

The AAT remitted the matter to the Director-General with a recommendation that Colussi be paid handicapped child's allowance at the maximum rate applicable.

Handicapped child's allowance: late claim

MOGRIDGE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W.83/82)

Decided: 17 August 1984 by G. D. Clarkson.

The AAT *affirmed* a DSS decision not to back date, for a period of some 4½ years, payment of a handicapped child's allowance granted to the applicant in respect of her foster child.

The applicant had claimed that there were 'special circumstances' which justified back payment of the allowance under s.102(1)(a) of the *Social Security Act*. According to the applicant, the special circumstances were that, when she had made arrangements to foster the child she had been told by a welfare agency that she was eligible for a foster allowance, but that neither the agency nor the DSS had told her that she was eligible for the handicapped child's allowance.

The AAT pointed out that the applicant had been granted an allowance on the basis that the child was substantially handicapped (s.105JA) rather than severely handicapped (s.105J). The legislation providing for such an allowance dated from November 1977, more than four years after the applicant had begun to foster the child. Moreover, the Tribunal said, it had for some time appeared doubtful whether the applicant would qualify for any allowance for the child, even on the basis that the child was substantially handicapped.

Given the relatively late extension of eligibility for the allowance and the substantial doubts about the child's meeting the definition of a 'handicapped child', the AAT said that it was 'expecting too much of the officers concerned to say that the officers of the welfare agencies with whom the applicant had had contact should have encouraged the applicant to apply for the allowance'.

GOULD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/56)

Decided: 17 August 1984 by G. D. Clarkson.

Jennifer Gould gave birth to a child, C, in September 1976. In August 1977, the child was seriously burnt when he fell into a hot bath. Over the next five years, the child received hospital treatment (as an inpatient and an outpatient) on 30 occasions. Over much of that period, Gould provided considerable care and attention to the child in their home.

In October 1982, Gould applied for a handicapped child's allowance and, although the DSS conceded that C had been severely handicapped between August 1977 and August 1979, this claim was rejected because it had not been lodged within the time limit set by s.102(1) of the *Social Security Act*. Gould applied to the AAT for a review of that decision.

Late claims and 'special circumstances'

Section 102(1) of the *Social Security Act* provides that a handicapped child's allowance can be paid from the date of eligibility if a claim is lodged within six months of that date or at the Director-General's discretion, 'in special circumstances' if the claim is lodged within a longer period.

Evidence was given to the Tribunal that, following C's accident, Gould was under considerable emotional stress (because she felt that she was personally responsible for the child's injuries) and was socially isolated (because she was living in a small country town to which she had recently moved).

Gould told the AAT that she had not learned of the existence of the allowance until after her child had made a substantial recovery from his injuries and that, even then, she had thought that the allowance was only paid for retarded and crippled children. It was, she said, not until late 1982 that she realised that C's former condition would have entitled her to a handicapped child's allowance. That evidence was substantially corroborated by a Children's Hospital social worker who said that very few parents whose children had been burned enquired about eligibility for handicap-

ped child's allowance, that the DSS took no efforts to reach those parents and that it had been beyond Gould's emotional capacity to enquire about money associated with C's care, despite her financial hardship.

The AAT said:

> Here there is the familiar ignorance of either the existence of the allowance, or that a particular disability would attract entitlement. Here also, there is the comparative isolation of a small country area, an isolation heightened by the time-consuming care and treatment which the child's injuries required and the fact that the members of the family were newcomers in the district.
>
> There is however here an additional factor which was not sufficiently brought out to the Department when the claim was being considered, and which I consider to be of crucial importance and that is the mental and emotional state of the applicant for most, if not all, of the period of the delay.
>
> It is quite clear that the applicant was greatly distressed by the feeling of guilt which oppressed and at times overwhelmed her . . .
>
> Whether Mrs Gould was unable to make the appropriate enquiries or would have been unable to make an application if she had known of the allowance, it appears that the chances of her making an application within time were diminished and the delay in making the application increased by her intense and persistent reaction to the events which gave rise to the entitlement.

(Reasons, pp.13–14)

The Tribunal concluded that there were sufficient 'special circumstances' to justify back payment of the allowance and that there was 'no good reason to exercise against the applicant the discretion to grant the allowance for the restricted period for which it is claimed': Reasons, p.14.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that Gould was entitled to payment of handicapped child's allowance for the period from October 1977 to August 1979.

BLURTON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/75)

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

In September 1982, Donna Blurton was granted a handicapped child's allowance for her son, M, on the basis that he was a 'handicapped child': s.105JA of the *Social Security Act*.

However, the DSS refused to back date payment of the allowance to September 1976 when M had been born. Blurton applied to the AAT for review of that refusal.

The legislation

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

No 'special circumstances'

Throughout most of the 6 years covered by this application, Blurton had been, as

the SSAT had put it in its recommendations that she be paid arrears, 'subjected to extreme, prolonged and continual financial, domestic and personal stress'. She had given birth to 3 children (2 of whom were constantly ill), changed her residence 8 times, being subjected to persistent and violent assaults by her husband, hospitalized on 10 occasions and had separated (and hidden) from her husband many times.

Blurton's claim that there were 'special circumstances' in her case depended upon a combination of her ignorance of the scope of the handicapped child's allowance and her unsettled family situation. She also told the AAT that, throughout the period in question, she had had a great deal of contact with the DSS and with a welfare agency, neither of which had advised her to claim the allowance.

The AAT accepted that Blurton had had 'a long and continuous history of domestic and personal problems'. But, the AAT said, these had not deprived her of the capacity to claim the allowance.

Although the Tribunal said that the failure of the DSS and the other welfare agency to advise Blurton to claim the allowance was 'extraordinary', it was not satisfied that there were 'special circumstances' to justify back payment of the allowance:

> [T]he fact is that it was not her domestic situation that precluded her from making application for a handicapped child's allowance earlier than she did. It was simply a failure to appreciate the relevance of the allowance to her situation and, as is clear from the experience of this Tribunal, that is a common and not an unusual situation. Equally Mrs Blurton's financial position is far from exceptional in the case of parents with handicapped children.

(Reasons, p.6)

Formal decision

The AAT affirmed the decision under review.

CLARK and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V84/40)

Decided: 23 July 1984 by R. Balmford.

The AAT *affirmed* a DSS decision not to back-date (by some seven years) a grant of handicapped child's allowance made to Clark for her child.

The Tribunal decided that the failure of the social worker employed by the hospital where Clark's child had been born, to advise Clark that she should apply for the allowance, was not a 'special circumstance' within s.102(1)(a) of the *Social Security Act* so as to justify back-dating of the allowance.

The Tribunal considered, but did not finally decide, an argument based on s.145 of the *Social Security Act*. That section provides that, where a person makes a claim for a payment under one provision of the Act, the Director-General may treat it as a claim for the appropriate pension, allowance or benefit. In the present case, Clark had lodged a claim for maternity allowance and family allowance shortly after the birth of her child and, if s.145 were applied to that claim, it might be treated as justifying payment of handicapped child's allowance from the date of its lodgement.

The AAT considered whether there might be some inconsistency between s.102(1) and s.145 which would prevent an applicant for handicapped child's allowance taking advantage of s.145. But, the AAT said,

> there is no irreconcilable conflict between the two provisions, and there seems no reason, in the light of the manner in which s.145 was discussed and applied in *re Dixon* (1984) 20 *SSR* 213, why both s.145 and sub-s.102(1) should not be available as giving different bases on which the Director-General might back date a claim for handicapped child's allowance.

(Reasons, para. 19)

However, the AAT noted that the DSS had argued that, because of s.105K, s.145 could not be used to treat an original claim for family allowance as a claim for handicapped child's allowance. Section 105K provides that handicapped child's allowance is not payable for the child unless family allowance is payable for that child. The DSS argument was that once an original claim for family allowance was treated as a claim for handicapped child's allowance under s.145, then 'there would be no claim for family allowance'; so that family allowance would no longer be payable for that child and s.105K would prevent payment of handicapped child's allowance for that child.

The AAT did not dispose of these arguments, saying that, in the circumstances of the present case, it would exercise the discretion in s.145 (assuming that the provision was available) against back-dating Clark's claim under that section.