SOCIAL SECURITY Reporter

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Comment

Writing in the middle of 1983, Martin Partington pointed to the difficulties faced by many people in lodging their social security claims within the time limits established by the *Social Security Act* – simple ignorance of rights, bad information, inadequate publicity, language barriers and obscure forms were some of the problems which Partington identified. In some situations, the *Social Security Act* gives the DSS a discretion to allow the late lodgement of a claim and to backdate payment of the appropriate benefit. However, as Martin Partington pointed out, both the DSS and the AAT tended to adopt a restrictive attitude to the exercise of this discretion: 'Late Claims for Social Security' (1983) 14 *SSR* 146. That restrictive attitude was reflected in the observation of Davies J (the President of the AAT) in *Johns* (1984) 20 *SSR* 211: 'As a general rule, the *Social Security Act* turns its face against the making of lump sum retrospective payments.'

The Tribunal's decisions in *Johns* and in several other cases where it refused to backdate payment of handicapped child's allowance are now on appeal to the Federal Court. Meanwhile, however, the AAT has begun to demonstrate a rather more liberal attitude to the backpayment question. Many of the claims for backpayment have come up in the context of s.102(1) which deals with late claims for family allowance and handicapped child's allowance. The AAT had not only taken a restrictive view of what was a sufficient 'special circumstance' to explain a late claim, but had also insisted that, before the discretion to backdate payment would be exercised, the claimant must show some additional factors (such as financial hardship or misleading DSS advice): see, for example, *Corbett* and *Johns* (1984) 20 *SSR* 210 and 211. But in a recent decision, *Bowles*, the AAT expressed some doubts about the restrictive approach taken in *Corbett* and *Johns* and accepted a DSS submission that, if the AAT found there were 'special circumstances' to explain the delay in claiming a handicapped child's allowance, then that should be sufficient to allow the discretion to be exercised in favour of backdating. The Tribunal also offered some specific criticisms of the approach taken in *Corbett* and *Johns*, rejecting the idea that backpayment should only be made where the claimant had gone into debt during the period for which backpayment was sought: 'Those in most need,' the AAT said, 'are often not able to find people prepared to lend to them.'

The Federal Court may agree with those implicit criticisms of the double-barrelled test in *Corbett* and *Johns* and decide that once 'special circumstances' for the delay are established, the claimant should be entitled to backpayment. In the meantime, the AAT has shown (in *Sunamura*) that any discretion to backdate payment of *family* allowance should be readily exercised. In that decision, the AAT pointed out that family allowance was 'an instrument of general financial policy rather than purely a welfare payment'; and that family allowance was, in effect, a return to parents of income tax paid by them. Those general policy considerations, the AAT said, should be taken into account when exercising the apparent discretion under s.102(1). Because the applicant's husband had paid Australian income tax over several years, she was entitled to have the discretion exercised in her favour.

In this issue:

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(While any weakening of the restrictive view developed in *Corbett* and *Johns* is to be welcomed, the result in *Sunamura* presented an ironic contrast to the result in those other cases: here we see an affluent family receiving backpayment of family allowance because the family had been compelled to pay income tax; while in the earlier decisions, an impoverished and highly marginal family were denied backpayment of handicapped child's allowance because they had not gone into debt during the period when the allowance was payable to them. No doubt the AAT would respond that this contrast flows from the different purposes of family allowance and handicapped child's allowance; but that response is less than totally convincing when one considers the degree of creativity which the AAT has invested in reaching the conclusions in these cases.)

The backdating question has been raised several times by parents who have claimed continuing family allowance for their student children after those children's 16th birthday. Decisions such as *Faa* (1981) 4 *SSR* 41 have assumed that payments of family allowance could only be continued for a student child if a new claim was lodged within 6 months of her or his 16th birthday; or, where the claim was lodged later, if there were 'special circumstances' to explain the delay. However, in *Ellis*, the AAT has now decided that the parent of a student child remained eligible for family allowance after the child's 16th birthday; that the lodgement of a claim for continued payment of that allowance was not a new claim but only a means of advising the DSS of the child's student status; and that it was open to the parent, by advising the DSS of that status at any time, to obtain backpayment of the family allowance for that student child without having to cross either of the hurdles ('special circumstances' to explain the delay, and extra factors to justify the exercise of the discretion) erected by such decisions as *Corbett* and *Johns*.

Backdating of invalid pension presents particular difficulties under the *Social Security Act*: s.39 says that the pension can only be paid from a date after the pension claim is lodged. But in *Whitehead*, the AAT has demonstrated that, through a combination of other sections, invalid pension could be backdated for some 3½ years. Where an injured person has claimed workers' compensation, s.119(4) 'deems' that claim to be a claim for sickness benefit; and s.145 allows the DSS to treat the 'deemed' sickness benefit claim as an invalid pension claim if invalid pension would be the appropriate payment. Bearing in mind that a significant proportion of invalid pension claims come from people who have suffered industrial injuries, this decision could have quite wide consequences.

P.H.

Administrative Appeals Tribunal decisions

Late claim: family allowance

SUNAMURA and SECRETARY TO DSS (No. V84/182)

Decided: 29 January 1985 by R. Balmford.

Sadako Sunamura, her husband and their two children had lived in Australia between December 1980 and May 1984, while Sunamura's husband worked for a Japanese company and paid Australian income tax.

In January 1984, after Sunamura and her husband had learnt of their entitlement to family allowance, they claimed and were granted that allowance for their 2 children. However, the DSS refused to back date payment of the allowance to December 1981, the date when Sunamura had become eligible for the allowance.

Sunamura asked the AAT to review that decision.

The legislation

Section 102(1) of the *Social Security Act* provides that family allowance is payable from the date when the claim is lodged; but payment is to be back dated to the date of eligibility if the claim is lodged within 6 months after that date, 'or, in special circumstances, within such longer period as the Secretary allows'.

Section 96(1) provides that a family allowance can only be granted to a claimant born outside Australia for a child born outside Australia after the claimant and the child have resided in Australia for 12 months.

'Special circumstances'

Sunamura and her husband told the AAT that they had not known of their entitlement to family allowance for some 3 years after their arrival in Australia. None of the husband's fellow workers had been entitled to the allowance and his employer had not provided him with any information about it. The DSS had not publicised the existence of the allowance amongst temporary visitors nor amongst Japanese residents.

The AAT decided that there were sufficient 'special circumstances' to explain the late claim. These were Sunamura's ignorance of her entitlement, the absence of any system for informing temporary residents of their entitlement and the fact that Sunamura could not have been expected to enquire about entitlement.

The discretion

The Tribunal noted that, in *Bygrave* (1984) 22 *SSR* 251, the AAT had said that, even where there were 'special circumstances', the Secretary had a discretion to allow or deny back-payment.

That discretion, the AAT said, should be exercised consistently with the purpose of the payment of family allowance. (The AAT referred to observations by the High Court by *Klein* v *Domus Pty Ltd* (1963) 109 CLR at 473, 'that wherever the legislature has given a discretion . . . you must look at the scope and purpose of the provision and what is its real object.')

In the present case, s.102(1) did not set out any criteria to guide the exercise of the discretion. This was an obscurity, which justified the AAT looking at Parliamentary materials under s.15AB(2)(f) and (h) of the *Acts Interpretation Act* 1901 in order to establish the purpose of family allowance. The AAT pointed out that family allowance was an unusual benefit under the *Social Security Act*:

> Entitlement to family allowance, in contrast to entitlement to every other pension, allowance or benefit, is unrelated to means, or to any special need or deprivation.

(Reasons, para. 29)

The legislative history of family allowance (formerly known as child endowment), and particularly statements made in Parliament when the dependent child taxation rebate was abolished the child