

endowment substantially increased in 1976, showed –

that family allowance is seen by governments as an instrument of general financial policy rather than purely a welfare payment. While concern for low-income families is manifest, other policy objectives are also sought to be attained by the use of the allowance . . . It is clear that the legislation requiring payment of tax and the legislation providing for entitlement to family allowance are, as a matter of policy, seen as reciprocal in effect.

(Reasons, para. 32)

It followed, the AAT said, that because Sunamura and her husband had lived in Australia for more than 4 years and because Sunamura's husband had paid income tax during that period, the discretion in s.102(1) should be exercised in favour of backdating payment of the allowance to the date of eligibility, namely December 1981.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that time for lodging the claim for family allowance be extended to December 1981.

ELLIS and SECRETARY TO DSS (No. Q84/115)

Decided: 15 February 1985 by R. Balmford. Mrs Ellis had adopted a child, A, shortly after his birth (1 August 1963) and was then granted child endowment (as family allowance was then called) for A. That allowance was paid into Mrs E's bank account.

Shortly before A turned 16, Mrs E completed and returned to the DSS a form declaring that A would continue as a full-time student after his 16th birthday.

However, that form was not received by the DSS and, accordingly, the DSS cancelled payment of the allowance from A's 16th birthday.

In 1983, when Mrs E discovered that no payments of the allowance for A had been credited to her bank account since 1979, she claimed that allowance for the period from 1 August 1979 to November 1982 (when A had ceased to be a full-time student). The DSS rejected that claim and she sought review by the AAT.

The legislation

Section 95(1) of the *Social Security Act* provides that a person with the custody, care and control of a child is qualified to receive family allowance for that child.

Section 94(2A) provides that a person is to be treated as a child for the purposes of family allowance, if the person is aged 16–25 years, is a full-time student and is wholly or substantially dependent on another person.

At the time of the decision under review, s.103(1)(f) provided that 'family allowance . . . granted in respect of a child ceases to be payable' when the child turns 16, unless the Director-General was satisfied within 3 months of that date, that the child became a 'student child' (that is a person covered by s.94(2A)) on that date.

Section 102(1), in effect, allowed the Director-General to extend, 'in special circumstances', the normal 6 month period for lodging a claim for family allowance.

No 'special circumstances'

The AAT said that Mrs E's failure to notice that the allowance for A was not being credited to her bank account and her posting to the DSS of the claim form for that allowance did not constitute 'special circumstances' so as to bring into play the

discretion in s.102(1) to extend the time for lodging the claim for the allowance.

Claim not necessary

However, the AAT decided that it had not been necessary for Mrs E to lodge a claim in order to establish her entitlement to family allowance for A in order to receive that entitlement. The AAT adopted the view that the purpose of s.103(1) was not to extinguish a person's right to family allowance but to deal with the *payment* of family allowance:

Administratively family allowance ceased to be payable to Mrs Ellis in respect of A when 3 months had elapsed after he attained the age of 16 years without the Director-General being satisfied that he became a student child on attaining that age. But she was still qualified to receive the allowance in respect of him because he had become on that day, and continued to be, a student child.

35. That being so, the question arises as to what action she could have taken to bring about the resumption of payment of family allowance, either while A was still a student child, or later. As she had a continuing entitlement it appears to me that she would have had no need to do other than advise the Director-General of that fact.

It followed the AAT said, that Mrs E was not required to lodge any further claim for student family allowance after A's 16th birthday; and the claim lodged by her in November 1983 was sufficient to revive her entitlement to receive payment of family allowance.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that Mrs E was qualified to receive family allowance for A from 15 August 1979 to 1 November 1982; and that the amount that she should have received was now payable to her.

Late claim: handicapped child's allowance

DAWES and SECRETARY TO DSS (No. A84/92)

Decided: 12 February 1984 by J.O. Ballard.

Isobelle Dawes had given birth to her third child, L, in October 1975, when she was living with her husband in a small country town. Dawes and her husband separated at the end of 1976, resumed cohabitation in Canberra in March 1977 and finally separated in July 1977. Meanwhile, L began to suffer convulsions, would not sleep and had difficulty in talking from early 1977. However, it was not until November 1980 that L was diagnosed as suffering from brain damage. In December 1981, Dawes applied for a handicapped child's allowance for L and this was granted on the basis that L was a severely handicapped child. The DSS originally decided to backdate payment of the allowance to November 1980 when L's condition had been diagnosed but the DSS later annulled that backdating decision. Dawes asked the AAT to review the annulment.

The legislation

Section 105(1) of the *Social Security Act* (in combination with s.105R) provides that payment of a handicapped child's allowance can be backdated 'in special circumstances' if the allowance is not claimed within 6 months of the date of eligibility.

The date of eligibility

The Tribunal decided that Dawes had been eligible from November 1980, when she was first given medical diagnosis of L's condition. Her child could not be said to need constant care and attention nor could Dawes be said to be providing constant care and attention before that date because, until that diagnosis, Dawes had 'merely a suspicion from symptoms which may only have been recognised by [her] hindsight.'

Special circumstances

The AAT said that there were 'special circumstances' to explain Dawes' delay

in applying for the allowance. These were her geographical isolation until March 1977, the disruption caused to her life by her marriage break-down and the heavy parental responsibilities which she had for her children.

The discretion

The AAT noted that, in *Johns* (1984) 20 SSR 211 the Tribunal had said that, the longer the period for which backdating was sought, 'the more weighty have to be the reasons for exercising the discretion favourably to an applicant.' In the present case, because the period involved was relatively short (some 14 months), the discretion to backdate payment should be exercised in her favour.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that payment of the allowance be backdated to 15 November 1980.

BOWLES and SECRETARY TO DSS
(No. V84/328)

Decided: 22 February 1985 by
J.R. Dwyer, H.G. Browne and
G. Brewer.

Patricia Bowles gave birth to a daughter, A, in 1971. Shortly after her birth, A was diagnosed as suffering from a chronic incurable liver disease, which was expected to prove fatal within a few years. Bowles provided intensive care for her daughter — administering medication, controlling her diet and monitoring her health. A's condition improved significantly between 1975 and 1981 (to the extent that, according to medical specialists, she had 'near normal health'), and then deteriorated. But, even in the period of relatively good health, it had been necessary for Bowles to monitor her daughter's health closely.

In August 1983, Bowles learned of the existence of handicapped child's allowance, which had been introduced from 30 December 1974. She claimed and was granted an allowance for her daughter; but the DSS refused to backdate payment of the allowance. Bowles sought review of that decision.

The legislation

Section 105J of the *Social Security Act* (which came into operation on 30 December 1974) provides that a person who provides, in a private home, 'constant care and attention' to a severely handicapped child is qualified to receive handicapped child's allowance. (Section 105H defines a severely handicapped child as one who needs constant care and attention because of a physical or mental disability.)

Section 102(1) (when read with s.105R) provides that a handicapped child's allowance is payable from the date

of eligibility if the claim is lodged within 6 months of that date or 'in special circumstances, within such longer period as the Secretary allows'.

Eligible from 1974

The AAT said that the evidence showed that A had been a severely handicapped child from the time when the allowance had been introduced on 30 December 1974 and that Bowles had been eligible for the allowance from then. The care and attention provided by Bowles had been 'continually recurring' and had 'continued without pause or letup' since then, and could therefore be described as 'constant', according to the decision in *Yousef* (1981) 5 SSR 55.

'Special circumstances'

The AAT found 'special circumstances' within s.102(1) to explain the late lodgement of Bowles' claim. These included:

- the very serious nature of A's disease and the priority which Bowles had given to caring for A;
- Bowles' consequential isolation, and the effect of A's illness on her emotional state, family life and ability to earn income;
- the effect of A's illness on her father's ability to hold steady employment;
- the considerable financial burden caused by A's illness;
- the saving to the community resulting from the quality of the care given to A at home, rather than in hospital; and
- the failure of various medical advisers to inform Bowles of her eligibility for the allowance.

A discretion?

The AAT noted that in *Corbett* and *Johns* (1984) 20 SSR 210 and 211 the

AAT had said that the Secretary had an overriding discretion under s.102(1) — that there had to be some extra factor, beyond the 'special circumstances' which explained a late claim, to justify backdating payment of the allowance.

In the present case the AAT indicated, rather guardedly, that it found this approach difficult to accept: it pointed out that, in *Johns*, 'in a case where there was extreme poverty, payment of arrears was denied' and said that it was difficult to understand why the discretion had not been exercised in that case.

But, the AAT said, it was 'not necessary for us to reach a concluded view on this matter': Reasons, para. 29; because those earlier decisions were on appeal to the Federal Court; and the DSS advocate had said that, if the AAT found 'special circumstances' in the present case, it should allow backpayment for the whole period.

Formal decision

The AAT accepted that submission and said that the problems faced by Bowles since her daughter's birth justified the exercise of the discretion. The AAT noted that Bowles had incurred debts in caring for her daughter, and said:

Bowles since her daughter's birth justified the exercise of the discretion. The AAT noted that Bowles had incurred debts in caring for her daughter, and said:

We would, however, be reluctant to place too much emphasis on the incurring of a debt or the borrowing of money as those in most need are often not able to find people prepared to lend to them. Alternatively, such people may not seek a loan simply because they do not have the means to repay it.

(Reasons, para. 30)

Late claim: sickness benefit

McEWAN and SECRETARY TO DSS
(No. V84/221)

Decided: 27 February 1984 by J.R. Dwyer.

Peter McEwan had been employed for some 9 months until January 1983, when he was dismissed following a dispute with his supervisor. He immediately claimed unemployment benefit, which the DSS granted. In August 1983, the DSS reviewed his entitlement to unemployment benefit and decided that he was a genuine job-seeker and still qualified for unemployment benefit. (Throughout this period, McEwan sought work from his former employer, other firms and the CES.)

In November 1983, McEwan claimed and was granted sickness benefit at the same rate as his unemployment benefit (which was some \$12 a week below the standard rate of sickness benefit). He then lodged a further claim for sickness benefit for the period from January to November 1983, supported by retrospective medical certificates declaring that he had been incapacitated for work

during that period because of a long-standing anxiety state. (McEwan had been undergoing treatment for this anxiety state for several years.) The DSS rejected that claim and McEwan sought review of the DSS decision fixing the rate of his sickness benefit and denying him retrospective payment of sickness benefit.

The legislation

Section 108(1) of the *Social Security Act* provides that a person who was temporarily incapacitated for work and had lost 'salary wages or other income' [sub-para.(i)] or would otherwise have qualified for unemployment benefit [sub-para.(ii)] is qualified for sickness benefit.

Section 113 limits the rate of sickness benefit to the amount of wages or unemployment benefit lost by the claimant. If McEwan had qualified for sickness benefit in January 1983, he would have been paid \$77.25 a week, rather than the \$64.40 he was paid by way of unemployment benefit; and, of course, he would

have continued to receive that rate of sickness benefit after November 1983, rather than the lower rate fixed by s.113.

Section 119(2) provides that sickness benefit is payable 7 days after the day when a person becomes incapacitated for work, if the claim is lodged within 13 weeks of that day. Section 119(3) provides that, if the claim is not lodged within that time, benefit is payable from the day when the claim is lodged; but the sub-section allows the Secretary to backdate payment if he is satisfied that the delay in lodging the claim is 'due to the cause of the incapacity or to some other sufficient cause'.

The cause of McEwan's 'loss of income'

The AAT said that McEwan had lost his job, not because of his anxiety state, but because of what his employer took to be a dispute between McEwan and his supervisor.

Had McEwan been 'incapacitated for work'?

Even if McEwan's loss of income in January 1983 had been due to his illness,