

date on which the claim for the benefit was lodged'; and s. 66 (adopted for the purposes of supporting parent's benefit by s. 83AAG(1)) provided that a claim should 'be made in writing in accordance with a form approved by the Director-General'.

The AAT noted that no provision was made for the backdating of supporting parent's benefit in contrast with, for example, family allowance. Accordingly, it was not possible for payment of Theunens' benefit to be backdated beyond the date of her claim in September 1981.

Ex gratia payment?

The AAT said that it did not have the power to direct an *ex gratia* payment nor should it make any formal recommendation because the matter was entirely in the discretion of the Minister for Finance. However, at the request of the parties, it observed that this was an appropriate case in which the Secretary to the DSS would recommend the Minister for Finance that an *ex gratia* payment be paid to Theunens under s. 34A of the *Audit Act* 1901.

It would, in the AAT's opinion, be unjust if Theunens were not to receive the benefit to which she had been

entitled and which she had attempted to obtain.

Formal decision

The AAT affirmed the decision under review and expressed the opinion that payment of supporting parent's benefit to Theunens should be considered on an *ex gratia* basis for the period from November 1980 to September 1981.

MRS N and SECRETARY TO DSS (No. N84/344)

Decided: 22 March 1985 by A.P. Renouf.

In May 1985, Mrs N telephoned a regional office of the DSS and inquired as to her eligibility for family income supplement. She was told that, before she could apply for this supplement, she would have to submit a copy of her 1982-83 income tax return.

As soon as that return became available (in November 1983) Mrs N applied for family income supplement which was granted to her almost immediately. However the DSS refused to back date payment of this supplement and she then applied to the AAT for review of that refusal.

No power to backdate

The DSS opposed backdating because

s.135TA of the *Social Security Act* provided that a family income supplement could not be granted until a claim was made and s.135TB provided that '(1) a claim shall be made in writing...'

On the other hand, Mrs N argued her failure to lodge a written claim was directly due to the incorrect advice given to her in May 1983; and that, accordingly, she should be regarded as having complied with the requirements of the *Social Security Act*.

The AAT said that Mrs N's argument was reasonable but, because of s.135TB(1), her argument could not be accepted. Accordingly, there was no remedy available to Mrs N, although she had been misled by an officer of the DSS and deprived of family income supplement between May and November 1983. The AAT concluded:

'16. I find no alternative therefore but to affirm the decision under review. nevertheless, I recommend that, in all the circumstances, this matter should be referred to the Commonwealth Ombudsman with a view to ascertaining whether an *ex gratia* payment to Mrs N might not be appropriate.'

Procedure: review of connected decisions

Re HUDSON and SECRETARY TO DSS

(No. S84/149)

Decided: 15 April 1985 by R.A. Layton, J.A. Kiosoglous and B.C. Lock.

Neil Hudson had been granted family income supplement for his 2 children; but the DSS cancelled payment of that supplement after deciding that Hudson's former wife should be paid additional unemployment benefit for the 2 children.

Hudson applied to the AAT for review of the cancellation decision. Before that review was dealt with, Hudson asked the Tribunal whether it would review the DSS decision to grant additional unemployment benefit to his former wife.

The legislation

Section 85(6) of the *Social Security Act* provides that a family income supplement is no longer payable to a person if the child, for whom the supplement is paid, ceases to be an 'eligible child'.

Section 84(1) defines 'eligible child' so as to exclude a child for whom some other Commonwealth benefit is being paid.

Hudson's former wife had been granted additional unemployment benefit for Hudson's two children under s. 112(5)(b) of the *Social Security Act*, because she was 'making regular contributions towards the maintenance' of the 2 children.

Joint review?

The AAT said that as a matter of practice and procedure, the DSS decision to grant additional unemployment benefit to Hudson's former wife should not be reviewed as part of Hudson's application for review of the cancellation decision. The 2 decisions had been made under separate sections of the Act, and involved 2 different payments to 2 different persons.

Although the decision to grant additional benefit might have affected the decision to cancel Hudson's family income supplement and although the 2

decisions had been made by the one person (that is, a delegate of the Secretary to the DSS), it did not follow that they should be dealt with the same application for review. To adopt that course, the AAT said, would create a number of difficulties: in particular, Hudson's former wife had 'no interest in having [the decision to grant her additional benefit for the two children] reviewed by this Tribunal'; and she had 'no interest in the granting or otherwise of any family income supplement to [Hudson]': Reasons, para. 17.

However, the AAT suggested that the practical solution to the problem would be for Hudson to make a separate application for review of his former wife's s. 112(5)(b) benefit. Hudson might be a person 'whose interests are affected' within s. 27 of the *AAT Act* by the DSS decision to grant his former wife additional benefit for the 2 children. If so, he would have sufficient standing to make a separate application for review of that decision.

Invalid pension: permanent incapacity

JACKSON-SMALE and SECRETARY TO DSS

(No. N83/426)

Decided: 1 May 1985 by R.A. Hayes, H.D. Browne and G.P. Nicholls.

The AAT *set aside* a DSS decision to reject an invalid pension to a 50-year-old man, who had worked in a variety of unskilled and semi-skilled occupa-

tions, from his migration to Australia (from Ceylon) in 1961 until he suffered an industrial accident in November 1980.

The AAT found that Jackson-Smale suffered from several minor disabilities; but that, because of his emotional inadequacy and a personality disorder, those disabilities had the effect of totally incapacitating him for work.

The AAT said that it was important to recognise that a minor physical disability which would incapacitate few people might nevertheless totally incapacitate a particular person. Just as, in the compensation area, there was an 'egg shell skull' rule which said that a wrongdoer 'must take his victim as he finds him', even if that victim was 'unusually sensitive, so also, the social