Administrative Appeals Tribunal decisions

Late claim: Family allowance

N. A. and SECRETARY TO DSS (No. N84/594)

Decided: 11 June 1985 by R. A. Hayes, G. P. Nicholls and G. D. Grant.

N. A. had been granted custody of the 2 children of his marriage by the Family Court of Australia in April 1980. The 2 children were then in New Zealand, in the physical custody of N. A.'s wife, to whom a New Zealand court had granted custody of the children.

N. A. had travelled to New Zealand and in September 1980 he obtained the physical custody of one of his children, G, with whom he returned to Australia.

Although N. A. had become eligible to claim family allowance for G from September 1980, he did not claim that allowance until February 1984. When the DSS granted him family allowance after his claim, it refused to backdate payment until the date of eligibility.

The legislation

Section 102(2) of the *Social Security Act* provides that family allowance is payable to a person who has assumed the custody, care and control of a child from the date of person's claim for that allowance; but, if the claim is lodged within 6 months of assuming custody, care and control or 'in special circumstances', the family allowance shall be paid from the date of the person assuming that custody, care and control.

'Special circumstances'

N. A. told the Tribunal that he had known of the existence of family allowance but had assumed that it was only payable for 'complete families', not to a sole male parent. He told the Tribunal that, before and after he had regained custody of his child, G, he had suffered considerable stress and was under continuing psychiatric treatment. The principal cause of this stress was his worry that his wife might regain custody of G and take the child to New Zealand.

The AAT said that, bearing in mind the *Social Security Act* was a beneficial legislation, intended to provide assistance, it 'should be construed strictly against the person who would restrict that assistance': Reasons p.7. Furthermore, as the Act had been intended to communicate to citizens their entitlement to certain benefits, one would expect s.102(2) to be read as an ordinary person would read it.

Bearing these considerations in mind, it might be sufficient 'special circumstances' that N. A. had been ignorant of his entitlement during a period in which he had been living in circumstances which differed from those of a normal family.

However, the AAT said, earlier decisions of the Tribunal had given to the phrase 'special circumstances' a different meaning. Decisions such as *Blurton* (1984) 21 *SSR* 234 had established that—

> there must be something in the circumstances of the family or in the circumstances in which the application was made that, in relation to the longer period for which the allowance is sought, may be described as unusual, uncommon or exceptional; and that personal problems endured by an applicant must have been such as to deprive him or her of the capacity to make a claim for family allowance.

However, the AAT said, it was not obliged 'on a seemingly identical set of facts' to that involved in an earlier case, to come to the same decision as that reached by another Tribunal in that earlier case:

> A Tribunal, in a review of a decision not to pay arrears of family allowance on the ground that no 'special circumstances' existed, is no more bound by a decision by another Tribunal that domestic violence on the facts before it did not amount to special circumstances than a court is bound by a decision of another court in a previous case that failure to fence dangerous machinery did not on the facts amount to a breach of the employers' duty of care.

(Reasons, p.13)

In the present case, the AAT said, the stress from which N. A. had suffered and continued to suffer, the financial hardship which he had sustained after assuming custody of his child and his relatively isolated position as a sole male parent together constituted sufficient 'special circumstances' to explain his delay in applying for family allowance. Accordingly, the AAT said, payment of the allowance should be backdated. The Secretary had no residual discretion under s.102(2) once 'special circumstances' had been found to exist, as the Federal Court had recently decided in *Beadle* v *Director-General of Social Security* (see this issue of the *Reporter*).

Formal decision

The AAT set aside the decision under review and directed that N. A. be paid family allowance from October 1980.

RAC and SECRETARY TO DSS (No. V84/132)

Decided: 29 January 1985 by R. Balmford.

The AAT *affirmed* a DSS decision to pay family allowance to Elzbieta Rac and her two children from July 1985 and not from an earlier date.

Rac and her daughters had migrated to Australia from Poland at the end of June 1983, joining Rac's husband who had come to Australia in July 1981. In the intervening two years, Mr Rac had regularly sent money to his family in Poland.

The AAT pointed out that s.96(1)(a)(i) and (b)(i) of the *Social Security Act* prevented payment of family allowance unless the claimant was in Australia and the child was living in Australia. As Rac and her children had not arrived in Australia until June 1983, family allowance could not be paid for any earlier period.

The AAT then considered whether Rac's husband might have qualified for family allowance for his children before they came to Australia. Section 95(1) provided that a family allowance was payable to a person who had the 'custody care and control' of a child. In *Hung Manh Ta* (1984) 22 *SSR* 247 the AAT had said that a parent whose children were in another country did not have the custody care and control of those children, because he was unable 'to bring the children under his personal control [and] powerless to limit the period or the scope of the wife's custody care and control of the children'.

On the basis of that decision, the AAT said, it was

> highly unlikely that [Rac's husband] would be able to show that he had custody, care and control of his children while they were still with his wife in Poland.

(Reasons, para . 12)

Late claim: handicapped child's allowance

GLOCK and SECRETARY TO DSS (No. T84/30)

Decided: 11 April 1985 by R. C. Jennings, D. R. S. Craik and L. J. Cohn.

Judith Glock gave birth to a child, G, in 1971. In April 1980, G developed a muscle weakness which required regular physiotherapy. But, despite extensive medical tests, this condition was not diagnosed until February 1983, when it was recognised as very rare condition known as dermatomyositis. This condition required regular cortisone injectons, physiotherapy and a special diet.

Until the time of this diagnosis, the general medical opinion had been that G would 'grow out of' her condition; but the diagnosis established that G's condition was static and likely to continue indefinitely.

Glock applied to the DSS in October 1983 for a handicapped child's allowance. The DSS granted that allowance but refused to backdate the allowance to the date of Glock's eligibility, which the DSS conceded dated from 1980. Glock then asked the AAT to review that decision.

The legislation

Section 102(1) of the *Social Security Act*, in combination with s.105R, provides that a handicapped child's allowance is payable from the date of eligibility if the claim for that allowance is lodged within 6 months of that date or if there are 'special circumstances'. Otherwise, the allowance is payable from the date of the claim.