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.

The date of eligibility

Although the DSS conceded that Glock had been eligible for the allowance from the time when G's condition first developed in April 1980, the AAT decided that she had only been eligible from the date of diagnosis, in April 1983. The AAT reasoned as follows:

> 9. One of the requirements of a successful claim is that the respondent must be satisfied that the child is likely to need constant care and attention 'permanently or for an extended period'.
>
> 10. Until doctors were able to diagnose her condition there is no evidence before us that the applicant could have established this requirement. There was opinion and belief that she would 'grow out of it' and even that it was 'psychological'.
>
> 11. We accordingly treat this case as of the same character as *Dawes*, a recent decision of Mr J. O. Ballard (Senior Member) on 12 February 1985 [(1985) 24 *SSR* 283]. The Tribunal in that case declined to accept a concession by the respondent that the child had been severely handicapped from birth and treated the date from which the applicant was first advised of the abnormality as the relevant date.

'Special circumstances'

Accordingly, the AAT said, the period for which backdating was possible extended only from February to October 1983. The Tribunal said that it accepted 'the view that it is easier to find special circumstances in relation to such a short period': Reasons, para. 18. In the present case, the extra expense of caring for the child (expense which was substantially more than the $85 a month of the allowance) amounted to sufficient 'special circumstances' to justify backdating the allowance.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary, with a direction that special circumstances applied under s.102(1) and that payment of the allowance be backdated to February 1983.

DAVIES and SECRETARY TO DSS (No. W84/192)

Decided: 22 April 1985 by J. A. Kiosoglous, I. A. Wilkins and J. G. Billings.

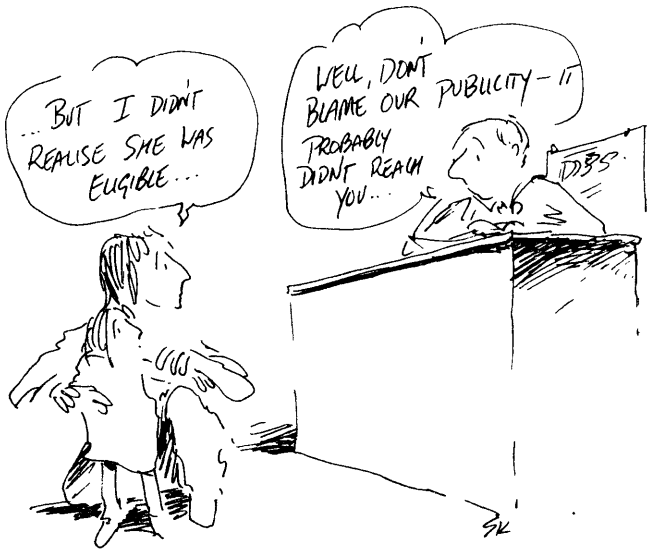
Valma Davies gave birth to her child, L, in 1968. The child was diagnosed as a chronic asthmatic in 1970. It was conceded that L was a 'handicapped child' and that, accordingly, Davies would have qualified for handicapped child's allowance under s.105JA of the *Social Security Act* from the date when the Act was amended to extend eligibility for that allowance in November 1977.

However Davies had not claimed the allowance for L until February 1983 and, when the DSS granted her the allowance, it refused to backdate payment to the date of her eligibility, namely November 1977.

Davies applied to the AAT for review of that refusal.

The legislation

Section 102(1) of the *Social Security Act*, in combination with s.105R, provides that family allowance is payable from the date of eligibility if a claim is lodged within 6 months of that date or, if the claim is lodged after that 6 months period, 'in special circumstances'. In any other case, the allowance is payable from the date when the claim is lodged.



'Special circumstances'

Davies told the AAT that she had known of the existence of the allowance—in fact, she had been receiving the allowance since 1974 for her eldest son, S, who suffered from several disabilities including chronic epilepsy. However she had not realized that the allowance was available for children with asthma.

Evidence was also given to the Tribunal that, despite her frequent contact with social workers and medical advisers, Davies was not encouraged to apply for the allowance for L; and, at about the end of 1982, she had been actively discouraged from applying for the allowance by an officer of the State Community Services Department.

Throughout much of the period for which Davies sought backdating, she had lived in a small country town, some 60 miles from the DSS office; she had had a very difficult marriage relationship; she and her 3 children had suffered from a variety of illnesses and disabilities and she had suffered substantial financial hardship in caring for L.

The AAT said that the cumulative effect of all these factors amounted to 'special circumstances' which explained her delay in claiming the allowance.

Discretion

During the course of the hearing of this matter, counsel for the DSS said that, if the Tribunal found that there were 'special circumstances' then the Secretary would make a full backpayment. That is, the DSS took the approach that, once those 'special circumstances' were established, the Secretary had no overriding discretion to refuse to backdate the allowance.

However, the Tribunal took the opportunity to endorse the comments made by G. D. Clarkson in *Bygrave* (1984) 22 *SSR* 251—that once 'special circumstances' had been shown, there was a presumption that the allowance should be backdated. The AAT observed:

> 12. The law in this area is in need of clarification. Although large lump sum retrospective payments are not made as a matter of course and the legislature has seen fit to require a demonstration of 'special circumstances' to justify such payments in relation to handicapped child's allowance, all such matters should be considered against the background of the *Social Security Act* as beneficial legislation.

Inadequate publicity

The AAT suggested that the efforts of the DSS to publicize the existence and the scope of handicapped child's allowance might be responsible for the general level of confusion about that allowance. The Tribunal called for 'more relevant publicity and more effective departmenal communications' in this area. Referring to the leaflet prepared by the DSS on the allowance, the AAT said:

> Despite the fact that the leaflet is only a general guide and states 'not all children's disabilities can be seen' and gives four types of disabilities merely as examples, namely: mental retardation, Downs Syndrome, deafness and blindness, a number of further examples could perhaps be added without inviting every parent with an asthmatic child to apply for handicapped child's allowance. The words 'extreme asthmatic conditions' or other appropriate words would probably not open the floodgates as some might fear as long as departmental communications were improved in relation to the degree of care and control required which, after all, is the guiding principle in handicapped child's allowance applications.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary on the understanding that, as there were 'special circumstances', the Secretary would exercise any discretion in favour of Davies.

In 1978 the child was diagnosed as suffering from ear infection and, following an operation at the children's hospital in Perth, Garlett was obliged to undertake intensive care of F. In August 1983, she applied to the DSS for a handicapped child's allowance which was granted with effect from that time.

However, the DSS refused to backdate payment of that allowance to the time when Garlett would have become eligible, namely, the beginning of 1979. Garlett then asked the AAT to review that decision.

The legislation

The central question before the Tribunal was whether there were sufficient 'special circumstances' within s.102(1) of the *Social Security Act* to explain Garlett's delay in lodging her claim for handicapped child's allowance. If there were 'special circumstances', payment of the allowance could be backdated to the date of her eligibility (s.102(1) and s.105R).

'Special circumstances'

Evidence was given to the Tribunal that Garlett had spent most of her life in country areas, had experienced very little schooling, was barely literate and had a very poor memory. Despite these limitations, she had been, in the AAT's words, 'a caring mother figure to the boys she describes as her grandsons', that is, F and another child who had come into her custody at the same time.

Garlett told the Tribunal that she had not known of the existence of handicapped child's allowance, despite being in touch with various welfare and medical agencies over several years. Those agencies had advised her to apply (some time after she started caring for F) for a foster allowance from the State welfare department, but had not mentioned the handicapped child's allowance until 1983. It was clear that she did not, even now, understand what was meant by 'handicapped'.

The AAT referred to the earlier decisions in *Corbett* and *Johns* (1984) 20 *SSR* 210, 211 and *Cox* (1984) 22 *SSR* 252, where the circumstances of 'disadvantaged members . . . of a minority group' had been considered:

> There is no stereotyped member of this or any similar group since the circumstances of any two members are not the same, and indeed may vary substantially. The picture emerges of an elderly Aboriginal widow, fostering in a country town a grandson and his half brother, who is a handicapped child. She is barely literate, physically handicapped herself and displays a defective memory. She is shown by the evidence to have been incapable without detailed guidance and assistance of applying for two allowances to which she was entitled.

(Reasons, pp.7-8)

The AAT noted that, although Garlett was not obliged to apply any backpayments for the benefit of F, extending those backpayments would allow her to discharge debts incurred by her in carrying on the household and so better meet the needs of that household.

There were, the AAT concluded sufficient 'special circumstances' to justify backdating the payment of the allowance to the beginning of 1979.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that backpayments of handicapped child's allowance for F be made to her for the period from January 1979.

Unemployment benefit: 'benefit week'

HEIDEMANN and SECRETARY TO DSS
(No. N84/571)

Decided: 16 April 1985 by Ewart Smith.

Heather Heidemann was being paid unemployment benefit when, in March 1984, she undertook employment for 8 weeks. The DSS then cancelled her benefit.

Heidemann received her last payment of wages and stopped working on 25 April 1984 (a Wednesday); and, on the following day, she applied to the DSS for unemployment benefit. The DSS decided to treat Heidemann as having been 'unemployed' during the 8 weeks of her employment, so that she would not need to serve the 7-day 'waiting period' normally required by s.119 of the *Social Security Act*.

However, the DSS decided that, if Heidemann's unemployment benefit was to be restored, its restoration should be on the same basis as before she took up her employment. That is, the 'unemployment benefit week' for which she was to be paid, should be from Monday to Friday.

As Heidemann had received her last payment of wages on Wednesday 25 April, the DSS decided that these wages should be treated as her income for the current 'unemployment benefit week', preventing her from receiving any benefit until the next unemployment week, which commenced on Monday 30 April 1984.

Heidemann asked the AAT to review that decision.

The legislation

Section 114 of the *Social Security Act* provides for the reduction of a person's unemployment benefit by reference to that person's income, which (according to s.106(1)) includes 'any personal earnings, moneys . . . earned, derived or received'.

Section 132 provides that unemployment benefits 'shall be paid by instalments in respect of such periods as the Secretary determines'.

'Income' for which period?

The AAT said that the decision of the DSS to treat Heidemann as 'unemployed' during her period of employment had superseded the cancellation of her benefit. Accordingly, it was appropriate that, when she reapplied for unemployment benefit, the resumed payment of that benefit should be for the same periods as those for which she had been paid benefit before taking up her employment.

Furthermore, the AAT said,

> income must be considered over the same week as her unemployment benefit week, and it may be apportioned if received in respect of a period longer than a week (s.106(2)). On that basis, Mrs Heidemann received income in the relevant week; she was paid on the Wednesday of the week in question for the two preceding weeks.

(Reasons, para. 11)

Even when apportioned, the part of Heidemann's fortnightly pay which related to the unemployment benefit week was sufficient to prevent, under s.114, any payment of unemployment benefit to her for that week.

Formal decision

The AAT affirmed the decision under review.

Overpayment: not recoverable

IRWIN and SECRETARY TO DSS
(No. T84/46)

Decided: 21 June 1985 by R. C. Jennings.

Lynne Irwin had been granted a supporting mother's benefit in 1976, which was converted into a supporting parent's benefit in 1977.

In December 1980, Irwin asked the DSS to cancel her benefit because she had just taken up employment. A DSS officer then telephoned her and, after establishing that she was earning around $127 a week (a figure which would vary from week to week), the DSS decided that her benefit should not be cancelled but reduced.

Irwin was then advised in writing that her benefit had been reduced from $170 a fortnight to $54 a fortnight; and that this calculation had been based on her current income of $254 a fortnight. The letter told Irwin that if her average income increased she should notify the DSS within 14 days.

Over the next 2½ years, the DSS regularly sought information from Irwin's employer about the level of her wages and adjusted her supporting parent's benefit accordingly. However, because this information was collected at scattered intervals, it failed to take account of significant variations in Irwin's income and the DSS eventually calculated that she had been overpaid some $3777 between the end of 1980 and October 1983. The DSS decided to recover that overpayment and Irwin sought review by the AAT.

The legislation

Section 140(1) of the *Social Security Act* provides that an amount of overpayment is recoverable where that overpayment has been made 'in consequence of a failure or omission to comply with any provision of this Act' and where the overpayment 'would not have been made but for the . . . failure or omission'.