

## Handicapped child's allowance: late claim

ROESSEL and SECRETARY TO DSS  
(No.S83/132)

Decided: 22 October 1985 by J.A.Kiosoglous, B.C.Lock and J.T.B.Linn. Christine Roessel gave birth to the eldest of her 5 children, M, in September 1972. From about 1974, M developed severe behavioural problems and Roessel found it necessary to provide him with almost constant supervision.

Although Roessel sought medical assistance for M on many occasions, it was not until December 1982 that an EEG test was performed and M was found to be suffering from a condition which was associated with severe behavioural disorder. Immediately after this diagnosis, Roessel learned of the existence of handicapped child's allowance. She then claimed and was granted, with effect from December 1982, an allowance on the basis that M was 'severely handicapped'. However, the DSS refused to backdate payment of that allowance to 1974. Roessel asked the AAT to review that decision.

### The legislation

Section 102(1) of the Social Security Act, read with s.105R, provides that payment of a handicapped child's allowance can be backdated to the date of eligibility if the allowance is claimed within 6 months of that date or, if the allowance is not claimed within this period, in 'special circumstances'.

### 'Special circumstances'?

Roessel told the AAT that she had not been aware of the existence of the allowance until immediately before she lodged her claim in December 1982; and that none of the medical advisors and

welfare workers consulted by her in the preceding 8 years had told her of the existence of the allowance. She also said that, over much of that 8 year period, she and her family had suffered financial difficulties (largely because her husband had been unemployed for long periods but also because of the extra costs of caring for M).

The AAT said that these factors did not amount to 'special circumstances' as that phrase had been interpreted and applied by the Federal Court in *Beadle etc* (1985) 26 SSR 321 and the AAT decisions in *Beadle and Corbett* (1984) 20 SSR 210 and *NA* (1985) 26 SSR 310. The family's financial circumstances demonstrated a degree of need but the relatively restrictive manner in which the legislation had been interpreted precluded a finding of 'special circumstances'. There was no evidence of false or misleading or negligent advice, of social or geographic isolation nor of illiteracy.

The AAT noted that several decisions had suggested reform of the backpayment provisions. The Tribunal commented:

'In its present form the legislation is patently inadequate and inappropriate. The first problem is that it may, but does not necessarily, meet needs which ought to be its primary objective, given the aims of the *Social Security Act* . . . Secondly, there is the problem of the inability of the Secretary, or the Tribunal on review, in an area with a large discretionary component, to apportion arrears where appropriate to reflect the degree of the applicant's need or the 'weight' of the applicant's

circumstances. Under the present 'all or nothing' position the applicant is effectively placed in the position of having to discharge an unwritten but nevertheless sizeable onus of proof of 'special circumstances' commensurate to the relevant 'longer period'. The position becomes untenable for applicant, respondent and Tribunal the longer the provisions remain enforce . . . If, as the Federal Court has confirmed, 'six months is the norm', surely the provision has outlived its usefulness once the 'longer period' makes the 'norm' appear minimal in comparison. The provisions which may at one point in time have been a useful administrative tool for special cases have become an administrative millstone in 1985.'

(Reasons, para.11)

The AAT also noted that s.102(1) applied to both family allowance and handicapped child's allowance; yet these two allowances arose in 'markedly different contexts'. The provisions appeared to work more satisfactorily in the area of family allowance for a number of reasons -

'because the date of eligibility is usually more readily determinable, because community awareness of the existence of family allowance is greater, because communications are generally effective and because the criteria and applicability are better understood by all concerned.'

(Reasons, para.11)

### Formal decision

The AAT affirmed the decision under review.

## Family allowance: late claim

SECCULL and SECRETARY TO DSS  
(No. V84/279)

Decided: 2 October 1985 by H.E.Hallowes. Barbara Succull had been granted a family allowance for her son, D, in 1965, shortly after his birth. When D turned 16 in 1981, the DSS ceased to pay the family allowance. (It had sent Succull an application form for continuation of the allowance but, as she had changed her address, she did not receive this form.)

Secull would have been entitled to continue to receive family allowance for D after his 16th birthday because he had continued to be a full-time student. But she did not lodge a claim for continuation of the allowance until January 1984 because it was her understanding that family allowance was only payable for children under 16 years of age.

In January 1984, Secull learned that she was eligible for family allowance for D and she lodged a claim which the DSS granted. However the DSS refused to backdate payment of that claim to the date when it had ceased payment of the allowance, September 1981. Secull asked the AAT to review that decision.

### The legislation

Section 103(1) of the *Social Security Act* provided, in September 1981 and January

1984, that family allowance ceased to be payable if -

'(f) the child attains the age of 16 years unless the Director-General is satisfied, before the expiration of 3 months after the child attains that age, that the child became a student child on attaining that age . . .'

(This provision was amended, with effect from October 1984, by deleting the words 'the Director-General is satisfied before the expiration of 3 months after the child attains that age, that'.)

Section 102(1) provides that a family allowance is payable from the date of eligibility for that allowance, if the claim 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 need for a new claim - a conflict

The AAT said that, in *Michael* (1982) 10 SSR 98, the Tribunal had decided that, once family allowance had ceased to be payable under s.103(1) of the *Social Security Act*, it was necessary for the parent to lodge a new claim for the allowance; and that, once granted, the allowance would be payable from the date specified in s 102(1) - that is, 'late claims' for student family allowance would only be backdated if

lodged within 6 months of the child's 16th birthday or in 'special circumstances'.

However, another Tribunal had decided in *Ellis* (1985) 24 SSR 283 that it was not necessary, where family allowance had ceased to be payable under s.103(1), for the parent to lodge a new claim in order to establish her entitlement to a revival of that family allowance. In *Ellis*, the AAT had said that the purpose of s.103(1) was not to extinguish a person's right to family allowance but only to deal with the payment of that allowance. Because a new claim was not necessary, all that the parent needed to do was to establish, to the satisfaction of the DSS, that she was still entitled to the allowance; and once that continuing entitlement was established, the DSS should pay her the family allowance for the whole period of her entitlement - no question of backdating under s.102(1) would arise.

In the present case, the AAT decided to follow the decision in *Michael* rather than the decision in *Ellis*:

'Once a family allowance had ceased to be payable by virtue of one of the events described in s.103(1) of the Act, is it possible for the payments to resume other than within the provisions of s.102(1)? Having given this matter