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 Seccull an application form for continuation of the allowance but, as she had changed her address, she did not receive this form.)

Seccull 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, Seccull 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. Seccull 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

considerable thought, I am inclined to the view that it is not.'
(Reasons, para.10)

The AAT explained that the word 'suspend' was used in other provisions of the Act - ss.46, 48A(1), 105QA, and 131(1) - but it had not been used in s.103(1):

'One must, therefore, assume that it was the intention of the legislature that the phrase "cease to be payable" had some meaning other than "suspend". If it was intended to mean "suspend" it would have been clearer if that term had been employed in s.103 or provision made in a separate section of the Act for the suspension of family allowance for student children until such time as the Director-General was advised that they remained qualified. The word "cease" is defined in the *Shorter Oxford English Dictionary* at p.301 of volume 1 as being "to stop; to give over; to discontinue; to pass away".'
(Reasons, Para.12)

'Special circumstances'?

The AAT went on to conclude that there were, in the present case no 'special circumstances' to justify backpayment of the allowance. The most that could be said was that Seccull had not been aware of her entitlement to the allowance. The fact that the notification from the DSS did not reach Seccull could not be attributed to any fault on the part of the DSS, which had sent the notification to her last known address. In concluding that these facts did not amount to 'special circumstances' the AAT relied upon the earlier decision in *Manzini* (1983) 14 *SSR* 138.

Formal decision

The AAT affirmed the decision under review.

'Annual rate of income': which period?

RUGGERI and SECRETARY TO DSS (No. V83/322)

Decided: 10 October 1985 by R.Balmford.

Maria Ruggeri had been granted an invalid pension from December 1977. The level of her pension was fixed by taking into account half her husband's weekly income of $192. Over the next 4 years, the DSS adjusted the level of Ruggeri's pension to take account of changes in her husband's income as notified to the DSS by Ruggeri.

However, in 1981 the DSS discovered that Ruggeri had understated her husband's income (there was no suggestion that she had intended to deceive the DSS). The DSS then recalculated Ruggeri's 'annual rate of income' over the preceding four years, using 'pension years' as the basis of the calculation; and, on the basis of those annual rates of income, the DSS calculated that there had been an overpayment to Ruggeri of $1889, which the DSS decided Ruggeri should repay. Ruggeri asked the AAT to review that decision.

The legislation

Section 28(2) of the *Social Security Act* provides that the annual rate of an invalid pension is to be calculated by reference to the pensioner's 'annual rate of income'. According to s.29(2) a pensioner's income includes half the income of the pensioner's husband or wife.

Section 140(1) provides that any overpayment of pension, which has been made as a result of the pensioner's failure to comply with any provision of the *Social Security Act*, is recoverable from the pensioner. Section 45(2) obliges a pensioner to notify the DSS of increases in her or his average weekly income.

'Annual rate of income' - which year?

Ruggeri's main argument before the AAT was that the periods over which her 'annual rate of income' was calculated should have been the income tax years (that is, the years beginning on 1 July) and not the 'pension year' adopted by the DSS (that is, the years beginning on the date when her pension had been granted and each anniversary of that date). It appeared that, if income tax years (rather than pension years) were adopted as the basis of calculation, the amount of the overpayment would be reduced by $204.

The AAT referred to the High Court decision in *Harris* (1985) 24 *SSR* 294. The Tribunal said that there were two 'essential principles' which could be extracted from the judgment of the majority in *Harris*: first, that the circumstances of the case must determine what is a fair method of ascertaining a person's current annual rate of income; and, secondly, where a person's annual rate of income was being determined after the event with the benefit of hindsight, it was appropriate to take a broad view.

The AAT said that the High Court had not endorsed any particular period (whether pension year, income tax year, calendar year or other year) as the universally correct period over which to calculate a person's 'annual rate of income'. The AAT said that in *Harris* the High Court had endorsed the adoption of the year which began when Mrs Harris commenced to receive additional income. Although that period had been appropriate to the facts of *Harris*, there was, the AAT said, 'nothing in the circumstances of Mrs Ruggeri which indicates a similarly appropriate specific period': Reasons, para 22. The AAT thought that, in the present case, there were two possible periods over which Ruggeri's annual rate of income could be calculated: these were the financial year and the pension year.

Balancing convenience, fairness and consistency

In favour of the financial year was its 'considerable significance for the administration of the financial affairs of all people who are required by the provisions of the taxation legislation to lodge taxation returns': Reasons, para. 23. It was, the AAT said, common for pensioners or beneficiaries to supply information to the DSS by providing copies of group certificates or of income tax returns.

On the other hand, the DSS argued that its general practice was to adopt the pension year in its calculations of an 'annual rate of income' and that the interests of consistency in administration strongly supported using this period in the present case. The DSS relied upon a Federal Court decision in *Nevistic* v *Minister of Immigration* (1981) 34 ALR 639 which had stressed 'the desirability of consistency in the making of decisions affecting rights, opportunities and obligations under Court had also said that 'the desire for consistency should not be permitted to submerge the ideal of justice in the individual case.'

The AAT noted that the difference between using the pension year and using the financial year was $204 - an amount which was not trivial but, in the present context, not substantial. The fact that calculations on a financial year basis produced a smaller amount of overpayment in the present case did not make it a 'more fair' method of calculation:

'. . . I do not think that it can properly be said that, in the administration of social welfare legislation, fairness must always require a decision which favours the recipient of welfare as against the administering department. Fairness is, as the High Court made clear in *Harris*, a matter to be decided according to the circumstances of the particular case.'
(Reasons, para. 34)

The Tribunal said that its own 'tentative view' was that there was a great deal to be said for averaging over a financial year. This was -

'based on a general feeling that it was desirable that financial matters should be related to a financial year because so many of them are; and on the fact that financial information, of the kind required by the Department in these cases, has normally been prepared in relation to a financial year, and is readily available in that form.'
(Reasons, para. 33)

However, the Tribunal concluded that there was, in the present case, no reason for concluding that one method of calculating Ruggeri's annual rate of income was, as between her and the DSS, more fair than the other. Accordingly, the AAT accepted the DSS argument that the matter be resolved in accordance with the principle of administrative consistency and Ruggeri's annual rate of income calculated on the basis of the pension year.

Checking the DSS calculations

The AAT noted that there was some dispute between Ruggeri and the DSS as to whether the Department's calculations were arithmetically correct. The Tribunal said that it was not in a position to make any finding as to the accuracy of the calculations. Accordingly the AAT, 'with some reluctance', accepted that the calculations were correct but reserved the right