

Administrative Appeals Tribunal decisions

Handicapped child's allowance

SCRIVENER and SECRETARY TO DSS

(No.W84/17 & W84/201)

Decided: 8 May 1986 by J.A.

Kiosoglous, I.A. Wilkins and J.G. Billings.

Helen Scrivener sought review of 2 decisions of the DSS: a decision that her son, T, was a 'handicapped child' rather than a 'severely handicapped child'; and a decision that there were no 'special circumstances' justifying backdating of payment of the allowance for some 5 1/2 years from the date of her claim in June 1983.

Backdating: 'special circumstances'?

Section 102(1)(a) 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 is lodged within 6 months of that date *or if* there are 'special circumstances'. Otherwise, according to s.102(1)(b), the allowance is payable from the date of the claim.

T was born in 1972 and diagnosed, in late 1977, as suffering from Perthes disease, an osteochondritis of the femur. He also suffered from otitis media, a squint and a speech disorder. Scrivener had not known about the allowance until alerted to its existence by a welfare worker, shortly before she claimed the allowance in June 1983.

The majority's view

The majority of the AAT, Kiosoglous and Wilkins, attempted to apply the Federal Court decision in *Beadle* (1985) 26 SSR 321. The Court had given no precise definition of 'special circumstances', saying that the phrase, although it lacked precision, required no 'judicial gloss'.

The majority identified a number of factors relevant to the consideration of 'special circumstances' which it distilled from the Federal Court decision and past AAT decisions:

- (1) Ignorance of the allowance was not a 'special circumstance', but if combined with, for example, illiteracy, isolation or misinformation from the DSS or someone else, could do so.
- (2) The longer the period of arrears, the weightier the facts establishing 'special circumstances' had to be.
- (3) Financial hardship, by itself, is not a 'special circumstance' but, in combination with other factors, may establish 'special circumstances'.

The majority of the AAT had some doubt about the relevance of financial hardship to the discretion to backdate: '[T]he discretion relates to the lodgment of applications outside the six-

month period, and it is difficult to understand how financial hardship justifies, or explains, an out-of-time application': Reasons, para.11.

However, they felt bound by the *Beadle* decision to take that hardship into account; and went on to suggest that it should not be confined to situations where debts had been incurred and remained undischarged (the situation in *Beadle*), but should extend to debts which had already been paid:

'After all, an applicant who has already discharged the obligations he had incurred on the child's behalf is in no less deserving a position that one whose debts are currently being discharged by installments, or have yet to be discharged.'

(Reasons, para.11)

To differentiate between the two categories would lead to a 'patent injustice', they said.

Turning to the facts of the present case, the majority found that none of the staff at the children's hospital, which Scrivener had attended for several years, had told Scrivener about the allowance, but that she had not sought advice from the hospital staff. The majority referred to the earlier AAT decisions in *Q* (1983) 14 SSR 138 and *Colussi* (1984) 19 SSR 194; both decisions had indicated 'the necessity of some misleading *act* on the part of a responsible third party before special circumstances can be found': Reasons, para.15. There was no such act here.

The AAT also refused to hold that the DSS had a duty to inform every possible recipient of the allowance:

'Her ignorance was ignorance simpliciter, unaffected by any act or omission for which an officer of the DSS, or indeed, another third party, should be held responsible. In the circumstances the Tribunal has no option but to attach little weight to the applicant's ignorance.'

(Reasons, para.15).

Examining Scrivener's financial situation, the majority found that she had purchased a hydrotherapy pool for T, and a second hand car to use when T was in splints, and that Scrivener's husband had resigned from his job as a technical officer with Telecom so that the family could live together in Perth, where treatment was available for T.

The majority considered that, of these expenditures, the purchase of the pool could be described as 'unusual' because it had been purchased solely for T's benefit and he was unable to use public resources. However, not all

of the purchase price of the car could be regarded as caused by T's handicap, because it remained a family asset and had always been used for the benefit of other members of the family. Turning to Mr Scrivener's loss of income, the majority noted that he had found other work in Perth, at a reduced salary and had eventually returned to a job with Telecom. The majority accepted that he had lost some opportunity for promotion with Telecom, an opportunity which was difficult to quantify.

The majority said that these facts had to be weighed against the very long period of backdating sought, some 5 1/2 years. As the Federal Court had confirmed in *Beadle* that there was no discretion to backdate for a shorter period, 'the concept of "special circumstances" involves accordingly a measure of elasticity which correlates to the length of the arrears period': Reasons, para.21).

The majority concluded that special circumstances had not been made out; and made the following comments:

'Whilst the Department is not obliged as a matter of law to seek out those potentially eligible for welfare allowances, as a matter of prudence the Department should attempt to make contact with at least those who attend public institutions for treatment of persistent disabilities in their children. That the Department has not achieved better mechanisms for the dissemination of information relevant to welfare applications is a matter of some regret. The decision in this case should not be taken as reflecting credit on the means employed by the Department to furnish information to the public. It would be a relatively simple matter, one would assume, to ensure that specialist doctors distribute, to the parents of the disabled, pamphlets explaining their entitlements at law.'

(Reasons, para.24).

'Special circumstances': the minority's view

The minority of the AAT, Billings, decided that there were 'special circumstances' to justify backdating the claim some 5 1/2 years, taking into account Scrivener's ignorance of the allowance and her financial circumstances.

The minority found that Scrivener's ignorance of the allowance arose from several factors: the failure of various health and education professionals to tell her about the availability of the

allowance; the lack of any contact between Scrivener and the DSS; her social isolation in November 1977, arising out of the problems with T, 2 other small children and a new baby and the absence of her husband who was working in the country. Looking at the financial costs incurred, the minority noted, in addition to the expenses considered by the majority, the provision of a special diet for T because of a hormone imbalance, and baby-sitting costs when T was taken to medical appointments. The minority was also prepared to put more emphasis on Mr Scrivener's loss of income.

The final factor which the minority took into account was the effort the family had made to look after T:

'[A]lthough it is not the role of the Tribunal to present rewards for effort, it does seem appropriate to bear in mind that the payment of arrears in this case will ease the continuing burden that has fallen on the family and ensure that the resources of the whole family are not further depleted and that the needs of T, in particular, are met satisfactorily'.

(Reasons, p.3)

Severely handicapped?

The majority of the AAT then considered whether T was a 'severely handicapped child' from the date the allowance was granted. Section 105H(1) defines a 'severely handicapped child' as a child who -

- '(a) has a physical or mental disability;
- (b) by reason of that disability, needs constant care and attention; and
- (c) is likely to need such care and attention permanently or for an extended period.'

T's Perthes disease now required little care; his hearing was within normal limits; his squint required no care and attention in the home; Scrivener had to give T about 45 minutes a day speech therapy; because of T's learning difficulties, Scrivener spent about 2 hours a night, 4 nights a week assisting T with homework; she sometimes had to drive T to school; and she often had to change his bed-clothes because he suffered from bed-wetting.

The majority was prepared to assume that T's learning difficulties arose out of his clear physical disabilities (the Perthes disease) and were therefore a physical disability within para.(a) of the definition.

Turning to the care and attention provided by Scrivener, the majority said: '[I]t is, in fact, care and attention given by a mother to ensure that her child adjusts as well as possible to his limitations. To achieve this end, the

care and attention must be intense, frequent, and regular': Reasons, para.31. The majority concluded that the care and attention provided was constant and would last for an extended period of time.

The minority also considered that T was a 'severely handicapped child', and had been so over the period that arrears were to be paid.

Formal decision

The AAT affirmed the decision of the DSS that there were no special circumstances to justify backdating of the allowance.

The AAT set aside the DSS decision to classify T as a 'handicapped child', and substituted a decision that he was a 'severely handicapped child' and had been from the date the allowance was granted.

CORBETT and SECRETARY TO DSS (No.2)

(No.W83/58)

Decided: 18 March 1986 by A.N. Hall. This was the rehearing of a matter remitted to the AAT by the Federal Court following a successful appeal (*Beadle* (1985) 26 SSR 321) against an earlier AAT refusal (*Corbett* (1984) 20 SSR 210) to backdate the date from which a handicapped child's allowance was payable.

Ms. Corbett had been granted a handicapped child's allowance from November 1981. She then applied to have that allowance backdated to the date when her eligibility had arisen, January 1978.

The legislation

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

The question here was whether there were 'special circumstances' to allow backdating for 3 years and 10 months.

'Special circumstances': what factors are relevant?

The Federal Court had concluded that there had been an error of law in the original AAT decision in *Corbett* because the AAT had decided that s.102(1) gave the Secretary a residual discretion not to backdate payment even where there were 'special circumstances' to explain the delay in lodging the claim. However, the AAT said in this case, the Federal Court had not eliminated, as relevant to the question whether there were 'special circumstances', 'considerations based on the policy of the Act and on financial hardship incurred in relation to the child': Reasons, para.17. The AAT

pointed out that the Federal Court had said:

'In the case of lengthy delay weighty facts would be required to establish special circumstances . . .

[T]he legislature has indicated six months latitude is the norm.'

The AAT repeated the view expressed in the earlier AAT decision in *Beadle* (1984) 20 SSR 210, that there was a need to concentrate on the circumstances 'surrounding the claim and the time at which it was made'. This concentration was essential to understanding the power given by s.102(1)(a). The AAT suggested that, in *Beadle*, the Federal Court had adopted 'a slightly more cautious approach to questions of ignorance, illiteracy, isolation, illness and the like' than the AAT had in its previous decisions. Yet these factors were still relevant to the question whether 'special circumstances' existed.

The circumstances of the present case
The AAT relied on the findings of fact made at the first AAT hearing, as no new evidence was presented by the parties. Corbett had given birth to her child, A, in June 1977. In January 1978, A was diagnosed as suffering from a chronic middle ear infection, otitis media, which the DSS conceded made him a handicapped child.

However, Corbett did not learn of the existence of handicapped child's allowance until 1980, and she did not discover that she might be eligible for the allowance until 1981, shortly before she lodged her claim.

Although Corbett had regular contact with welfare and medical authorities over the period from 1978 to 1981, none of them had explained to her the existence or the nature of the allowance until 1981.

Throughout the period in question, Corbett and her children lived in poor physical and financial circumstances, largely as a result of her husband's behaviour. She had an adequate level of reading ability but did not write well. Although she was said to be reluctant to approach government agencies,

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Corbett had, from time to time, successfully applied for various welfare payments.

The AAT said that although Corbett may have needed help in lodging claim forms and may have been reluctant to approach welfare agencies, she had been able to obtain supporting parent's benefit, family allowance and emergency support when needed. She was able to read correspondence and had an adequate understanding of what was required of her. Her financial difficulties had not contributed to her ignorance of the allowance; rather, the difficulties had brought her into contact with welfare agencies, from whom she might have obtained assistance. The AAT did not accept that Corbett's ignorance of the allowance was due to illiteracy or isolation:

'... Corbett's initial unawareness of the existence of handicapped child's allowance and her later misconceptions as to her possible eligibility are not uncommon features of cases such as this... She was, like many other people in Australian society, unaware of the true basis of eligibility for handicapped child's allowance.'
(Reasons, para.35)

The AAT said that the strongest factor in Corbett's favour was the consistent failure of welfare and medical authorities to help her apply for the allowance. But that failure was 'only one of the totality of considerations':

'There are some parallels, in my view, with the problems that arise in cases of misleading advice...'

39. The question whether advice that is tendered is incorrect or misleading, or whether a professional health or welfare adviser has failed in some obligation to the mother of the child to proffer advice about handicapped child's allowance, must depend upon a consideration of all the circumstances. The more severe the disabilities and the more obvious the need for constant care and attention, the greater may be the weight attributable to incorrect advice or unaccountable silence when the circumstances plainly called for positive assistance and advice. The more borderline the case of eligibility, the less may be the weight attributable to advice that in retrospect can be seen to be incorrect or to the failure of a professional adviser to draw attention to the handicapped child's allowance.'

In the present case, the child's disabilities were not severe and 'it would [not] necessarily have been obvious to anyone treating A that he was a child in respect of whom handicapped child's allowance would be payable':
Reasons, para.41.

The AAT concluded that Corbett's circumstances were 'not sufficiently weighty' to support a finding that 'special circumstances' allowed a period of almost 4 years for the lodgment of the claim. Although Corbett had a 'socially disadvantaged' living environment, she did not live in a remote area, she had access to welfare agencies, was articulate and not illiterate. Her ignorance of the existence and scope of the allowance was something she had 'in common with many other mothers of handicapped children':
Reasons, para.42.

Formal decision

The AAT affirmed the decision under review.

JOHNS and SECRETARY TO DSS (No.2)

(No.W83/60)

Decided: 18 March 1986 by A.N. Hall

This was the rehearing of an application for review of a DSS decision refusing to backdate payment of a handicapped child's allowance granted to Eliza Johns.

At the first hearing of this matter, the AAT had decided that there were 'special circumstances' to explain Johns' delay in lodging her application for the allowance but that, as a matter of discretion, the time for lodging the claim should not be extended: *Johns* (1984) 20 SSR 211. On appeal, the Federal Court held that the relevant provision in the Act, s. 102(1), did not allow for any discretion once special circumstances had been found and remitted the matter for rehearing: *Beadle* (1985) 26 SSR 321.

The legislation

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

The facts

The parties tendered the evidence which had been given at the first hearing and called no further evidence. The AAT adopted the findings of fact made by the AAT at the first hearing, but did not consider itself bound by the earlier finding that there were 'special circumstances'.

Johns had given birth to her 12th child, P (who was the subject of her claim for an allowance) in 1968. P became a severely handicapped child in May 1977 but did not claim a handicapped child's allowance until January 1982.

Johns, an Aborigine, was 41 years old at the date of P's birth. She was almost totally illiterate, having had virtually no schooling. Her husband was totally illiterate. Both Johns and her husband were in ill-health between 1977 and 1982, but provided P with constant care and attention.

Johns lived in a small town some 150 miles from Perth. During the period in question, she had contact with her local doctor, a community nurse and made frequent visits to a children's hospital in Perth. She also had contact with the State welfare agency. No health or welfare worker told her of the existence of the handicapped child's allowance.

Johns found out about the allowance through her niece and with the help of a welfare agency in Perth filed her claim. There was some delay between Johns finding out about the allowance and claiming which, the AAT said,

'tends to confirm Mrs Johns' insecurity and her lack of confidence in dealing with social welfare agencies and indicates the extent to which she required positive assistance in pursuing her entitlements'.

(Reasons, para.14)

'Special circumstances'

The AAT adopted the reasoning in *Corbett* (No.2) (see this issue of the *Reporter*) and concluded that -

'notwithstanding the lengthy delay by Mrs Johns in lodging a claim for handicapped child's allowance in respect of P, the circumstances of this case are sufficiently weighty to justify an extension of time for lodging the claim. By reason of the illiteracy of Mr and Mrs Johns, the extent of the care and attention that they needed to devote to P, their own ill health, the lack of access to officers of the DSS, their isolation in a small country community, the lack of assistance from doctors or other welfare authorities who might reasonably have been expected to recognise the severity of Paul's disabilities and Mrs Johns' entitlement to handicapped child's allowance, together with her reluctance to approach welfare authorities for assistance, a finding of special circumstances is, in my view, justified.'

(Reasons, para.15).

Formal decision

The AAT set aside the decision under review, and substituted a decision that there were special circumstances to allow the relevant period for lodgment to be extended to March 1982.