

# Administrative Appeals Tribunal decisions

## Assets test: financial hardship

### LUMSDEN and SECRETARY TO DSS

(No. W86/50)

Decided: 19 August 1986 by R.D. Nicholson, N. Marinovich and K.J. Taylor.

Mary Lumsden was a 71-year-old age pensioner. She owned and lived on a 99 hectare dairy farm with her 39-year-old son, his wife and their three children. Much of the land was good farming land although a portion was sandy (on which the residence was built) and another portion was swampy.

In May 1985 it became known that it was proposed to build a freeway through part of the land. This made sale of the land difficult as it had no market appeal.

The total value of the property of Mrs Lumsden, excluding the value of the house and curtilage in which she lived, had been assessed at \$210,000. The value of the farm excluding the dairy was assessed to be approximately \$200,000.

#### The legislation

Section 28(2) of the *Social Security Act* provides for the rate of a person's age pension to be reduced where the value of the person's property exceeds a certain amount.

Section 6AD(1) provides that the value of a person's property is to be disregarded if the property in question cannot be sold or realised or used as security for borrowing (or if it would be unreasonable to expect the property to be sold or realised or used as security for borrowing) and if the Secretary is satisfied that the person would suffer severe financial hardship if the property were taken into account for the purpose of the assets test.

#### Severe financial hardship?

The critical issue was whether the applicant would suffer severe financial hardship if the value of the farm was taken into account.

It was argued on behalf of the DSS that the guidelines which the DSS used to administer the section provide that severe financial hardship may be accepted as present if the person's available funds did not exceed \$6000 in the case of a single person. It was pointed out that the value of the applicant's assets had dropped from \$8762 on the date of the original decision to \$6547 on the date of the hearing. This sum included a life insurance policy valued at \$4694.

The AAT observed that the guidelines were not statements of law and merely provided part of the background of the case.

The AAT then referred to the meaning of severe financial hardship and noted

that it was the equivalent of 'arduous financial suffering'. Reference was made to the AAT's decision in *Reynolds* (1986 32 SSR 404 where the Tribunal had said that 'in the ordinary case "severe financial hardship" is a condition that is more likely to be demonstrated by a person whose income is materially less than the current maximum pension'.

On the date of the original decision the applicant's income was not materially less than the current maximum pension; however at the date of the hearing it was materially so.

The DSS contended that as the applicant was likely to face hardship in the long term she should realise her life insurance policy. The AAT considered this a reasonable requirement, as hardship is not to be measured by income alone. Non-income earning assets must also be taken into account.

It then became important to determine at what date the Tribunal should apply facts to determine the matter. If the applicant had realised the life policy at the date of the hearing her available funds would only have been marginally above the \$6000 figure adopted in the DSS guidelines. Furthermore, once her bank accounts were depleted it would not matter whether the policy was realised or not (presumably because its value was only \$4964). The AAT said that at that date she should be considered as suffering severe financial hardship.

#### Applicable date for decision

The AAT referred to s.43(1) of the *Administrative Appeals Tribunal Act* and the decision of the Federal Court in *Commonwealth of Australia v Hanna Ford* (unreported, 27 March 1986) where Wilcox, J said that the Tribunal 'has the power to make such decision as - upon the facts proved before it - is appropriate to be made'. Thus the AAT decided the facts as they applied at the date of the hearing and found that Mrs Lumsden did suffer severe financial hardship at that date.

#### Rental value of property

The AAT also considered the operation of s.6AD(3). That section provides that, where any property has been excluded through the operation of 6AD(1), the DSS may reduce the person's pension, 'having regard to the annual rate of income that could reasonably be expected to be derived from [that] property'.

The rental value of the property had been valued at \$17,500. However, the AAT concluded that it was not reasonable to expect that the land should be leased. The applicant's son was working the farm and was dependent on it. It would not be economical to lease the land.

Also, the proposed freeway made leasing almost impossible. The applicant's son was not in a financial position to pay rent. Section 6AD(3) did not therefore operate to bring into calculation the rental value of the farming property.

#### Formal decision

The AAT set aside the decision under review and substituted a decision that the applicant satisfied the requirements of s.6AD(1).

### BUESNEL and SECRETARY TO DSS

(No. N85/556)

Decided: 10 September 1986 by J.O. Ballard

Lorna Buesnel applied to the AAT for review of a decision by the DSS to cancel her widow's pension following the introduction of the assets test. The applicant had liquid assets of \$40,000 and owned a half share in a farm. This farm was farmed by the applicant's son and the applicant lived in a house, owned by her, located elsewhere. It was not in dispute that but for the hardship provisions contained in the legislation the applicant's pension must be cancelled.

#### The legislation

Section 28(2) of the *Social Security Act* provides that the rate of a person's pension is to be reduced where the value of that person's property exceeds a specified amount.

Section 6AD provides that the value of a persons property is to be disregarded if the property cannot be sold, realised or used as security for borrowing (or could not reasonably be expected to be sold, realised or used as security for borrowing) and 'the Secretary is satisfied that the person would suffer severe financial hardship if this section did not apply in relation to the person...'

#### 'Severe financial hardship'?

The applicant said that there was no specific contingency for which she was holding her investments of \$40,000. She did not want to become a burden on the family. She had to pay a fairly high hospital contribution. It was accepted that in time the applicant may have to consider moving to new accommodation (her heating was not very adequate). She was 62 years of age.

The Tribunal referred to the decision in *Doyle* (1986) 33 SSR 414. In that decision the DSS guidelines were noted as stating that a single person could be regarded as suffering 'severe financial hardship' if the person had readily available money totalling no more than

\$6000. The figure for a married couple was \$10,000. That decision also noted that these guidelines were to be applied with some flexibility.

The DSS argued that having regard to the decision in Doyle, the applicant's funds should not be seen as limited to the income from her investments. The whole of her \$40,000 should be taken into account. It was argued that the applicant could not retain this amount and expect to receive a pension.

The AAT did not accept this view. However, the AAT said it would accept the submission put by the DSS if it were amended to accord the applicant a reserve of \$10,000. This allowance would suit the applicant's situation. The AAT concluded that although the property farmed by the applicant's son could not be sold, realised or used as security for borrowing, the applicant would suffer severe financial hardship if the hardship provisions did not apply, given her cash reserves.

#### Formal decision

The AAT affirmed the decision under review.

[Comment: The AAT seemed to regard \$10,000 as a reasonable figure for a single person to control and still qualify under the hardship provisions. The DSS guidelines suggest \$6000. Does this indicate a difference in attitude between the AAT and the DSS, even allowing for the flexible application of the guidelines?]

## Handicapped child's allowance: late application

### PHILLIPS and SECRETARY TO DSS

(No. W85/174)

Decided: 19 August 1986 by R.D. Nicholson, J.G. Billings and P.A. Staer.

The applicant sought review of a DSS decision not to allow the backdating of a claim for handicapped child's allowance.

#### The facts

The applicant had given birth to 19 or 20 children in her lifetime although in June 1969 only eight dependent children were living with her and her spouse.

In October 1969 the applicant became ill. Her condition was diagnosed as Korsakow's psychosis which included extreme loss of memory and depression. This condition had been brought on by alcoholism. The applicant applied for and received invalid pension from October 1969.

The applicant also suffered from a series of other medical conditions in subsequent years. She was hospitalised on one occasion for a heart condition in 1979 and other conditions required treatment in 1981.

In June 1972 the applicant's son had been diagnosed as having diabetes mellitus. He suffered from profound growth retardation and pubertal delay. On 4 June 1981 the applicant applied for handicapped child's allowance in respect of this son. This was granted from 15 July 1981. The application for review before the AAT related to the period from 31 December 1974, when the allowance was first introduced, to 14 July 1981. The issue to be determined was whether 'special circumstances' existed which would justify the backdating of the allowance.

#### The legislation

Section 105R of the *Social Security Act* applies sub-sections 102(1) and (2) (which relate to family allowances) to the payment of handicapped child's allowance. Sub-section 102(1) reads:

(a) if a claim is lodged within 6 months after the date on which the claimant

became eligible to claim the family allowance, or, in special circumstances, within such longer period as the Secretary allows from the commencement of the next family allowance period after that date; or (b) in any other case - from the commencement of the next family allowance period after the date on which the claim for family allowance is lodged.

#### Did 'special circumstances' exist?

The Tribunal referred to the Federal Court decision in *Beadle*, (1985) 26 SSR 321. In that case it was held that it was not possible to lay down precise rules as to whether special circumstances exist in a particular case. Generally, special circumstances would be those events which would render the six month time limit as unfair or inappropriate. In the case of a lengthy delay, weighty factors would be needed to establish special circumstances.

The applicant claimed that she had been ignorant of her entitlement and that the disability of her son would have qualified for the allowance. It was also claimed that her bad memory was a special circumstance. However, the AAT observed that as soon as an elder son became aware of the entitlement the application was made without delay. Thus it could not be claimed that bad memory was a factor which contributed to the delay in applying for the allowance. It was a different case to *Garlett* (1985) 26 SSR 311. She may not have been told of the allowance but there was no evidence that she had been misled by a departmental officer or that her ignorance was the result of a third party.

The social isolation of the applicant was also claimed to be a special circumstance. The applicant's counsel referred to the Tribunal's decision in *Damalas* (1984) 19 SSR 195 where it was decided that there was no real difference between physical isolation and isolation caused by an inability to communicate due to family and health reasons. However, the AAT did not consider that the applicant's situation

approached the circumstances in *Damalas*.

The AAT concluded nevertheless that taking into account all the family circumstances of the applicant (her spouse was also in ill-health and had been in receipt of an invalid pension since 1971), her illness, the number of children in the family and the family's social isolation that there were special circumstances in this case.

#### Backdating for lengthy period - extremely special circumstances required?

The AAT then considered the length of time for which it was asked to backdate the allowance, a period of just over six and a half years. The arrears would total approximately \$4,582.

The AAT concluded that weighty factors would be needed to justify the finding of special circumstances so as to backdate payment in such a case. While the facts of the case would have justified an extension of the time to lodge a claim if a shorter period had been involved, the AAT concluded that the circumstances were not so special as would justify a six and a half year extension of the period.

#### Formal decision

The Tribunal affirmed the decision under review.

### REIDY and SECRETARY TO DSS

(No. W86/31)

Decided: 19 August 1986 by R.D.

Nicholson, J.G. Billings and P.A. Staer.

The applicant, of Aboriginal descent, had four children. In 1977, one of her daughters developed an ear condition which required hospitalisation in March 1978 followed by regular out patient visits. Her condition also required care and attention by her mother in the changing of dressings, ear drops and ear toilets and travelling 170 kilometres to the hospital for her visits. In September 1984 a further operation was required but