

No 'special circumstances'

The AAT referred to *Beadle* (1984) 20 SSR 210; and said:

'The question is not one of whether an applicant is a deserving one, because of the special circumstances which exist in her life, thereby justifying payment of an allowance earlier than a date from which it

would ordinarily be paid, but whether special circumstances prevented, or contributed to an applicant being prevented from lodging the application in time.' (Reasons, pp.8-9)

The mistaken belief of Rich that the allowance was still being paid did 'not have that "particular quality of

unusualness" necessary to establish special circumstances', the AAT said: Reasons, p.9.

Formal decision

The AAT affirmed the decision under review.

Invalid pension: applicable eligibility criteria

PHILLIPS and SECRETARY TO DSS (No. S86/169)

Decided: 23 September 1987 by J.A. Kiosoglous, J.T.B. Linn and B.C. Lock

John Phillips had been refused invalid pension by the DSS and applied to the AAT for review of that decision. The applicant suffered from a minor back problem which had resulted in him perceiving himself as an invalid. He was resitant to treatment as a result of this negative perception. He had not worked since 1984.

The relevant legislation

The Tribunal first had to determine the applicable legislation for the determination of the claim. The applicant had first applied for invalid pension on 11 July 1985. The DSS decided to uphold the SSAT decision to dismiss his appeal on 16 May 1986. This was the decision from which the applicant appealed to the AAT.

After the hearing of the matter the eligibility criteria affecting invalid pension were amended. The amendment came into operation on 1 July 1987. The effective change in the criteria was that to be eligible for invalid pension the applicant must not only be permanently incapacitated for work to a degree not less than 85%, but must now have at least 50% of that permanent incapacity directly caused by a physical or mental impairment. [s.27 *Social Security Act*]

The question for the AAT was whether it must look at the legislation on the date the claim was made or on the date of the handing down of its decision.

Under *Administrative Appeals*

Tribunal Act 1975, s.43(6) a decision of the AAT varying a decision under review has effect from the day upon which the decision under review had effect unless the Tribunal specifically orders otherwise. Thus, to apply the new law existing at the date of its decision would be to give that law retrospective effect.

Did the applicant have an accrued right?

Section 8 of the *Acts Interpretation Act* 1901 provides:

'Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not -

(c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or

(e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid, and any such investigation legal proceeding or remedy may be instituted continued or enforced...as if the repealing Act had not been passed.'

The Tribunal referred to the discussion of what constitutes a 'right' in *Free Lanke Insurance Co Ltd v. Ranasinghe* (1964) AC 541 and summarised in *Mathieson v. Burton* (1970-1971) 124 CLR 1 by Gibbs, J. as not including a power to take advantage of an enactment or a hope or expectation that a right will be created. What was included in this context were those rights of a specific nature 'given to an individual upon the happening of one

or other of the events specified in the statute.' But as was pointed out in *Robertson v. City of Nunawading* [1973] VR 819 the mere taking of a procedural step towards asserting the right does not create the right.

Thus the issue became whether the applicant in applying for invalid pension was taking a procedural step or was asserting a statutory right. The AAT thought that it was the latter. Once the Tribunal was satisfied that the criteria was met then there was no discretion not to grant an invalid pension. The role of the Tribunal was to 'discover' the right, not to create it.

Thus an accrued right is acquired when a claim for invalid pension is made and that right cannot be removed by amending legislation.

Finally, there was no intention in evidence in the amending Act that it should apply retrospectively. The AAT could therefore conclude that any person who claimed the pension prior to 1 July 1987 must have the old eligibility criteria applied to them until the date of the Tribunal's decision. Of course, after that decision the DSS may review the eligibility of such a person under the new section and make a separate determination from that time.

The AAT then considered the applicant's eligibility in the light of the old criteria and found on the evidence that the applicant was qualified to receive invalid pension.

Formal decision

The AAT set aside the decision under review.

Invalid pension: permanent incapacity

BAILEY AND SECRETARY TO DSS (No. N87/205)

Decided: 18 September 1987 by A.P. Renouf

The AAT set aside a DSS decision to refuse an invalid pension to Mary Bailey. The applicant had slight physical impairment and mild mental retardation. The Tribunal gave considerable weight to non-medical factors in determining the applicant's eligibility.

The AAT said that the question was '...whether a person like Mrs Bailey in all her circumstances can attract

an employer. I consider that her chances of doing so are remote and were she able to do so, the chances of her holding down full-time remunerated employment are more remote. Firstly, she is a person who is less competent than about 98% of the population and at work, this would speedily become apparent. There are less employment opportunities for such persons. Secondly, Mrs Bailey is 42 years of age. This does not mean that she is elderly but an employer would be even more reserved than

normal in taking on a person of such limited intelligence of that age than a similar person who was younger. Thirdly, the applicant has really no marketable skills except for process work. Finally, she has been out of the workforce for 9 years, a lengthy time.'

(Reasons, para.14)

While the case was borderline, the AAT found that on the balance of probabilities the applicant was eligible for invalid pension.