Family allowance: lodgement of claim

CARBONARI and SECRETARY TO DSS
(No. 6050)
Decided: 18 July by R.A. Balmford.

Carbonari asked the AAT to review a decision of the SSAT in which payment of family allowance was not backdated prior to the family allowance period during which her claim form was received at a DSS Regional Office.

The facts

Carbonari's first child was born on 28 August 1986. She completed a family allowance claim form with the assistance of a friend and asked her friend to post it to the Sunshine Regional Office of the DSS. The form indicated that it could be lodged by post.

The AAT found that this claim 'was not received in the Sunshine Regional Office; and that had it been lodged at another office of the respondent, it would have been forwarded to Sunshine': Reasons, para 4.

As friends told her that 'these things take some time', Carbonari did not inquire about her non-receipt of family allowance until June 1988 when she went to the Sunshine office, was told her claim had not been received and lodged a new claim. Payment was made on the basis of the new claim and not backdated prior to June 1988.

The legislation

As at the date of the child's birth in August 1986 the *Social Security Act* stated that payments of family allowance 'shall not be made except upon the making of a claim' (s.135TA(1)(c)).

By June 1988 the relevant provisions of the Act had been amended. A claim still had to be made (s.158(1)(c)) and backpayment of family allowance was limited to the first day of the family allowance period during which the claim was 'lodged'.

Claim not 'lodged' unless received

The AAT followed an earlier AAT decision in *Coin* (1983) 16 *SSR* 160, in which it was decided that, to be 'lodged', a claim must arrive in the hands of an officer of the DSS or in some way at a DSS office. It therefore held that the initial claim form completed by Carbonari after her child's birth had not been 'lodged'.

Formal decision

The AAT affirmed the decision of the SSAT.

[D.M.]

Family allowance supplement: late claim

ROCKLEY and SECRETARY TO DSS
(No. Q90/56)
Decided: 14 August 1990 by D.W. Muller.

Rockley asked the AAT to review a DSS decision that she not be paid any Family Allowance Supplement prior to 19 October 1989. She had been receiving Family Allowance Supplement until 1 December 1987 when her husband began to receive unemployment benefit. From February 1989, she had been in receipt of unemployment benefit while her husband was farming a property. Her benefit was cancelled on 3 July 1989.

On or about 18 August 1989, Rockley received a letter from DSS informing her of the cancellation and also stating that if a claim for Family Allowance Supplement was made within 6 weeks of the cancellation, payments could continue from the date of cancellation. However, the 6 week period had already expired by the time she received the letter.

Rockley telephoned the DSS office at Cairns and was apparently told that she needed to produce information about taxable income in the financial year ended 1989. She stated that this would not be available until December 1989 but was told to lodge the claim and supply the information later. Rockley told the AAT that she asked for a claim form to be sent but never received one. In October 1989, she came across a claim form and then realised that the relevant year of income was the tax year ended 1988. She immediately claimed Family Allowance Supplement and her claim was granted from 19 October 1989.

Rockley claimed that she should be paid Family Allowance Supplement either from the date of cancellation of unemployment benefit (3 July 1989) or at least from 16 August 1989 (when she claimed to have received wrong advice from DSS).

While the AAT noted that there was no doubt that Rockley was eligible throughout the period, the sections of the *Social Security Act* governing the lodgment of claims (ss.158 and 159) made it clear that no arrears were payable prior to the lodgment of a claim. For that reason, the AAT affirmed the decision under review.

[R.G.]

Family allowance supplement: reduced income

CLEAR and SECRETARY TO DSS
(No. V90/45)
Decided: 19 September 1990 by B.M. Forrest.

Aileen Clear applied to the AAT for review of a decision rejecting her claim for family allowance supplement (FAS) on the basis of the income test.

The legislation

The FAS income test under s.74B(1) of the *Social Security Act* is initially applied to the combined income of married persons derived in the 'base year of income', which is defined in s.72(1) as 'the year of income of the person that ended in the preceding calendar year'. If the couple's combined income has reduced, a request can be made under s.74B(3) to apply the income test to that income. However, a condition for the application of s.74B(3) is stated to be that the couple's combined income 'for the year of income in which the request is made (... "the current year of income") is at least 25% less than the relevant taxable income ... for the base year'.

As Clear had 2 children the FAS income test threshold applicable to her was $23 296.

The facts

Clear lodged a claim for FAS on 7 August 1989 and made a request to apply the income test to reduced income on 29 August 1989.

She and her partner had combined taxable incomes of $23 810 in 1987/88 and $10 617 in 1988/89. The latter figure was made up entirely of unemployment benefit paid to her partner. On 7 July 1989 her partner commenced employment and an estimated combined income of $18 477 for 1989/90 was accepted by both parties before the AAT.

Literal interpretation rejected

The AAT agreed that, on the literal interpretation of the Act advanced by the DSS, s.74B(3) would be applied to the 1989/90 estimated combined income. This would mean that Clear's claim was properly rejected because their 1989/90 income fell $620 short of being 25% less than the combined income in 1987/88, the base year.

This was not an outcome that the AAT found acceptable, especially because the AAT said Clear would have qualified for FAS if her claim had been lodged prior to 30 June 1989.

Reference was made to the relevant second reading speech and to the DSS submission to the AAT that the number of FAS recipients had increased by more than 25% since the change from a four weekly to an annual income test. The AAT stated:

> 'It seems to me that if it is intended that the amendments to the legislation are designed to assist a wider number of recipients, the result in the case of the applicant is unreasonable if the words are given their literal meaning. . . . I am not convinced that the legislation is designed to produce the result that in 1989 the applicant in her circumstances is not entitled to benefit.'

(Reasons, p.8)

Formal decision

The AAT set aside the decision under review and remitted it with a direction that Clear was qualified to receive FAS from 29 August until 31 December 1989.

[D.M.]

[**Editorial comment:** The AAT seemed to overlook that, as Clear's partner was apparently on unemployment benefit up until 30 June 1989, a FAS claim lodged before that date would have been rejected because of s.73(1)(a)(i) of the *Social Security Act*.]

Special Benefit: New Zealand immigrant

WILLIAMS and SECRETARY TO DSS
(No. 6287)

Decided: 12 October 1990 by P. Gerber.

John Williams arrived in Australia from New Zealand on 13 October 1989, having recently lost his employment when his employer went out of business. He had been advised by his brother-in-law, living in Wollongong, that there was work available at the latter's place of work. On arrival, Williams was advised that there were no longer any such vacancies. The $500 with which he had arrived was spent within a week on transport, rent and clothes for interviews.

Not eligible for unemployment benefit

Williams applied for unemployment benefit on 24 October 1989. His claim was rejected – correctly, the AAT found – under sub-para 2(a) of Article 9 of the reciprocal agreement between Australia and New Zealand (see Schedule 3 of the *Social Security Act*). That provision imposes a requirement that a New Zealand resident, in order to qualify for unemployment benefit, must have been continuously present 'for not less than 6 months since the date of his or her most recent arrival in Australia'.

Special benefit

Having been rejected for unemployment benefit, Williams applied for special benefit under s.129 of the *Social Security Act*. The claim was rejected in reliance on a policy guideline set out in para. 24-802 of the Benefits Manual which stated that:

> 'A New Zealand citizen moving to Australia should have ensured that he or she had enough funds or have made adequate provision for his or her own support within the first six months in Australia.'

The policy basis for this instruction was that New Zealanders should not be able to receive through special benefit what they could not gain, because of the Reciprocal Agreement, through unemployment benefit.

The DSS also found that, although Williams was suffering severe financial hardship, his hardship was not due to unforeseen circumstances. He had arrived in Australia without sufficient funds nor an offer of employment. His claim therefore did not satisfy s.129(1)(c) of the Act.

Status of the guideline

The AAT endorsed the view of the SSAT that the Benefits Manual had no statutory basis; and, where it was in direct conflict with the express language of the Act, the former must give way. A claim could be rejected only where it fell outside the provisions of s.129, not where it fell outside the categories in the Benefits Manual.

Formal decision

The Tribunal affirmed the decision under review, being a decision of the SSAT which had set aside the rejection of Williams' claim for special benefit.

[P.O'C.]

Carer's pension: 'a home'

KINSEY and SECRETARY TO DSS
(No. 6310)

Decided: 19 October 1990 by B.M. Forrest.

This matter was remitted to the AAT by the Federal Court to determine whether Kinsey's daughter's flat was a home of Kinsey and her daughter for the purposes of s.39(1) of the *Social Security Act*. (For the Federal Court decision, see *Kinsey* (1990) 56 *SSR* 763.)

Background

Kinsey's daughter, who suffered from a severe mental illness, had lived with her husband and child in Kinsey's house, where Kinsey provided daily care for her. In May 1988, Kinsey's daughter, the daughter's husband and her child moved into a unit on an adjacent block of land, which was on a separate title from Kinsey's house. Kinsey continued to provide care for her daughter and her daughters' child as well as for her own husband (who was also disabled) dividing her time between her own house and her daughter's unit.

The DSS then decided that Kinsey could no longer qualify for carer's pension because she was not providing care to her daughter 'in a home of the person and of the other person' as required by s.39(1). On appeal, the Federal Court ruled that the AAT was correct in deciding that Kinsey's house and her daughter's flat could not constitute the one home. But the Federal Court remitted the matter to the AAT to decide whether the flat, by itself, was a home of Kinsey and her daughter.

The meaning of 'home'

The Tribunal noted that the Act did not use expressions such as 'the home', 'same home', 'principal home' or 'permanent home'. It used the term 'a home'. There was nothing in the Act or in the concept of 'home' that precluded a person from having more than one home. The matter was a question of fact, and the AAT considered the amount of time spent by Kinsey in the flat and whether the flat was a separate household as relevant but not determinative. 'What has to be considered', said the AAT, 'is whether of itself it is also a home of the applicant.'

The DSS argued that the flat was more like a place of work for Kinsey. It was argued that a home cannot be a place where one lives intermittently. The motive of Kinsey, suggested the