

## Federal Court decisions

### Invalid pension: backdating

**SECRETARY TO DSS v COOPER**  
(Federal Court of Australia)

**Decided:** 16 February 1990 by O'Loughlin J.

This was an appeal under s.44 of the *AAT Act*, from the AAT's decision *Cooper* (1989) 49 SSR 643.

Cooper's father had been receiving a handicapped child's allowance in respect of Cooper, who suffered from Downs Syndrome. In April 1987, at the time of Cooper's 16th birthday, the father completed a review form, in which he applied for continuation of the handicapped child's allowance, after her 16th birthday.

In November 1987, after he was advised that his daughter had become eligible for invalid pension on her 16th birthday, Cooper's father lodged a claim on her behalf for the payment of that pension. When the DSS granted that claim, Cooper's father requested that payment of invalid pension be backdated to April 1987. The DSS refused to do this.

On review, the AAT decided that the application for continuation of handicapped child allowance, lodged by Cooper's father in April 1987, should be treated as a claim for invalid pension, pursuant to s.159(5) of the *Social Security Act*, so that payment of invalid pension could be backdated to April 1987.

#### The legislation

Section 159(5) gives the Secretary a discretion to treat a claim for one pension, allowance or benefit as a claim for another pension, allowance or benefit 'that is similar in character' to the pension, allowance or benefit for which the claim was lodged, where the Secretary considers it reasonable to do so.

#### 'Claim'

The Court first considered, and rejected, an argument made on behalf of the DSS that the form lodged by Cooper's father in April 1987 was not a 'claim' but merely a review relating to the payment of an allowance in respect of a student turning 16.

The Court said that the return of the review form, by Cooper's father, and

his supply of the information contained in it established that his entitlement to handicapped child's allowance continued so that his completion and submission of the review form to the DSS was, at least, a claim for the continuation of the allowance: Reasons, p.7.

#### Claim not lodged by Cooper

The Court then considered the second argument advanced on behalf of the DSS: this was that, as Cooper had not lodged the initial claim for continuation of handicapped child's allowance, she could not take advantage of s.159(5), because that provision referred to a claim lodged by a person for one payment being treated as if it were a claim lodged by the same person for another payment. That is, there were in the present case two 'persons' — Cooper and her father, whereas a strict reading of s.159(5) pointed to the existence of only one 'person'.

The Federal Court said that this argument was inconsistent with an earlier AAT decision, *Dixon* (1984) 20 SSR 213; and the Court was satisfied that *Dixon* had been correctly decided. To adopt the argument made on behalf of the DSS would, the Court said, prevent those people who were physically incapable of completing a written claim from qualifying for a payment under the *Social Security Act*, because s.159(1) demanded the lodging of a claim in writing (a requirement which, according to the Federal Court in *Formosa* (1988) 45 SSR 586, was mandatory):

'To contemplate that such a person would thereby be rendered ineligible for an invalid pension would be preposterous. Obviously the legislation must be construed so as to enable a claim for an invalid pension to be made for or on behalf of such a person even though that person lacks the legal capacity to make the claim or to authorise his or her parent or guardian to act as an agent for the purpose of making the claim.'

(Reasons, pp.10-11)

The Federal Court pointed out that the *Social Security Act* was beneficial legislation; and said that it was appropriate to read s.159(5) as covering those situations where a claim was lodged for payment 'to or for the benefit of a person'. This was a case in which the italicised words should properly be read into the legislation.

#### 'Similar in character'

The Federal Court concluded by saying that it was satisfied that the handicapped child's allowance was

similar in character to an invalid pension. This similarity could be seen in the criteria by reference to which eligibility for the two payments was determined — the 'state of health' of a person was 'the dominant criteria [sic] in determining eligibility'. And it could be seen in the use to which the two payments would or should be put — the benefit of a disabled person.

It followed that, in the present case, the discretion in s.159(5) had been available, so that the AAT had not made an error of law in treating the application for continuation of handicapped child's allowance to Cooper's father as a claim for payment of invalid pension to Cooper.

#### Formal decision

The Federal Court dismissed the appeal.

[P.H.]

### Income test: pension payable only in East Germany

**ROSE v SECRETARY TO DSS**  
(Federal Court of Australia)

**Decided:** 2 March 1990 by Lockhart, Gummow, andinfeld JJ.

This was an appeal under s.44 of the *AAT Act*, from a decision of the AAT that a retirement pension, to which Rose was entitled in the German Democratic Republic (GDR) amounted to 'income' for the purposes of the *Social Security Act*: *Rose* (1989) 49 SSR 634.

Rose was an Australian citizen who had lived and worked for many years in the GDR. Following his retirement from employment in that country, he was granted a retirement pension by the GDR, which was paid monthly into his cheque account there. This pension was not transferable or payable to Rose anywhere outside the GDR.

Since his retirement, Rose had continued to live in the GDR for most of the year, but had travelled regularly to Australia for several months in each year, in order to pursue his research