

that the respondent be paid sickness benefit from and including 7 November 1989.

[B.S.]

Family allowance supplement: backdating

HATCHER and SECRETARY TO DSS

(No. 6389)

Decided: 14 November 1990 by P.W. Johnston.

Jane Hatcher arrived in Australia from England in September 1988. On her arrival, she went with her husband to the DSS and applied for family allowance. She did not complete those parts of the form which related to 'income details for family allowance supplement'. She told the officer of the DSS that the family was in financial difficulties pending the arrival of finance from the United Kingdom. However, she later told the AAT, she was not told about the existence of family allowance supplement and advised to only complete those parts of the form that related to family allowance.

On learning of the existence of family allowance supplement in November 1989, Hatcher lodged a claim for it. She subsequently discovered that she could have claimed the supplement from the date of her arrival and in January 1990 she applied for backdating of the payment to the date of her arrival. She claimed that the misleading information had prevented her from making the claim.

The DSS refused to accept her claim for back payment and the SSAT subsequently affirmed this decision. Hatcher then asked the AAT to review the decision.

The legislation

Section 76 of the *Social Security Act* provides:

'Subject to this Part, where a claim by a person for an allowance is granted, the allowance shall be paid during the period starting on the day when the claim was lodged and ending on the next 31 December, and shall start to be paid from the first allowance pay day after the day before the day on which the claim was lodged.'

Section 158(1)(c) provides that the payment of the allowance 'shall not be made except upon the making of a claim for [the allowance]'.

Section 159(1) requires the claim to be in writing in accordance with a form approved by the Secretary and lodged with the DSS.

No payment prior to claim

The AAT referred to the decision of the Full Federal Court in *Formosa* (1988) 45 SSR 586, where in similar circumstances the lodging of a claim was regarded as a precondition for payment, and arrears prior to the date of the claim were not payable. This approach had been followed in *Fry* (1990) 56 SSR 753 and *Rockley* (1990) 58 SSR 787.

The AAT thus concluded:

'... there is no legal basis on which the family allowance supplement can be paid in the present circumstances. This is so irrespective of what happened or did not happen when the applicant spoke to the respondent's officer on 8 September 1988. In this respect there is no difference between lodging a claim partly filled out, leaving the relevant part blank, and not lodging a claim form at all.'

(Reasons, p.3)

Claim for a payment 'similar in character'

The Tribunal also referred to s.159(5) of the Act, which allows a claim for a payment under the Act to be regarded as a claim for another payment which is 'similar in character' to that claimed. This is allowed in circumstances where a claim for the second type of payment might properly have been made.

In the present situation the AAT considered that s.159(5) could not apply. The Tribunal commented:

'In its terms, it [s.159(5)] could be read in an appropriate case to allow the respondent to characterise family allowance supplement as a benefit "similar to" family allowance. Whilst s.159(5) would normally be concerned with pensions and the like which are near alternatives, it could be read to include another benefit that is cumulative upon the other. Such a case might be where, for instance, in the body of the claim form relating to family allowance, some financial details were included that would advert the respondent to the fact that supplement is also being sought. In the present circumstances, however, there is nothing elsewhere in the claim form that could satisfactorily overcome the fact that part of the claim form relating to family allowance supplement is entirely blank. That part clearly relates to what is a distinct and discrete claim, and failure to fill in any part of it must be treated as a failure to make the claim as required by s.159 of the Act.'

(Reasons, p.5)

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Assets test: mortgage over NZ property

SECRETARY TO DSS and ROBINSON
(No. W90/107)

Decided: 14 December 1990 by T.E. Barnett.

This was an application by the DSS for review of a decision of the SSAT which determined that the value of Paul Robinson's property in New Zealand should not be included as property for the purposes of determining his entitlements to a rehabilitation allowance under the assets test.

The facts

Robinson was the beneficiary under his father's will of a third share of a farm in New Zealand. His father had died in 1982. It was a term of the will that Robinson's brother had 6 months after the death of the father to exercise an option to buy out the shares of Robinson and his sister.

To facilitate the purchase by the brother of the total interest in the farm, the father's will provided that the trustees of the father's estate could advance loans to the respondent's brother out of the share of the estate belonging to the respondent and his sister.

Within 6 months of the father's death, Robinson's brother exercised this option and executed a second mortgage over the property to the trustees to secure the loan advanced from the share of the estate beneficially belonging to the respondent and his sister. The terms of the mortgage provided that repayment was postponed for 10 years, i.e. until 1992.

Robinson's brother ran into financial difficulty and in 1986 had to refinance. This involved, *inter alia*, discharging the mortgage to the trustees and executing a new mortgage directly to Robinson and his sister. This mortgage was executed on 19 April 1987. This mortgage was redeemable on 1 June 1992.

In 1988 Robinson and his sister made a gift to their brother by way of forgiving part of the debts secured by their mortgages.

Robinson commenced receiving the rehabilitation allowance on a date not stated in the AAT's Reasons. The issue arose as to whether the value of Robinson's share in the mortgage over the New Zealand farm should be included in his assets for assets testing purposes and, if so, what was the ap-