

Family allowance supplement: current year of income

SECRETARY TO DSS v CLEAR
(Federal Court of Australia)

Decided: 25 March 1991 by Heerey J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Clear* (1990) 58 SSR 787.

The AAT had decided that, where a person had claimed family allowance supplement in August 1989, her 'current year of income', referred to in s.74B(3) of the *Social Security Act*, meant the tax year 1988/89 and not the tax year 1989/90.

The AAT had conceded that the literal meaning of s.74B(3) required the

1989/90 tax year to be used as the 'current year of income'. But this, the AAT said, would produce a result which would be unreasonable and inconsistent with the purpose of the legislation which introduced the income test based on taxable income for family allowance supplement, namely to assist a wider number of recipients. (Clear's taxable income was lower in 1988/89 than in 1989/90.)

No justification for departing from literal meaning

The Federal Court said the argument, that a particular meaning of legislation produced an unreasonable result, could only provide a reason for departing from that meaning where there was some foundation in the legislation for the construction which is said to be reasonable.

In the case of the family allowance supplement income test, Heerey J said,

the Act clearly indicated the meaning of the term 'current year of income':

'Even if denial of FAS for Mrs Clear is seen in the abstract as unjust or unreasonable, . . . the reasoning of the tribunal discloses no construction of the language, however slight or tenuous, which could be preferred to the obvious and literal meaning so as to achieve the result that her application succeeded. There is no attempt made to deduce such a meaning. It is simply said that the result was unfair and therefore a different result ought to follow. I think such reasoning is not correct. Social security legislation could be drafted so as to confer broad general discretions on administrators so as to achieve what is thought to be just or reasonable results in individual cases. Understandably, the Act is not so structured. It applies quite detailed and at times quite complex rules which govern entitlement to benefits and those rules are the law which has to be applied.'

(Reasons, pp. 10-11)

Formal decision

The Federal Court set aside the AAT's decision.

[P.H.]

Background

Access to social security in regional areas

The decision of the AAT in *Barnett* (1991) 61 SSR 843 raises a number of issues with respect to the accessibility of people living outside metropolitan areas to social security. Although the Tribunal's decision in that case was clearly correct, it is the approach taken by the DSS which is the cause for concern.

Background

Mrs Barnett lived in Innisfail, Far North Queensland. Her husband was a blocklayer. Due to wet weather making employment hard to obtain, he decided to commence training as a real estate salesperson. This necessitated a period of study before commencing work. The Barnetts asked the DSS what income support they might receive during this period and were told that they would be eligible for special benefits. This obviously influenced their final decision to pursue the above course.

In fact Mrs Barnett had no less than 6 communications with the Cairns office of the DSS over a short period of time. Usually each time she spoke with them by telephone she had to repeat her situation to a new DSS officer. Importantly,

the advice given by the DSS as to her entitlement kept changing. Eventually she was advised that she was not entitled to any benefit, even though this advice was given hours after a conversation with a local MP's office in which it was indicated Mrs Barnett would receive some payment.

Mrs Barnett successfully appealed to an SSAT. The DSS appealed to the AAT against that decision. The total period for which special benefit was claimed was 5 weeks. The AAT affirmed the decision of the SSAT.

The DSS approach

The arguments advanced by the DSS seem to indicate a lack of understanding of the problems experienced by people living in regional areas generally, and North Queensland in particular. There are 3 areas where the Department's approach was deficient.

(1) The misleading advice

The DSS regarded the misleading advice given by the Cairns DSS office as 'regrettable' but as not providing grounds for the exercise of the discretion to grant special benefit. The basis of the submission was that, in deciding to exercise the discretion in the *Social Security Act* with respect to the granting of special benefit, the focus should be the degree of control which the claimant had over the circumstances leading to her inability to earn a livelihood. The DSS argued that

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