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

Mrs Barnett could have influenced her husband not to leave the workforce and could also have decided to join the workforce herself. The AAT was not swayed by that argument. It concluded that the misleading advice was such that it changed her perception of the situation in such a way as to take from her complete control of her circumstances.

The DSS approach seems to ignore the difficulties of obtaining information about social security entitlements in regional areas. Even though there is an Innisfail DSS office, it is clear from the AAT decision that it operates as an agency of the Cairns office and relies on the Cairns office to make the important decisions. Mrs Barnett had to rely on telephone communication with the Cairns office. She had to deal with different people each time she rang, and this required her to repeat her story on each occasion. Also she had to contend on one occasion with what she described as 'a very rude lady' before she could obtain the information required. It is clear from the facts of the case that this difficult form of communication was an important factor in her obtaining wrong advice.[1] The DSS, it appears, was prepared to shift the responsibility for the manner in which they service people living in regional areas onto the claimant.

(2) Ability to work

The DSS also submitted that Mrs Barnett did not satisfy a precondition to the exercise of the discretion to grant special benefit in that she was not 'unable' to earn a sufficient livelihood. To support this argument they produced ABS statistics which showed that, in June 1990, 49% of married couples with children between 0 and 4 years had the wife in the labour force. The DSS submission was that it was not therefore 'unusual in today's society for mothers of young children to participate in the labour force'. This led to the proposition that '[t]he fact that a woman has a young child does not of itself give rise to an inability to earn a livelihood'.

The AAT concluded that Mrs Barnett was unable to earn a sufficient livelihood, not only because she had a young child who she wished to continue breastfeeding, but also because of a number of circumstances including the quality of advice given by the DSS.

But it is the use made of the ABS statistics which should cause the greatest concern. In relying on Australia-wide statistics to show what is usual in society, the DSS completely swept aside the possibility of any regional variation from that supposed norm. In a country such as Australia where most of the population live in capital cities, one must seriously ask whether such statistics contain a metropolitan bias. As Cheers[2] shows, poverty and lack of welfare services are more pronounced in regional areas than they are in the capital cities. Where was the DSS evidence of the number of married women with young children in Innisfail participating in the labour market? Child care may be more accessible in capital cities because more resources are allocated to welfare in those cities. The ABS statistics may reflect this on an Australia-wide basis given the substantial majority of the population living in those cities. To use Australia-wide statistics to suggest what could be reasonably expected of a particular individual in a particular region is close to an abuse of statistics.

(3) Climate

At the basis of the *Barnett* case is the fact that the husband decided to leave his work as a blocklayer due to wet weather causing difficulties in obtaining employment. The AAT gave some emphasis to this factor in considering the discretion to be exercised in this case. But it seems that the DSS did not completely understand this factor. For example, in arguing the issue of the degree of control Mrs Barnett had over her husband's decision to change his occupation, the DSS submitted that she could have influenced him not to take that course.

The effect of the climatic conditions may be hard to understand if the DSS officers constructing this argument had no experience of North Queensland. Although Mrs Barnett may have understated the situation by describing the problem in obtaining employment as emanating from 'wet weather', the key to understanding this factor is in her comment that, as a result of this weather persisting, 'it was impossible' for her husband to work. What North Queenslanders may describe as wet weather is in fact the impact of a tropical monsoon. Months of rain not only make it difficult to work, but roads (already inadequate) are cut off at times and travel on them is impossible. Supplies of materials may also therefore be difficult to obtain during the wet season. All of these factors combine to impact considerably on the amount of work available for a person who normally works outside.

Thus the degree to which the Barnetts controlled their decision to seek alternative employment should be assessed against a climatic factor which is a major aspect of the way in which North Queenslanders live. It is a severe climate in many ways unlike the essentially stable conditions which prevail in those parts of Australia where most people live. It is clear from the facts of this case that the climate determined significantly what the Barnetts chose to do. Did the DSS appreciate this point?

Conclusion

Although the AAT confirmed the grant of special benefit to Mrs Barnett, it is important that the DSS not ignore the various considerations which the case raised. In particular, it shows that, where a discretion is to be exercised, the standards to be applied should take account of local factors and not rely on some 'Australia-wide' test which is in reality a capital city standard inappropriately and unfairly applied to regional residents.

Brian Simpson

Brian Simpson teaches law at James Cook University and lives in Townsville.

References

1. See also *Dodson* (1991) 59 *SSR* 800 for difficulties caused by reliance on telephone contact with DSS.
2. Cheers, B., 'Rural Disadvantage in Australia' (1990) 43 *Australian Social Work* 5.