Special benefit: the scope of the discretion

SECRETARY TO DSS v SCHOFIELD

(Federal Court of Australia)

Decided: 30 July 1992 by Lee J.

Lynelle Schofield was a 19-year-old woman whose serious medical problems had obliged her to abandon a full-time university course some 6 weeks after starting the course in February 1991.

Schofield claimed sickness benefit in April 1991. The DSS granted sickness benefit, but subject to a 13-week deferment period, because she had abandoned her course.

In May 1991, Schofield claimed special benefit. The DSS rejected that claim because Schofield had cash reserves of about $4000.

On review, the AAT decided that Schofield should be granted a special benefit. The AAT took into account a range of factors other than Schofield's financial situation, including her ill-health, the forced curtailment of her studies, and the role which payment of special benefit could play in improving her health: see *Schofield* (1991) 64 *SSR* 905.

The Secretary appealed to the Federal Court under s.44 of the *AAT Act* 1975, contending that the AAT had made an error of law.

The legislation

It was agreed between the parties that the AAT had correctly seen the question before it as depending on the *Social Security Act* 1947.

Section 129 of the Act gave the Secretary a discretion to pay special benefit to a person, to whom another benefit was not payable, where the person was unable to earn a sufficient livelihood.

The purpose of the special benefit

Lee J noted that the education leaver deferment period imposed by s.127 of the 1947 Act did not apply to special benefit. Accordingly, the discretion to pay special benefit was

> 'all the more important in ensuring that the operation of s.127 of the Act was not unduly harsh or penal in its consequences. The discretion vested in the Secretary was provided for the clear purpose of alleviating hardship or ameliorating what would otherwise be unnecessary harshness in the operation of the Act.'

(Reasons, pp. 19-20)

The education leavers' deferment period had originally applied only to unemployment benefit; but an amendment to the *Social Security Act* had extended this deferment to sickness benefit in September 1990; and this extension

> 'increased the prospect of hardship occurring in such cases and thereupon s.129 had an additional function to perform'

(Reasons, p. 20)

The Secretary attacked the AAT's decision on the basis that the AAT had failed to follow the DSS guide-lines, which referred to financial factors as the dominant consideration in exercising the discretion to grant special benefit. The Secretary said that the AAT should have followed the guide-lines in the interest of 'consistency', and should not have take account of medical and social factors.

Lee J said that, when the exercise of a discretion was involved, consistency of approach rather than of outcome was required. As Deane J had said in *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639, 647, 'while consistency may properly be seen as an ingredient of justice, it does not constitute a hall mark of it'. Consistency must be related to policy, but should only be pursued 'when the policy is appropriate and acceptable'.

The question was, Lee J said, whether the AAT had exercised its discretion 'according to rules of reason and justice' and had not descended 'to private opinion or disposition': Reasons, p. 30, quoting *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 189.

Lee J pointed out that the AAT had not disregarded the guide-lines, although it had quite properly declined to be bound by them. The AAT had understood that special benefit was a payment of last resort; and it had understood that the outcome of Schofield's application turned on its own special facts, with little or no bearing on other applications.

Lee J said that the AAT had properly considered the financial resources available to Garratt and the demands on her, the cause of her inability to work or continue her course of study, and the effect which her lack of income was having on her health. These were relevant matters and the AAT had not considered them to the exclusion of all other considerations. To argue, as the Secretary had done, that the AAT given too much weight to Garratt's particular circumstances was not to raise an error of law, Lee J said. He concluded:

> 'It cannot be said that it is beyond the scope and purpose of s.129 to exercise the discretion conferred by that section to grant a special benefit to a person totally incapacitated for employment incurring regular expenditure in the course of that incapacity and when the lack of ability to earn a sufficient livelihood is itself an exacerbation of the applicant's incapacitating condition. Of course, the fact that such an applicant is living at home with the benefit of parental assistance and support will be of great relevance and all competing elements will be duly weighed and balanced but once that procedure has been carried out a decision to grant a special benefit will not be beyond the ambit of the discretion provided by s.129. That other minds or differently constituted tribunals may have decided otherwise does not in itself raise a question of law.'

(Reasons, pp. 33-34)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]