

Although the right was accrued as at the date of lodgement of the application for review, it did not necessarily follow that the law to be applied to the accrued right was the law in force at the date of the lodgment. Since the AAT was in the shoes of the delegate when making its decision, the applicable law was that which existed at the date of the original decision. The AAT said that this proposition was consistent with the High Court's views in *Esber*, where the majority had left open the question of whether the relevant law to apply was the law in force at the date of lodgement of the application for review.

In the present case it would make no practical difference whether the law to be applied was the law as it stood at the time of the original decision or the law as at the date of the lodgement of the application for review, because both of those dates preceded the amendment.

The AAT proceeded to apply the law as it stood at the date of the original decision.

Special circumstances

The SSAT had referred to *Lee* in support of its decision that there were special circumstances to disregard part of the weekly compensation payments. In *Lee* the AAT found special circumstances in the absence of any connection between Mrs Lee's eligibility for pension and the fact that her husband was receiving compensation payments. The facts in the present case were similar to those in *Lee*, but the AAT declined to follow the prior case. It said that the facts in the present case and those in *Lee* fell squarely within the terms of s.1168. While it might seem unfair that a dollar for dollar deduction be applied where the pensioner's spouse was receiving periodic compensation but not when the spouse was receiving wages, that was the clear intention of the legislation. There was nothing special about that circumstance.

Haughey further argued that it was unfair that the reduction in pension was calculated on the gross and not the after tax amount of compensation payments. The AAT applied the reasoning in *Gutierrez* (Decision No. 9213; 24 December 1993) to find that the compensation payments referred to in s.1168 are the gross amounts of the compensation received rather than the after tax amount that is actually received. That fact is not of itself unfair so as to go towards an exercise of the discretion in s.1184.

The AAT found that there were no special circumstances under s.1184.

Formal decision

The AAT set aside the decision under

review and substituted a decision that the rate of Mr Haughey's DSP and Mrs Haughey's wife pension was to be reduced under s.1168(3) in accordance with the reasons of the AAT.

[P.O'C.]

Rate of special benefit: whether married person

GORDON and SECRETARY, DSS (No.9470)

Decided: 12 May 1994 by B.A. Barbour, J.Campbell and A.Cripps.

Background

This application related to a DSS decision to reject Mr Gordon's claim for special benefit on the ground that his spouse's income precluded payment for the period 22 March 1989 to 31 December 1989. An extension of time to lodge the application was granted. The facts of the matter were not in dispute. 'The applicant and his wife, who are legally married, have lived together, after a period of separation of some 5 years, since 1982': Reasons para 4. In 1985, the AAT found that Mr and Mrs Gordon were not living separately and apart for the purposes of social security entitlement (*Gordon* (1985) 27 SSR 339). In March 1989, the Department conceded that they were living separately under one roof and had done so for a period of at least 26 weeks.

The legislation

Prior to 1 January 1990, s.3 of the *Social Security Act 1947* provided that:

'(8) Where:

- (a) a person who would, apart from this subsection, be an unmarried person was formerly a married person;
- (b) the person is living in his or her former matrimonial home; and
- (c) the person's former spouse is also living in the same home; the person shall, if the conditions referred to in paragraphs (b) and (c) continue to apply to the person, be treated as a married person for the purposes of this Act after the end of the period commencing on the day (in this sub-section called 'commencing day') on which those conditions were first satisfied or 14 May 1987, whichever is the later, and ending ...
- (e) in any other case 26 weeks after the commencing day ...'

Mr Gordon declined to give oral evidence on certain matters or make oral submissions at the hearing. He had prepared two written submissions and

the AAT considered these arguments in its written decision.

Mr Gordon submitted that the DSS had not assessed his claim for special benefit in accordance with ss.129 and 130 of the 1947 Act. The AAT found that Mr Gordon was qualified for special benefit under s.129 at all material times. There was no argument on this point.

Mr Gordon accepted the DSS's submission that he should be considered a married person and as there was no other evidence before the AAT, it found that he was a 'married person' for the relevant period.

The issue was the rate of payment. The DSS submitted that the rate of payment, calculated according to ss.130, 122(1) and (4) was nil. This was based on Mrs Gordon's income. Mr Gordon did not dispute that this would be the case if Mrs Gordon's income was taken into account. He did not raise any argument in relation to his status as a married person nor the assessment of the rate of payment. Consequently, the AAT rejected his submission that the rate of payment was incorrect. The AAT found that if Mrs Gordon's income was ascribed to Mr Gordon, then his entitlement would be nil.

Mr Gordon's second argument was that the DSS was negligent in assessing his claim because they did not investigate evidence supporting his claim as a separated person. The AAT noted that the material did not go to the issue of whether Mr Gordon and his wife were properly treated as married persons.

The third argument alleged DSS negligence and non-compliance with the *Fol Act 1982*. The AAT noted this was not relevant to determining eligibility for special benefit and rate of payment.

The fourth argument was that the DSS was harsh, unreasonable and unjust in the assessment of Mr Gordon's claim and that the DSS Manual of Instructions was not followed. The AAT commented that the DSS guidelines were not binding on the AAT and that the AAT must determine Mr Gordon's entitlements according to the law despite the fact that he might consider the result harsh and unreasonable.

The AAT noted that the amendment to the Act which came into force on 1 January 1991 was a recognition that the definition of 'married person' in s.3 had operated harshly, but that that did not entitle Mr Gordon to payment of special benefit prior to the date of the amendment.

Formal decision

The AAT affirmed the decision under review.

[M.A.N.]