Age pension: whether letter constitutes a claim?

GUTMANN and SECRETARY TO DSS
(No. 11082)

Decided: 23 July 1996 by J. Handley.

Background

Gutmann claimed that he posted a letter in July 1990 to the DSS requesting age pension as he was about to turn 65 years old. After four or five months he had no reply, so wrote again to the DSS. Gutmann claimed he did not receive a response. Gutmann wrote to the Minister for Social Security on 24 April 1995. This letter was forwarded to a regional DSS office. A departmental officer contacted Gutmann and a claim form was lodged on 22 June 1995. A decision was made that Gutmann was eligible, and to pay the pension from the first pay day after 22 June, namely 29 June 1995. Gutmann requested a review, and the authorised review officer (ARO) varied the decision to make the pension payable from 4 May 1995, the first pay day following the letter of 24 April 1995. Prior to June 1995 Gutmann had not been in receipt of any form of pension or benefit.

The issues

The first issue is were the letters sent in 1990? If they were, do they constitute a claim for age pension?

The legislation

Section 48 of the *Social Security Act 1991* states that a person who wants to be granted an age pension must make a proper claim. Section 49 states that to be a proper claim, a claim must be made in writing and must be in accordance with a form approved by the Secretary. Section 50 goes on to stipulate where a claim must be lodged to be a proper claim.

A proper claim

Gutmann argued that the DSS had ignored his letters in 1990 and had failed to exercise a responsibility towards him. He also argued that as the DSS had treated his letter of 24 April 1995 to the Minister as a claim for pension, the DSS was also capable of treating his letters of 1990 as claims for pension.

The DSS relied on the legislative provisions. Gutmann's letters of 1990 (of which the DSS had no record), do not constitute claim forms within the meaning of the legislation. Accordingly the pension was not payable prior to the date the claim form was lodged in June 1995. The DSS took no issue with the ARO's decision to pay pension from May 1995 (which had been affirmed by the SSAT), and described the decision as 'generous'.

The AAT was not satisfied that Gutmann did write to the DSS in 1990, and commented that even if the letters were sent, they probably did not constitute a claim form.

When delivering oral reasons at the hearing, the AAT affirmed the decision under review, but in the written reasons, it found that the ARO's decision to pay the pension from May 1995 was wrong in law and the pension should have been paid from the first pay day after the claim was lodged in June 1995. The AAT noted that there was nothing to indicate that the DSS would attempt to recover the payment of pension prior to 29 June 1995.

Formal decision

The decision under review was set aside insofar as it affirmed a decision made by an ARO to pay pension to Gutmann from a date not before 4 May 1995. In substitution for that decision it was decided that pension was not payable to Gutmann prior to the date of lodgement of his claim form on 22 June 1995. In all other respects the decision under review was affirmed.

[M.A.N.]

Age pension: application of assets test to unpaid loans

CLAYTON and SECRETARY TO DSS
(No. 11131)

Decided: 6 August 1996 by A.E. Hallowes.

Clayton applied for the age pension on 21 November 1994. He was notified by the DSS on 26 April 1995 that his application was refused on the basis that, under the assets test (s.1064-G), he had assets above the allowable limit of $347,000. This decision also necessarily affected the age pension of Mrs Clayton. Under s.1122, the DSS included as assets of Clayton, a loan of over $500,000 to the Clayton Property Trust and the Clayton Family Trust. Section 1122 states:

> 'If a person lends an amount after 27 October 1986, the **value of the assets** of the person ... includes so much of that amount as remains unpaid but does not include any amount payable by way of interest on the loan.'

The decision of the DSS was affirmed by the SSAT on 19 January 1996. Clayton sought review by the AAT.

The loans

Clayton sold his grazing property in Victoria in 1987 and established the Clayton Property Trust and Clayton Family Trust. He loaned the proceeds of sale to the trusts for investment in a hardware business for the benefit of his children and grandchildren. The business traded profitably for some years, with profits being reinvested and money borrowed. In 1992, however, as a result of the Pyramid Building Society collapse, the business debt was sold by the liquidator and only 30 days were given for an overdraft of $379,000 to be repaid. The hardware business was sold to pay the debts.

In his application for pension, Clayton advised the DSS about the loans. He stated that both Trusts had significant losses. The Trust balance sheets disclosed deferred liabilities to the Claytons and to a bank. Clayton's accountant advised the DSS that the Family Trust only had realisable assets of $7581 rather than $439,247, which assets could only be realised if Clayton's daughter sold her home. He put to the DSS that the value of Clayton's assets in the Property Trust was about $250,000. Clayton submitted that the loans were lost.

Date at which to consider application

The AAT held that it must consider Clayton's assets as at the date at which he lodged his claim for age pension in November 1994, or within 3 months of that date, by virtue of s.46(3) and s.48 of the Act, following the Federal Court decision in *Goudge* (1989) 17 ALD 415. The AAT observed that as it was not a primary decision maker, it did not have jurisdiction to consider Clayton's claim at the date of hearing.

Loans unrecoverable

The AAT concluded that the loans had to be considered at their face value, by virtue of the requirement in s.1122 to consider the amount of a loan which 'remains unpaid'. This is not interchangeable with 'remains unrecoverable'. The provision is clear, and any hardship is intended to be ameliorated by the hardship provisions.

Hardship provisions

If a pension is not payable to a person because of the application of an assets test; the person has an unrealisable asset;

the person lodges an application form under the section; and the Secretary is satisfied that the person would suffer severe financial hardship, then the hardship provision in s.1129 will apply. Once s.1129 applies, then under s.1130, the value of any unrealisable asset is to be disregarded in working out the age pension. Under s.11, an asset is unrealisable if the person cannot sell it or use it as security for borrowing, or be reasonably expected to do so.

Clayton only lodged an application under s.1129 in 1996. The application was refused but the AAT advised him to apply immediately for review of that decision. The AAT concluded that it did not have jurisdiction to hear a hardship application until Clayton took action under s.1129. The AAT commented that the DSS officers should draw s.1129 to the attention of applicants if assets and hardship appear relevant to the claim.

Formal Decision

The AAT affirmed the decision under review

[M.S.]

Ordinary income on a yearly basis

SECRETARY TO DSS and MORRIS (No. 10956)

Decided: 17 May 1996 by J.A. Kiosoglous, D.J. Trowse and J.Y. Hancock.

Background

Morris, a 65-year-old married man was in receipt of fortnightly payments from Commonwealth Superannuation (ComSuper) under the *Defence Force Retirements and Death Benefits Act* 1973 (DFRDB Act).

He applied for age pension on 14 July 1995, and a dispute arose about the method to be used to calculate his annual income for the purposes the rate of pension payable.

The method used by the DSS delegate was to take Morris' gross annual entitlement of ComSuper, $14,634.65, as his annual income. Morris argued to the DSS that the correct method should have been to multiply his gross fortnightly payment by the number of such payments in a financial year.

The difference between the two methods was that the Morris method produced a figure one day's payment short of his annual entitlement. The 1994-95 financial year did not consist of 26 fortnights but of 26 fortnights and one day.

It also appeared that in certain financial years Morris, and other beneficiaries under the DFRDB Act, would receive 27 fortnightly payments although this would occur about every 13 years.

The SSAT set aside the DSS decision and ordered that the Morris method was to be used to determine the annual rate of income. The DSS requested review by the AAT.

Legislation

Both parties agreed the ComSuper payment was income for the purposes of s.8 of the *Social Security Act 1991,* and to be taken into account in determining pension entitlements.

The DSS claimed its process of calculation is as set out in the 'Method Statement' in Point 1064-A1 of the Act, which identifies a number of steps to take according to specified Modules. Included in this process is Module E which requires calculation of 'the amount of the person's ordinary income on a yearly basis' and in Morris' case is the $14,634.65 entitlement.

The AAT had to decide whether Morris' full annual entitlement of ComSuper fits the description of income that is 'earned, derived or received' within the meaning of s.8(2) of the Act, in order to determine what was his 'ordinary income on a yearly basis'.

Discussing the cases

The sticking point for the parties was the distinction between an annual 'amount' of income and an annual 'rate' of income. The DSS argued that the High Court case of *Harris v Director of Social Security* (1985) 57 ALR 729 was support for its position that 'rate' was the correct basis for its calculation, rather than the receipts for a financial year, as this was consistent with the expression of the 'rate of pension' in Point 1064-A1 of the Act.

Harris dealt with the *Social Security Act 1947* which used the expression 'annual rate of income' rather than 'on a yearly basis'. The DSS argued the 1991 Act did not change the notion of income away from an annual rate.

The AAT looked at a number of other Tribunal and superior court decisions in order to consider the proper meaning to be given to the words in s.8(2): (*Siebel and Director General of Social Security* (1983) 5 ALN N194, *Brent* v *FC of T* (1971) 125 CLR 418, *Smith and Director-General of Social Services* (1982) 4 ALN N231 and *'Carden's case'* (1938) 63 CLR 108).

The essence of the AAT's discussion of these cases, especially *Brent* and *Carden,* was that:

> 'The decisions of Dixon and Gibbs JJ make it clear that monies realisable (ie, where a present legal entitlement exists), but not received in an accounting period, should not always be regarded as income derived during that period and that, in any consideration of derivation, the source and kind of income are of prime importance.'

(Reasons, para. 25)

In looking at Morris' enforceable right of claim under the DFRDB Act, in other words his 'present legal entitlement', the AAT said it was limited to the amount actually received.

The words 'earned, derived or received' were to be given their own individual meaning. The AAT decided the ComSuper payment was 'earned' but it was the 'present entitlement' that was a vital part of the 'earned formula' and without that it could not be said to have been 'earned', and this coincided with the amount received by Morris.

The Tribunal also commented on the *Harris* case relied on by the DSS. It opined that the discussion in *Harris* about the distinction between 'amount' and 'rate' of income was not relevant to the interpretation of the 1991 Act but in any event 'the phrase "ordinary income on a yearly basis" is more analogous to the phrase "annual amount of income" than "annual rate of income"': Reasons, para. 29.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.W.]

Compensation preclusion: special circumstances

SECRETARY TO DSS and HICKMAN (No. 11108)

Decided: 31 July 1996 by H.E. Hallowes

The DSS decided that Hickman was precluded from being paid disability support pension until 10 September 2001 as a result of his receipt of a lump sum compensation payment of $350,000.