Administrative Appeals Tribunal

Special benefit: applicable policy and rate of payment

SECRETARY TO THE DFaCS and VU
(No. 2001/706)

Decided: 10 August 2001 by Justice D. O'Connor, N. Bell, T. Sourdin.

Background

In July 2000, Vu was born in Australia and was an Australian citizen. In October 2000 his parents separated due to domestic violence. From December 2000, Vu stayed with his mother at a women's refuge, or at accommodation provided by the refuge. His mother did not have permission to work in Australia. It was her understanding that Vu's father was not working. The domestic violence that preceded the breakdown of the relationship between Vu's parents restricted the possibility of obtaining child support.

In December 2000, a claim for special benefit was lodged on Vu's behalf with Centrelink. Centrelink decided to pay special benefit to Vu equivalent to the rate of youth allowance paid to a person living at home ($158.80 a fortnight).

Issues

What was the correct or preferable rate of special benefit to be paid to Vu? There was no issue about Vu's entitlement to special benefit.

Legislation

The relevant legislation is s.746 of the *Social Security Act 1991* (the Act). Section 746 provides:

(1) The rate of a person's special benefit is the fortnightly rate determined by the Secretary in his or her discretion.

(2) Subject to Part 2.24 (major disaster), the rate of a person's special benefit is not to exceed the rate at which youth allowance, Austudy payment or Newstart allowance would be payable to the person if:

(a) the person were qualified for youth allowance, Austudy payment or Newstart allowance; and

(b) Youth allowance, Austudy payment or Newstart allowance were payable to the person.

Which policy to apply

The Department advised the Tribunal that the policy that was applicable at the time of the Centrelink decision was no longer applicable. The Department submitted that the new policy should apply.

Previously the policy was that infants of non-residents should be paid special benefit at the youth allowance 'at home' rate whereas the new policy was that infants of non-resident parents should be paid at the maximum 'independent' rate of youth allowance. The Tribunal requested documentation concerning the new policy. The material subsequently forwarded to the Tribunal indicated that the Department had recommended a change to the Policy Guidelines but that endorsement had not yet taken place.

The Tribunal noted that usually it was desirable for the Tribunal to apply the Department's policy 'unless the policy is unlawful' or unless its application 'tends to produce an unjust decision in the circumstances of the particular case (*Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634)' (Reasons, para. 12). But as the new policy was not endorsed the Tribunal concluded that they faced a situation where firm ministerial guidance was not available to interpret and apply the discretion available under s.746.

Application of s.746 discretion

The Department submitted that the discretion in s.746(1) was circumscribed by s.746(2) requiring the decision maker to choose between the three payment types. The most appropriate payment type should be made by reference to age. This method of exercising the discretion allowed for a smooth transition from the rate of special benefit determined to be paid, to the rate of the type of payment the claimant would eventually become qualified to receive. This policy was developed to promote consistency in the administration of the system of payments and benefits established under the Act.

Vu submitted that s.746 allowed for a broad interpretation of the discretion conferred by subsection (1), with some qualifications imposed by subsection (2). It was possible to interpret s.746 so that if a person did not easily 'fit' into the three payment types set out in subsection (2), then the decision maker could go back to the broad discretion in subsection (1) unfettered by the qualifications contained in subsection (2). Vu submitted that it was open to the Tribunal to assess the rate of special benefit for Vu at the parenting payment 'single' rate together with a payment of family tax benefit. This package of payments, it was suggested, properly recognised the particular difficulties faced by Vu as an infant, including his need for an adequately supported carer.

Both parties submitted that the concept of a 'benchmark group' referred to by the Tribunal in its decision in *Secretary, Department of Social Security and Underwood* (1991) 25 ALD 343 had application in this case. The Department submitted that the appropriate benchmark group was one based on an age discriminator, whereas Vu submitted that the appropriate benchmark group was one based on position in society or on need, rather than a qualification criteria in the Act.

The Tribunal looked at the history of s.746 including the explanatory memorandum:

> The Tribunal noted that while the intention to place a limitation on the rate of special benefit to be paid was clear, no mention was made in the Explanatory Memorandum of the factor of age and there was no apparent intention to adjust the underlying policy of the provision.

(Reasons, para. 25)

In relation to the Department's submission on the preferred policy and the issue of consistency, the Tribunal referred to the decision of the Federal Court in *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325.

The Tribunal rejected the argument that the factor of age should determine which of the three payments listed in s.746(2) would be used in setting the rate of special benefit. The Tribunal found no basis for it either in legislation or in logic.

> To apply the discriminator of age to the circumstances of a claimant who, because of his age, is ineligible to receive any payment but special benefit, is inapt. Further, the Tribunal does not agree with the Applicant's submission that the policy promotes a smooth transition to future or eventual payments under the Act. That submission relies on assumptions about future events that cannot be supported in the facts of this case ... The Tribunal considers that the consistency promoted by the policy, either in its original or recommended new form, does not save its inherent inaptness.

(Reasons, paras 28 and 29)

The Tribunal found that the discretion contained in s.746(1) is very broad, but qualified by s.746(2).

> If it is applied to a person who does not 'fit' completely into one of the three payment types listed in s.746(2), then the decision maker can return to the broad discretion. In such cases the limitation in s.746(2) has no work to do.

(Reasons, para. 30)

The Tribunal referred to the decision of Deputy President M Forrest in *Re Secretary, Department of Social Security and David* (1990) 20 ALD 262, on the nature of the discretion to grant a special benefit. In particular the Tribunal noted that it must consider 'the scope and purpose of the provisions and ... its real object.'

> While s.746(2) may have no direct application in these circumstances, it does provide the Tribunal with evidence of an intention to impose a ceiling on the rate of payment of special benefit.

(Reasons, para. 32)

Taking into account Vu's particular circumstances the Tribunal found that he should be provided with a level of income support that recognised his need for a carer and provided for a sufficient livelihood taking that need into account.

The Tribunal noted that:

> it should not be taken that in other circumstances, for example, in relation to a person aged over 65, that such a person would necessarily be entitled to receive income to support a carer. The circumstances of an infant Australian citizen child of a non-resident parent are particular and distinct.

(Reasons, para. 35)

The Tribunal considered that the appropriate rate of special benefit to be paid to Vu was the maximum amount that could be paid up to the ceiling indicated by s.746(2).

Formal decision

The decision of the SSAT was set aside and the appropriate rate of payment of special benefit to be made to Vu was the rate of newstart allowance for a single person, 21 years or over, with children or for a person who was single, aged 60 or over, after nine months.

[M.A.N.]

Youth allowance: need to live away from home

THOMAS-ANGELO and SECRETARY TO THE DFaCS (No. 2001/699)

Decided: 6 August 2001 by K.L. Beddoe.

Thomas-Angelo was born on 19 October 1983. His parents lived in Murwillumbah, NSW, and he lived with them until he had finished Year 10 at the local Murwillumbah High School (MHS). He gained a tuition-only scholarship to attend The Southport School (TSS) in Queensland for his final two years of high school in 2000 and 2001.

He was granted youth allowance from the start of the 2000 school year but was refused the 'away from home' rate and paid at the standard 'living at home' rate. Nevertheless he moved out of the family home and lived with his grandmother at Tugun, Queensland, while he attended TSS.

The test

Section 1067D of the *Social Security Act 1991* (the Act) states:

> (1) ... A person is taken to be required to live away from home for the purposes of this Part if, and only if:
>
> (a) the person is not independent; and
>
> (b) the person does not live at the home of either or both his or her parents; and
>
> (c) the Secretary determines that:
>
> (i) the person needs to live away from home for the purpose of education, training, searching for employment or doing anything else in preparation for getting employment; or
>
> (ii) the likelihood of the person's getting employment will be significantly increased if the person lives away from home.

The issue was whether Thomas-Angelo satisfied s.1067D(1)(c)(i) of the Act, in particular whether he needed to live away from home for the purposes of education.

The AAT accepted that 'need' is to be assessed objectively, but added that the objective 'need' to live away from home for the purposes of education must be tempered with subjective criteria of an individual's circumstances. The educational requirements of a child, whether exceptionally academically gifted or afflicted by severe learning difficulties, may require that the child move away from home and closer to a facility which can cater for those needs.

For Thomas-Angelo it was asserted that he was unhappy at MHS, although the reason for this was not revealed. He had considered attending the local TAFE rather than MHS if he could not attend TSS, but there was no evidence to show how he could be more challenged or stimulated by TAFE studies, nor how such studies could open the doors to his preferred course at a tertiary institution. The AAT accepted that a student would be less able to study effectively in an environment in which he was unhappy, but it was not satisfied that a failure to learn at a particular institution because a student was unhappy with the environment constituted a necessity to attend another educational institution. Finally, Thomas-Angelo's parents had conceded that he probably would continue to attend TSS even if youth allowance was paid at the standard rate. For these reasons the AAT was satisfied that the desire to take up the TSS scholarship was a matter of choice rather than necessity.

There was insufficient evidence for the AAT to compare the curricula or the level of challenge at MHS and TSS. It accepted that Thomas-Angelo's parents perceived the TSS program was appropriate and necessary for their son.

The guide

The AAT noted that the Guide to the Social Security Act provides conditions, at least one of which must exist for a secondary student to be taken to be required to live away from home. The only relevant condition is that 'an equivalent activity is not available locally'. This is explained to mean that a student is unable to study or attend training courses locally because:

- an equivalent course is not available locally,
- a student's academic needs are not met by a local education facility, or
- there is no local facility.

The AAT was satisfied that the fact of winning the scholarship to TSS on academic grounds indicated that Thomas-Angelo was a student of academic ability.

It was not in dispute that the time involved for Thomas-Angelo to travel to and from the family home in Murwillumbah to TSS was excessive.

It was also satisfied that his academic needs were not being met at MHS and, that it was necessary for him to move away to obtain an education appropriate to his needs. Therefore, he needed to live away from home for the purposes of education. His choice was to, in effect,