

## AAT DECISIONS

there was no basis on which payment of unemployment benefit could be made from that time.

**Special benefit?**

The AAT then considered whether special benefit could be granted to Gray for the period from November 1982 to February 1983. In *Kakouras* (1983) 17 SSR 172, the AAT had asked if, where

an applicant had managed somehow to borrow a sum or sums of money in order to survive, should he or she not be granted benefit retrospectively in order to discharge an obligation that ought never had to be

brought into existence? I should have thought that an affirmative answer would be demanded.

However, in the present case, the AAT noted that Gray had repaid the loan of \$1000 and was now enrolled in a 3-year nursing course. Although it could be said that, after mid-November 1982, he was unable to earn a sufficient livelihood, yet to direct retrospective payment of special benefit would effectively constitute a grant of money to someone who, having made no claim, did in fact by various honourable means derive support and who is

now no longer directly affected by the financial troubles which temporarily beset him.

(Reasons, para. 14).

The Tribunal concluded by observing that the circumstances surrounding Gray's visit to the DSS office in November 1982 were confused and that no finding of administrative error on the part of the DSS could be made.

**Formal decision**

The AAT affirmed the decision under review.

## Handicapped child's allowance: late claim

### HOLMES and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W.83/81)

**Decided:** 10 September 1984 by G. D. Clarkson, I. A. Wilkins and J. G. Billings.

The applicant's child, C, had been born in January 1978. In September 1980, C was diagnosed as mentally retarded but it was not until September 1981 that he began an intensive course of speech therapy. In September 1982, Holmes applied for a handicapped child's allowance which the DSS granted; but her application to have the payment of that allowance back dated was refused by the DSS. Holmes asked the AAT to review that decision.

Section 102(1)(a) gives the Director-General a discretion to back date payment of handicapped child's allowance, if the allowance is lodged more than six months after the date of eligibility in 'special circumstances'.

**Misleading advice?**

Holmes told the AAT that she had contacted the DSS several times during 1981 but, on each occasion, she had been told that she was not eligible for the allowance because of the nature of C's disability. But the AAT said that it could not accept the substance of that evidence and that it was more likely that she had contacted the Department and had been disappointed to receive a non-committal response.

**Bureaucratic failure?**

However, the AAT was told that, in October 1981, Holmes had contacted a section of the Mental Health Services of Western Australia, where a social worker had undertaken to enquire whether Holmes was eligible for a handicapped child's allowance. But because of oversight on the part of the staff of that agency, this enquiry was not followed up until September 1982, when the claim for handicapped child's allowance was made.

The AAT decided that Holmes' eligibility for handicapped child's allowance dated from the time when the child began speech therapy in September 1981. The AAT said that in ordinary circumstances the system adopted by the WA Mental Health Services would have resulted in a claim being lodged within the necessary six months period but, because of oversight in that agency, the claim had not been lodged for another 12 months. The AAT observed:

The chance that those two factors would combine to delay the claim beyond February 1982 must be very small and leads us to conclude that the circumstances surrounding the delay in the application distinguish this case from the ordinary case, and are reasonably and properly described as special.

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that back payment of handicapped child's allowance be made to Holmes from September 1981.

### BYGRAVE and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. W83/136)

**Decided:** 12 October 1984 by J.D. Davies J, G.D. Clarkson and J.G. Billings.

Mary Bygrave had given birth to twins in September 1978. One of the twins, M, suffered from 'a hole in the heart', as a result of which she was a severely handicapped child from birth. Although Bygrave was qualified for a handicapped child's allowance from the birth of M, she did not apply for the allowance until April 1983. The DSS granted her the allowance from that date but refused to back-date her claim.

**'Special circumstances'**

Section 102(1) gives the Director-General a discretion to back-date payment of a handicapped child's allowance to the date of eligibility in 'special circumstances'.

Bygrave had migrated to Australia from England in 1968 and had no relatives in Australia. Since the birth of her children, she had received no assistance from their father and her sole income had come from social security benefits. Early in 1979, her shortage of funds had obliged her to move to a housing commission unit. Bygrave told the AAT that, although she had known of the allowance, she had assumed that it was confined to obviously disabled or mentally retarded children. No suggestion had been made to her by the children's hospital or the State Welfare Department that she could qualify for the allowance. And information sent to her in November 1981 by the DSS had incorrectly described the availability of the allowance.

On the basis of this evidence, the AAT decided that there were 'special circumstances' which had affected Bygrave's understanding of her right to the allowance and her ability to apply for the allowance. These circumstances included her responsibility for twin children, one of whom required intensive care; her shortage of funds; the fact that she had no relatives in Australia and had received no assistance from the children's father; the fact that she had lost contact with her friends and had been forced to move to a new locality; the fact that none of the organizations, from whom she had sought help, had told her of the nature of the allowance; and the fact that written information from the DSS had reinforced her misunderstanding about the allowance.

**The discretion**

However, the AAT decided that the discretion in s.102(1) should not be exercised in favour of making a back payment to Bygrave. Davies J said that, because Bygrave was seeking back payment for 4½ years (a lengthy period) there would have to be substantial reasons to justify the exercise of the discretion. In the present case, Bygrave had not incurred a debt or expended significant amounts of money caring for M, nor had she claimed that M's condition prevented her from taking employment. Many of Bygrave's difficulties were due to the fact that she had to raise twin daughters without adequate assistance.

**Billings** took the same approach — that there were not 'sufficiently substantial' reasons to justify the exercise of the discretion. On the other hand, Clarkson said:

My own view has been that the circumstances relevant to the exercise of the discretion to allow back-payments are not so restricted and that, in any event, once an applicant has shown that eligibility existed for the relevant period and that special circumstances existed which explained the delay then a case for payment exists which should ordinarily be recognized by the Director-General of Social Security. The enquiry then becomes whether there are circumstances which warrant the applicant being deprived of back payments rather than whether reasons exist for making them.

However, it seems clear that this raises a question of law as to the proper construction of the relevant sections and I therefore defer to the view adopted by the President [Davies J] and agree that, on that view the decision under challenge should be affirmed.

(Reasons, p. 14).

#### Formal decision

The AAT affirmed the decision under review.

### MRS M and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/760)

Decided: 11 September 1984 by R. Smart.

Mrs M gave birth to a child, W, in January 1978. From the time of his birth, W suffered from mental retardation and was a severely handicapped child. Accordingly, Mrs M would have been entitled to a handicapped child's allowance for W from the time of his birth. However, she did not claim the allowance until July 1981, when the DSS granted her an allowance but refused to back-date it. Mrs M asked the AAT to review that refusal.

#### The legislation

Section 102(1) of the *Social Security Act* (read with s.105R) provides that a handicapped child's allowance is payable from the date of eligibility where the claim is lodged within 6 months of that date or 'in special circumstances, within such longer period as the Director-General allows'.

#### Were there 'special circumstances'?

Mrs M said that her late claim was due to her ignorance of the existence of the allowance. Although she had had regular contact with medical staff, no one had told her of the allowance until June 1981. Between the birth of W and June 1981, Mrs M had been confined to her home because of the care required by W and by her second and third children (who were born in 1978 and 1980). Moreover, M had a poor grasp of English, having migrated to Australia from the Lebanon in 1970; and the DSS had first published detailed pamphlets on handicapped child's allowance in Arabic (which was Mrs M's language) in mid-1981.

#### The Tribunal's conclusion

The AAT examined the several earlier decisions in which the meaning of 'special circumstances' had been discussed and it concluded that, in the present case, the following factors amounted to 'special circumstances':

- the difficulty, caused by the premature birth of W, of making an early and accurate assessment of the child's condition;
- Mrs M's emotional state, personality and pregnancy with a second child shortly after the birth of W;
- Mrs M's physical isolation for some 3 years following the birth of W;
- the fact that none of her medical advisors told her about the allowance;
- Mrs M's general level of understanding and competency in English, which

meant that she needed assistance to apply for the allowance; and (f) the absence of any detailed information in Arabic prior to mid-1981.

#### The discretion

The AAT noted that, according to *Corbett* (1984) 20 SSR 210, the back-dating of an allowance was discretionary. In the present case, the AAT said, the exercise of that discretion in Mrs M's favour was justified because of the extra money which she and her husband had spent in caring for W, her husband's relatively low income, the age of Mrs M (44) and her husband (50) and the fact that Mrs M's husband had been unemployed between 1982 and 1984.

#### Formal decision

The AAT set aside the decision under review and substituted a decision that Mrs M was entitled to payment of handicapped child's allowance from May 1978 (which was apparently the date when W had been discharged from hospital).

### COX and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W83/91)

Decided: 2 October 1984 by G.D. Clarkson, I.A. Wilkins and J.G. Billings.

L. Cox, an Aboriginal woman had given birth to her child, N, in 1967. N suffered from a series of disabilities which made him a 'handicapped child'. As a result, Cox would have been eligible for a handicapped child's allowance from the date when s.105JA of the *Social Security Act* came into effect - November 1977.

However, Cox did not lodge a claim for that allowance until April 1982. Her claim was granted but the DSS refused to back-date the payment of the allowance.

#### The legislation

Section 102(1) of the *Social Security Act* (when read with s.105R) provides that the handicapped child's allowance is payable from the date of eligibility if the claim is lodged within 6 months of that date or, 'in special circumstances, within such longer period as the Director-General allows'.

#### Were there 'special circumstances'?

Cox told the Tribunal that she had not known of the allowance until February 1982 and that she had not approached any government agency for help before then (despite the many disabilities from which N suffered) because, in her words 'I get scared to ask people . . . I cannot get on with white people', because she could not hear well and because she believed that the government agencies might take her child from her. This last fear had been reinforced in about 1972 when N had been transferred from hospital to a children's home without Cox's consent. Even after Cox had learnt of the existence of the allowance, she had been unwilling to lodge a claim because of her fear that she would lose her child; and

had only agreed to make the claim after persuasion and reassurance by a social worker.

#### The AAT's conclusion

The Tribunal said that there were, in the present case, sufficient 'special circumstances' to justify back-payment of the allowance. These circumstances included Cox's poor education, social deprivation and economic hardship, together with her genuinely held fear that she might lose her child if she sought welfare assistance for that child. That fear, the AAT said, was real, whether justified or not:

It would be in accordance with Aboriginal collective memory of the period extending into the 1960's in Western Australia during which a government officer was the legal guardian of all Aboriginal children whether their parents were alive or not and he could direct who should have custody of the child . . . One cannot of course say that the applicant's fears did in fact prevent an earlier application for the allowance, but it could have done so, because it isolated her from the agencies most likely to inform her of the existence of the handicapped child's allowance.

(Reasons, pp. 9-10).

The AAT noted that there had been other Western Australian cases where Aboriginal parents had made late claims for the allowance:

[I]t does emerge that there has been a small group of Aboriginal mothers in the Perth metropolitan area who come from a background of poor education, social deprivation and economic hardship, who to varying degrees are isolated from the mainstream of metropolitan society by lack of confidence and other disadvantages. For them to obtain the welfare benefits available to others it is not sufficient that they merely be told of the existence of the benefit, they must be brought to an understanding that they qualify for it, and even then, they need positive assistance and encouragement in making a claim and then in following the claim through.

(Reasons, pp. 9-10).

#### The discretion

In the present case, the AAT said, there were grounds for exercising the discretion in s.102(1) in favour of Cox. These factors included the extreme poverty in which Cox lived, her critical need for such basic essentials as furniture, bedding, cooking utensils and clothing and the fact that she had no prospect of increasing her income.

#### Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that there were special circumstances and the discretion in s.102 should be exercised in Cox's favour to allow back payment of the allowance from November 1977.