Administrative Appeals Tribunal decisions

Application for review — a liberal approach

EATT and SECRETARY TO DSS

(No. 8081)

Decided: 3 July 1992 by T.E. Barnett.

The applicant asked the AAT to review a DSS decision to cancel her family allowance payment. On 16 October 1989 the DSS had sent to Eatt a form to review her family income. This form had to be returned within 21 days for the payment to continue in 1990. The form was not returned within that period and the payment was cancelled.

On 5 January 1990 Eatt wrote to the DSS saying that she was unable to provide details of the family income as tax returns had not been submitted by the family due to an accident suffered by her husband. In April 1990 a DSS officer contacted Eatt again and was told that the tax returns had been submitted but not yet assessed.

On 17 October 1990, after her income had been assessed, Eatt lodged a claim for family allowance, requesting that arrears be paid from 28 December 1989. The allowance was paid from 18 October 1990 but no arrears were paid.

The legislation

The *Social Security Act* 1947 applied to this appeal.

Section 173 of that Act provided that a person affected by a decision of the DSS could apply to the Secretary for review of the decision.

The effect of s.168(4)(a) was that, where a person applied for review within 3 months of notification of a decision to cancel a payment, the person would be eligible for back payment from the date of the original cancellation.

Was the letter of 5 January 1990 an application for review?

If Eatt's letter of 5 January was treated as an application for review, then it could be said that she applied for review within 3 months of the original notification and thus could be back paid. The Tribunal thought the letter was a request for review:

> 'After careful consideration of the applicant's letter of 5 January 1990 the Tribunal considers that she was explaining why she had not been able to fill in and return the [review forms] . . . She closed her letter by saying that she was "looking forward to hearing from you in the near future".
>
> Even although the respondent's previous correspondence had been "mass produced" on a computer at this stage of the proceedings the applicant was entitled to hope that her response would be considered by a human departmental officer who was aware that the respondent is administering beneficial legislation. In the Tribunal's opinion the applicant gave sufficient indication that she did not accept that it was proper to cancel all her family allowance and that she wanted the matter reviewed . . .

(Reasons, p.8)

The AAT also noted that the *Social Security Act* did not require an application for review to be made on any particular form and that the DSS would often be dealing with people under financial and other forms of stress. In such circumstances the legal provisions were to be interpreted 'liberally'.

Formal decision

The AAT set aside the DSS decision and substituted a decision that the applicant be granted family allowance from 29 December 1989.

[B.S.]

Application for review: adequate notice?

SECRETARY TO DSS and MOULLY

(No. 8137)

Decided: 3 August 1992 by B.G. Gibbs.

On 30 January 1990 Mrs Moully lodged a claim for family allowance and family allowance supplement (FAS). The latter payment required some evidence of how much rent Moully was paying. This evidence was produced and she received the payment. On 25 November 1990 she then completed a form with respect to a review of her entitlement to the family payments. She failed to provide evidence of her rent payments at this time as required.

On 21 December 1990, the DSS requested Moully to provide details of her income for the last financial year. She claimed that she had provided this information and also sent to the DSS the rent receipt which she had used to prove her rent in January 1990. The DSS claimed that this letter was not received.

On 29 December 1990 the DSS wrote again to Mrs Moully and advised her that she would not be paid FAS after 27 December 1990 because she had not returned the re-application form. But she was also advised that, as the assets test had changed, a new form would be sent to her and that she would be back paid if the form was returned within 3 months. Moully returned the form on 25 January 1991 but did not provide evidence of her rent payments.

On 29 January 1991, the DSS advised Moully that she would receive FAS from 1 January 1991. The letter mentioned the rate at which she would be paid, but did not inform her that the rate had been reduced because no amount was to be allowed for rent assistance. The letter did provide information on how to query the decision.

Moully said that a DSS officer had told her over the telephone that she would receive arrears of rent allowance. She was unable to contact the DSS again about her rent allowance until 24 May 1991. On 27 May 1991 she wrote to the DSS and enclosed a rent receipt. Her rent assistance was reinstated from 30 May 1991. She claimed back payment of rent assistance from 1 January to 23 May 1991 but this was rejected by the DSS. She successfully appealed to the SSAT. The DSS sought review of that decision.

The legislation

The relevant legislation for this appeal was the *Social Security Act* 1947. Section 173 of that Act provided that a person affected by a decision of the DSS may apply to the Secretary for review of the decision.

Section 168(4)(a) provided in substance that where a person applied for review within 3 months of notification of the decision to cancel the payment

then the person may be paid from the date of the original cancellation.

Was notification given by the DSS?

The AAT found on the evidence that, in relation to the review of her entitlement to FAS, Moully had not provided evidence of her rent payments until 27 May 1991. Thus a decision to reduce her payment was made in January 1991.

The critical question, said the Tribunal, was whether that decision had been notified to Moully for the purposes of s.168. If she had been properly notified then she would not be entitled to arrears. She had not applied for review until 24 May 1991, more than 3 months later.

The letter of 29 January 1991 did not state that Moully's payment had ben reduced nor did it say that she was not being paid rent assistance. The question was whether the letter could constitute a notification of the decision. The AAT said the letter did comply with the Act.

> 'Clearly it would have been preferable had the letter indicated that the reinstated FAS payments were at a reduced rate and that the rent assistance component was no longer payable. On the other hand it would have been clear to Mrs Moully that the rate of FAS being paid to her was $3.62 and, as stated on the back of the letter, it was open to her to query how that rate was calculated if she thought it incorrect. Mrs Moully had been paid FAS at a rate almost $60.00 per fortnight more in 1990, a situation which, on its own, could have been sufficient reason for Mrs Moully to query the rate stated in the letter.'

(Reasons, pp.12-13)

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with a direction that the respondent was not eligible for the rent assistance component of FAS from 1 January 1991 to 23 May 1991.

[B.S.]

[*Editor's Note:* see comment on this case in *Opinion*.]

Income test: rate of return

RUSSELL and SECRETARY TO DSS

(No. 7874)

Decided: 3 April 1992 by B.A. Barbour, J.P. McAuley, and G.D. Stanford.

The case concerned an appeal from the SSAT over a valuation of the current annual rate of return on Fay Russell's accruing return investment.

Russell purchased units in a 'growth annuity' from Zurich Australia Life Insurance Limited on 28 August 1986. On 29 August 1988, Russell transferred her investment with the same company to a Public Securities portfolio.

The DSS assessed Russell's accruing return investment for the purposes of an age pension to be 13%. The matter proceeded to the SSAT, which affirmed the decision, holding the investment to be an accruing return investment on the basis that although it was possible for the unit valuation to decrease, it was not probable that it would do so because 75% of the fund was invested in Government securities.

The issue of the classification of the investment as an accruing return investment was not before the AAT. Nevertheless, the Tribunal said that it was satisfied that the investment was an accruing return investment on the basis that the portfolio now had a 100% investment in government securities (a 25% increase since the SSAT decision). Hence it was unlikely that the value of the investment would decrease as a result of market changes, bringing the investment within the definition of 'accruing return investment' in s.3(1) of the *Social Security Act* 1947.

The fund manager for Zurich provided monthly returns to the DSS, indicating the approximate rate of return for that month on each of their investments, including the investment portfolio in which Russell had invested. The DSS made its assessment of Russell's current annual rate of return on these figures.

The legislation

As Russell's original application for an age pension was lodged prior to the date of commencement of the *Social Security Act* 1991, it was determined that the appropriate legislation to apply was that in the 1947 Act: *Cirkovski* (1992) 67 *SSR* 955.

Section 3 of the 1947 Act defines a 'return' in relation to accruing return investments as follows:

> 'a return in relation to an investment (including an investment in the nature of superannuation), means any increase, whether of a capital or income nature and *whether or not distributed*, in the value or amounts of the investment' (emphasis added).

The issue

Russell raised 2 issues for determination in this appeal:

(1) First, she said it was unjust that her pension should be reduced by reason of notional increases in her accruing return investment, when she would not physically receive any benefit from the investment until the end of the 10 year period of the investment.

(2) The second issue for determination was the appropriateness of the DSS policy of determining the current rate of return on accruing return investments by taking an average over the preceding 12 months, based on the fund manager's returns to the Department.

The AAT's decision

In relation to the first issue, the AAT noted that the definition of 'return' did not require any distribution of a gain made in the investment. For this reason the AAT determined this issue against Russell.

The AAT considered and approved the DSS policy of taking an average return over the preceding 12 months based on the fund manager's returns.

The AAT noted that there would necessarily be a discrepancy between the actual rate of return received by Russell and the average rate applied by the Department. The Tribunal nevertheless determined that this was acceptable, given the difficulty involved in making these assessments.

However, the AAT noted that, where a particular aberration in the investments occurred such that the average figure for any particular pension period would give a particularly unfair result, then Russell would be at liberty to approach the DSS to make representation concerning this point. The AAT said that it expected the DSS would appropriately adjust the calculation of the current rate of return. The power of the DSS (and accordingly, of the Tribunal) to approximate these returns by way of averaging is to be found in s.12C of the 1947 Act.