

Federal Court decisions

Claim for pension

FORMOSA v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 17 August 1988 by Davies, Burchett, and Gummow JJ.

This was an appeal against an AAT decision, which had affirmed a DSS decision that age pension granted to Josephine Formosa should be paid from November 1986, the date when she had lodged a formal claim for the pension, and not from February 1986, the date when she had become eligible.

The AAT had found that Formosa and her husband had enquired at a DSS office about the availability of income support in December 1985. They had been advised that, because Formosa's husband was receiving worker's compensation, he was not eligible for sickness benefits. The Tribunal found that Formosa was misled by the DSS officer with whom they spoke about her approaching eligibility for age pension (she was about to turn 60 in February 1986). The Tribunal also found that, because of this misleading advice, Formosa delayed lodging a claim for age pension until November 1986.

The legislation

Section 158(1) of the *Social Security Act* provides:

'The grant or payment of [a pension] shall not be made except upon the making of a claim for that pension . . .'

Section 159(1) provides that 'a claim shall be made in writing in accordance with a form approved by the Secretary'; and that this claim 'shall be lodged' at a DSS office or a place or with a person 'approved for the purpose by the Secretary'.

Claim must be in writing

It was argued on behalf of Formosa that the AAT had made an error in failing to decide that she had lodged an oral claim in December 1985, a claim which would support the payment of pension to her from her 60th birthday in February 1986.

All members of the Court agreed that there was no evidence that Formosa had lodged any type of claim, even an informal oral claim, before November 1986: the conversation she had with a DSS officer in December 1985 could

not be described as a claim for pension. The Court then considered the question whether the provisions of s.159(1), requiring that a claim 'be made in writing', were mandatory.

Burchett and Gummow JJ said that the requirement that a claim be in writing should be read as an essential requirement - that is, unless a claim was made in writing, there could be no grant or payment of a pension. They said:

'The subject matter of the claim is the disbursement of public moneys consequent upon the satisfaction of various criteria laid down in the statute for the payment of particular pensions, benefits and allowances. It would be to attend the administration of the legislation with the greatest uncertainty both for alleged claimants and for those charged with administration of the legislation if oral applications were to be treated as sufficient for the making of a claim.'

(Judgment, p.14)

The two judges observed that, because of a claimant's uncertainty about the correct status of other elements specified in s.159(1), the requirements that a claim be made on a form prescribed by the Secretary and at a place or with a person prescribed by the Secretary would not be treated as mandatory and that strict compliance with these requirements would not be essential before a pension was granted or paid.

On the other hand, **Davies J** said that all of the requirements in s.159(1) were directory rather than mandatory; and that compliance with those requirements was not essential before a pension could be granted or paid. In particular, he said that an oral claim would be sufficient to support the grant or payment of a pension, notwithstanding the terms of s.159(1).

Davies J pointed to the difference in wording between s.158(1) and s.159(1): the former provision was clearly expressed in mandatory terms ('shall not be made except . . .') and this contrast suggested that s.159(1) was not meant to operate in a strict fashion.

In addition, **Davies J** said, there was no 'evident policy' why s.159(1) should be treated as mandatory:

'The suggestion that a claim not made in writing would inevitably produce severe problems for the administration of the Act seems to me, with respect to those who think otherwise, to lack reality. Of course a claim should be in writing, and s.159 requires that it shall be; the question is simply, what is the consequence of a failure to comply with that provision? If I am right, a claimant who failed to comply would still have to prove, in

appropriate proceedings, not only his entitlement as a person qualified, but also the making of his informal claim. That this should, on a rare occasion, be necessary, does not seem to me to threaten such serious consequences as to require a Court to hold that language, which is set in a directory context, must by some imperious call of administrative necessity be construed as mandatory - especially since the Act should be given a beneficial, rather than a restrictive, construction, one in favour of those aged and infirm persons whose failing capacities are the ground of its operation, and a likely cause of non-compliance.'

(Judgment, p.6)

Estoppel

It was also argued on behalf of Formosa that the misleading advice given by the DSS officer to Formosa and her reliance on that advice to her detriment, meant that the DSS was estopped from denying that she had lodged the appropriate claim in December 1985.

Burchett and Gummow JJ rejected this argument, pointing to the strict terms of s.158(1), which prevented the granting or payment of a pension except upon the making of a claim. That prohibition, the Judges said, could not be lifted through an estoppel. **Burchett and Gummow JJ** indicated that the operation of an estoppel may cut across the proper exercise of '[a] discretion reposed by legislation in a specified decision maker' but there was no room for the exercise of any discretion in the present situation, which was 'a case of right and obligation rather than discretion': Judgment, pp.17-18.

Moreover, they said, any payment of age pension to Formosa in the period prior to November 1986 'would conflict with the related principle that estoppel does not operate so as to sanction the appropriation of public moneys without the authority of the Parliament': Judgment, p.19.

Davies J did not disagree with this view but indicated that the misleading advice given to Formosa could support a payment to her under s.34A of the *Audit Act* 1901, which authorises payments where a person acting on behalf of the Government has given incorrect information which has led the claimant to act to her financial disadvantage.

Formal decision

The Federal Court dismissed the appeal.

[P.H.]