Federal Court Decisions

Sole parent pension: dependent child

LOWE v SECRETARY TO THE DSS
(Federal Court)

Decided: 13 November 1998 by Drummond J.

Lowe appealed to the Federal Court against the AAT decision to cancel payment of sole parent pension (SPP) to him. In his appeal Lowe stated that the AAT had breached the rules of natural justice because it had prejudged the issue, and that the AAT had misconstrued certain sections of the *Social Security Act 1991* (the Act).

Background

Lowe and Schembri were the parents of Sarina. After Lowe and Schembri separated they agreed to share the care of Sarina. They did not obtain any court orders reflecting this arrangement. Sarina lived with each parent on alternate weeks. The parent with whom Sarina was living for the week had the day to day responsibility for her. Larger issues were discussed between both parents and joint decisions made. Financial responsibility for Sarina was shared equally.

Lowe received sole parent pension for Sarina between 1993 and October 1996. In August 1996 Schembri gave up full-time work and lodged a claim for sole parent pension in respect of Sarina. She was granted SPP from October 1996.

The SSAT decision

The SSAT referred to s.251(2) and concluded that it could not refuse to pay a pension to either parent because they cared for Sarina equally, and it could not choose between them. The SSAT also stated that it could not divide the pension between the 2 parents. It had a statutory obligation to make a choice in favour of one of the parents. The SSAT decided in favour of Schembri, finding that she contributed slightly more financial support for Sarina.

The AAT decision

The AAT agreed with the decision of the SSAT in a brief set of reasons. It agreed that a choice had to be made between Lowe and Schembri, and on the basis that Schembri's financial needs were greater than Lowe's, Schembri should be paid the SPP. The Federal Court referred to this being 'another example of arbitrary decision making required by the structure of the legislation': Reasons, p. 3.

The law

Section 249 of the Act sets out the qualifications for SPP. Amongst other requirements the person must have at least one SPP child. Section 250 defines an SPP child as a dependent child of the adult, who has not turned 16 and who is the natural child of that adult. The term 'dependent child' is defined in s.5 as:

> '5.(2) Subject to subsections (3) and (6) to (8), a young person who has not turned 16 is a **dependent child** of another person (in this subsection called the **"adult"**) if:
>
> (a) the adult is legally responsible (whether alone or jointly with another person) for the day-to-day care, welfare and development of the young person, and the young person is in the adult's care; or
>
> (b) the young person:
>
> (i) is not a dependent child of someone else under paragraph (a); and
>
> (ii) is wholly or substantially in the adult's care.'

Section 251 of the Act provides:

> '251.(1) A young person can be an SPP child of only one person at a time.
>
> 251.(2) If the Secretary is satisfied that, but for this section, a young person would be an SPP child of 2 or more persons, the Secretary is to:
>
> (a) make a written determination that the Secretary is satisfied that that is the case; and
>
> (b) specify in the determination the person whose SPP child the young person is to be; and
>
> (c) give each person a copy of the determination.'

Dependent child

According to the Court the first requirement of s.5(2)(a) was that the adult must be legally responsible either alone or jointly with another for the day to day care, development and welfare of the child. This was similar to the right to custody under the *Family Law Act 1975*. The second requirement was that the child be in the adult's care, which according to the Court was the factual situation which must exist at any time for the person to be paid the SPP pension. Drummond J noted that earlier versions of the *Social Security Act* did not contain this requirement, and referred to the person having a legal right in respect of the child. This means that earlier cases such as *Secretary to the Department of Social Security v Field* (1989) and *Secretary to the Department of Social Security v Wetter* (1993) were of little relevance. The Court concluded that:

> 'Being "in the adults care" within s.5(2)(a) does not involve being in that care permanently or indefinitely, I would regard this requirement as satisfied whenever the child is, as a matter of fact, under the immediate care of the particular adult for any period of time other than a de minimus period.'

(Reasons, p. 6)

Dependent child of 2 or more persons

Drummond J noted that the wording of s.251(2) meant one or more persons could satisfy the qualifications set out in s.249 at any one time in relation to the same dependent child or SPP child. The Court analysed s.251(1) and concluded that the term 'at a time' was synonymous with 'at the one time'. Section 251(1) was not concerned with directing the minimum period for a person to receive a payment, but ensuring that only one person could receive a pension in respect of a particular child at any one time. Section 251(2) provided the mechanism for making a choice between those 2 parents.

However, according to Drummond J it was:

> 'the requirement that a child be "in the adult's care", which permits the child to be characterised as a "dependent child" and thus SPP child of the pension claimant, not s.251(1), that creates the difficulties thrown up by this case.'

(Reasons, p. 7)

The Court concluded that under the *Family Law Act*, Lowe and Schembri had joint custody of Sarina at all relevant times and so had joint legal responsibility for her daily care and control throughout the whole period. On the facts found by the SSAT and the AAT, Sarina was in the care of each parent to the exclusion of the other parent during every alternate week.

Drummond J disagreed with the Federal Court in *Vidler v Secretary to the Department of Social Security* (1995) 82 *SSR* 1194 where the Judge had included in the definition of 'dependent child', 'an additional requirement that such care be for a minimum period of fourteen days before dependency can exist.': Reasons, p. 8. The Court concluded that s.251 had no application to the situation of Lowe and Schembri because Sarina was an SPP child of each of them in alternate weeks. At no time was Sarina the SPP child of both of them at the same. Therefore the discretion in s.251(2) did not arise.

Was sole parent pension payable?

The next issue the Court addressed was whether sole parent pension was payable to either or both parents. Sections 270 to 279 of the Act govern how and when a sole parent pension is payable. According to s.270 the pension is payable on the first day on which the person is qualified.

The rate of pension payable is calculated on an annual rate, which is divided by 26 and paid every fortnight. Section 271(1) provides that each instalment is to be paid on the pension payday on which the person is qualified and it is payable. That is, the person will be paid a full instalment of the pension on each payday during the period it is payable, and nothing on a payday outside that period (see s.42(2)).

The Court rejected the argument that a pension could be paid if a person was qualified on a payday although not qualified on any of the preceding 13 days. Section 270 assumed the entitlement to payment of the pension continued throughout the period. This was supported by s.42(2). So, a person is required to satisfy the qualification requirements throughout the whole of any period when the pension is being paid. For Lowe or Schembri to be paid the pension they must have an SPP child, Sarina, during the whole of the instalment period of 14 days. Neither Lowe nor Schembri had Sarina for a continuous period of 14 days, and therefore neither had any entitlement to the sole parent pension. Whilst regretting this conclusion, Drummond J noted:

> 'there does not appear to be any insuperable administrative difficulty in the way of introducing into this frequently amended Act a scheme which would provide for the payment of a sole parent pension to each of the carers of a child in circumstances like the present.'

(Reasons p.12)

Natural justice

Drummond J decided he did not have to decide whether or not the AAT had denied Lowe natural justice because it had prejudged the case. The evidence showed the AAT had given its decision after a very short hearing of 10 minutes. The telephone hearing had been designated as a preliminary conference only. At the conference the AAT member indicated he had reached a decision that the SSAT decision was correct, and unless Lowe objected he would make a final decision. The Federal Court noted that Lowe probably acquiesced given the strong view expressed by the AAT member. Drummond J found this approach unorthodox, but declined to find it was a breach of natural justice given the other conclusions in this case.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

[Contributor's note: As a result of the introduction of the *Payment Processing Legislation Amendment (Social Security and Veterans' Entitlements) Act 1998*, the comments of the Court on payability may be of little significance. The DFaCS has decided to appeal to the Full Court of the Federal Court.]

Special benefit: newly arrived resident's waiting period

SECRETARY TO THE DSS v SECARA AND SECARA (Federal Court)

Decided: 26 November 1998 by Von Doussa, O'Loughlin and Mansfield JJ.

The Secaras claimed special benefit on 1 August 1997. Their claims were rejected on the basis that the Secaras had not served the 2-year newly arrived residents' waiting period. The DSS appealed to the Federal Court against the AAT decision that the residents' waiting period did not apply to the Secaras.

Background

The Secaras applied to immigrate to Australia from Romania in 1993. In September 1996 they were notified that their application had been successful. They were advised that they were entitled to work in Australia, but that there was no guarantee of employment. The letter also stated that they would not be eligible to receive unemployment benefits or sickness allowance for the first 26 weeks after their arrival. There was no mention of special benefit. In 1997 the Secaras sold their apartment for considerably less than they had anticipated, leaving them with about US$2000. They contacted friends in Australia who told them they would provide assistance during the first six months if necessary. As a result the Secaras made arrangements to migrate. The Secaras arrived in Australia in May 1997 with $1400(US). The AAT found that the Secaras organised their affairs so that they could survive for six months if necessary.

In February 1997 the Secaras had been telephoned by friends in Australia and told that the law might change and the waiting period to receive social security payments might be extended. Mrs Secara rang the Australian Embassy who said they knew nothing about this proposed change to the law.

The Secaras were able to maintain themselves for the first 6 months after their arrival. They were unable to obtain employment. They were effectively destitute when they applied for a social security benefit (either newstart allowance or special benefit). They were paid family payment and rental assistance totalling $134 a fortnight which did not cover their rent.

The law

From 4 March 1997 the waiting period for new immigrants was extended to two years. Section 739A(1)(a) of the *Social Security Act 1991* (the Act) provides that in relation to a claim for special benefit, a person who enters Australia on or after 4 March 1997 is subject to the newly arrived residents' waiting period. However, according to s.739A(7) of the Act:

> '739A.(7) Neither subsection (1) nor (2) apply to a person if the person, in the Secretary's opinion, has suffered a substantial change in circumstances beyond the person's control.'

According to s.739B of the Act, the discretion exercised in s.739A(7) must be exercised in accordance with guidelines in force under s.739C(1). That section allows the Minister to set guidelines for the exercise of the Secretary's discretion. That determination is a disallowable instrument. On 21 March 1997 the Minister made a determination setting out guidelines under s.739C. The Secaras circumstances did not fit within those guidelines. On the 25 of June 1997 the Senate disallowed the guidelines.

The AAT decision

The AAT found that the current law applied to the Secaras and so the Minister's guidelines had no binding force. This finding by the AAT was not disputed by the DSS on appeal.

According to the AAT a change of circumstances took place when the Secaras arrived in Australia with resources sufficient to last them for 6 months, and then discovered that the waiting period had changed to 2 years. The circumstances were beyond the Secaras control because the Secaras had no way of knowing of the 2-year waiting period before their arrival in Australia. They had been given positively inaccurate information before leaving for Australia.

Changes in circumstances

The Secaras argued that one change in circumstances was the fact that between late 1996 and early 1997 the value of their apartment dropped to less than half they had expected. The funds available in Australia was less than they had planned. The AAT found that the Secaras' decisive commitment to migrating was when they sold their apartment in March 1997. At that time the change in their economic circumstances had already occurred, and the Secaras knew they had less money. They still decided to migrate.

The second argument relied upon by the Secaras was that the difference between a migrant's expectation of an as-