Rehabilitation: recovery from damages award

WILSON and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/51)

Decided: 7 May 1982 by E. Smith.

Wilson was injured in a motor accident in June 1972 and his left arm was amputated.

In June 1972 he began receiving sickness benefits and, in September 1972, was accepted by the DSS for rehabilitation. Over the next seven years he received unemployment benefit, sickness benefit, special benefit and periods of rehabilitation. On at least three occasions over this time he was informed by the Department that, if he received compensation or damages for his injury, he would be required to repay the Department the cost of rehabilitation and training under s.135R.

The legislation

This section authorises the Director-General to serve a notice on a person who has received rehabilitation and who is (in the Director-General's opinion) entitled to recover compensation. That person is then 'liable to pay to the Director-General an amount equal to the cost of the treatment or training'. However, the Director-General has a discretion to waive recovery.

> (1B) Where the Director-General is satisfied that special circumstances exist by reason of which a person liable by virtue of the last preceding sub-section to pay an amount to the Director-General should be released in whole or in part from the liability, the Director-General may release the person accordingly.

Until September 1978 Wilson told the Department he was not qualified to receive, and was not claiming, any compensation or damages. In September 1978 he informed the Department that legal action for damages had commenced and settlement was expected early in 1979.

Wilson's solicitors were also advised, in December 1978, of the Department's intention to claim recovery of its rehabilitation costs under s.135R. The solicitors were advised of this intention at least four times up to January 1980; in June 1979 the cost of the treatment and training was specified as $3268.58.

In February 1980 the applicant's solicitors informed the DSS that Wilson's claim had been settled for $50 000 plus legal costs. They also requested the Department to release the applicant from half of his liability to repay the rehabilitation costs, because the settlement figure reflected Wilson's contributory negligence. But for his contributory negligence, they said, Wilson would have received at least $100 000. The DSS refused to waive full recovery.

The issue—'special circumstances'?

The question before the AAT was whether there were 'special circumstances' to justify the exercise of the discretion under s.135R(1B) to waive recovery of half of the rehabilitation costs. The applicant relied on the following factors:

(a) that he had received little or no benefit from the training and treatment and he had little or no choice to undertake this training;

(b) that it would cause him hardship to repay as he had little means other than his invalid pension and he could use the money to invest in say a small business to support himself in the future;

(c) that he had acted reasonably and on legal advice in accepting a half settlement; and

(d) that his expenditure of the settlement moneys was reasonable (he had bought a home and a car).

The Tribunal's assessment

The Tribunal noted that what may constitute special circumstances under s.135R is not spelt out in the legislation and referred to *Ivovic* where the meaning of special circumstances under s.115 of the Act was considered (see 3 *SSR* 25). The Tribunal here agreed with that decision, stating that the question was 'whether strict enforcement of the liability created by s.135R would be "unjust, unreasonable or otherwise inappropriate"'. (Reasons for Decision, para. 44)

Dealing with argument (a) above, the AAT said that usual programmes had been followed, attention and assistance given to the applicant, and the applicant's own attitude was probably responsible for any lack of success. Consequently, there was no failure of the objects of the legislation so as to constitute special circumstances under s.135R(1B).

With respect to hardship (ground (b) above), the Tribunal noted that the applicant had his own home and car, was in receipt of a married rate invalid pension and had four children to maintain. The Tribunal noted that while he was incapable of skilled employment, he had demonstrated a measure of resourcefulness and was capable of some work. While the family was not well off, they would not suffer severe hardship if the money was repaid. The Tribunal also pointed out that the money had been set aside so the applicant would not have his pension reduced or have to sell any assets to repay the DSS.

On aspect (c) above, the Tribunal accepted that his damages had been reduced by 50% because of his contributory negligence but went on to say that:

> I see nothing in s.135R which indicates that recovery is only to be sought where 'full' damages or compensation is recovered or that recovery is only to be sought in proportion to the damages or compensation recovered or received, so that if the person liable to recoup the costs recovers only half of the amount he sought to recover, or would have recovered but for his contributory negligence, only half of the costs of treatment or training should be sought from him. Sub-section (3) of the section appears to indicate clearly to the contrary, in providing that a person liable to pay compensation to a person to whom treatment or training has been provided is liable, upon being served with an appropriate notice, to pay to the Director-General the amount of the cost of treatment and training *or the amount of the compensation, whichever is the less*. Thus it is contemplated by the section that in some circumstances the Director-General's claim would take up the whole of the compensation and perhaps still not be wholly satisfied.

(Reasons for Decision, para. 53)

The Tribunal felt that the issue was whether the applicant had received a substantial amount of compensation, not whether it had been reduced by contributory negligence. They concluded he had and decided it was not 'unjust, unreasonable or otherwise inappropriate' (*Ivovic*) to insist on repayment.

Formal decision

The AAT affirmed the decision under review.

Overpayment: investment income

HERBERT and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. S81/13)

Decided: 12 July 1982 by G. D. Clarkson, F. Pascoe and J. Billings.

This was an application for review of a DSS decision to recover, under s.140(1) of the *Social Services Act*, an 'overpayment' of unemployment benefit.

Herbert had been paid unemployment benefit for the period 29 November 1977–2 January 1978 and the period 15 June 1978–16 August 1978. The DSS alleged that Herbert had failed to declare investment income 'received' by him in these periods and that consequently he received unemployment benefits at the maximum rather than at the (correct) reduced rate.

The first period

Herbert had received and invested a lump sum superannuation payment a few days after his first application for unemployment benefit (in November 1977). The income from that investment was to be paid quarterly at the end of December, March, June and September.

When asked, by the DSS, whether he had 'received' any income during November and December 1977, Herbert had answered 'no'. This answer was strictly correct, as the first payment of investment income was received by him in mid-January 1978.

However, the DSS relied on s.106(2) of the *Social Services Act* which provides:

> (2) Where a person is entitled to receive income by way of periodical payments made at intervals longer than one week, that person shall be deemed to receive in each week an amount proportionate to the number of