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.

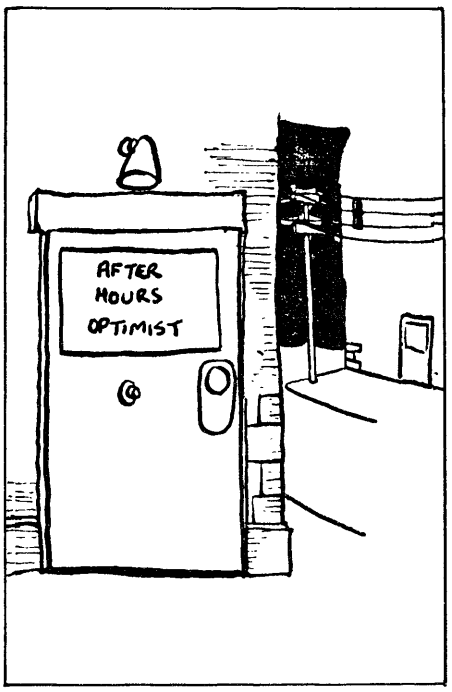
The first period

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



weeks in each period in respect of which he is entitled to receive payment.

The AAT doubted whether the word 'received', used in the DSS income questionnaire, should carry the extended meaning given by s.106(2). Even if it was given that extended meaning (so that income actually received in January 1978 would be treated as 'received' in November and December 1977), the AAT thought that Herbert had acted 'honestly and reasonably' in answering 'no', when asked in November and December. Accordingly, 'no action should be taken to recover any overpayment made to the applicant between 29 November 1977 and January 1978': Reasons for Decision, p.7.

The second period

In June and July 1978, when Herbert was asked if he 'received' any income, he again replied 'no'. When the same question was put to him towards the end of August he said 'yes' and declared income from his investment.

In fact, Herbert had received several earlier payments from that investment, in January and April 1978 (when he was not on benefit), totalling $794. The AAT said:

> Even setting aside section 106(2) of the Act it seems to us obvious that these two payments of interest should have been disclosed in the application [for unemployment benefit] of 8 June 1978 . . . It is quite clear that if the application of 8 June 1978 had disclosed the payments of interest totalling $794.44 . . . the grant of the benefit [at maximum rate] would not have been made.

(Reasons for Decision, p.5)

The Tribunal said that Herbert could not have assumed that the DSS was aware of the investment income and was monitoring it. As in *Livesey*, 6 *SSR* 62, the DSS had no way of knowing of the investment income unless Herbert told the DSS.

Accordingly the claimed overpayment for the period 15 June to 16 August 1978 was properly recoverable.

Formal decision

The AAT decided that no action should be taken to recover any overpayment made to Herbert between November 1977 and January 1978 but that otherwise the decision under review be affirmed.

Invalid pension: separation under one roof

'A' and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. A81/36)

Decided: 24 June 1982 by J. D. Davies J, D. R. S. Craik and H. E. Hallowes.

The applicant, Mr A, was entitled to and received an invalid pension. In determining the rate of pension, the Director-General had taken into account his wife's income, relying on s.29(2) of the *Social Services Act*:

> 29.(2) For the purposes of this Part, unless the contrary intention appears, the income of a husband or wife shall—
> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines,
> be deemed to be half the total income of both.

There had been no legal proceedings between Mr and Mrs A and thus no court order existed. However, a short time before the AAT heard the matter the parties made a separation agreement. This was not in existence at the time of the SSAT's and Director-General's decision and was therefore not considered by the AAT, except insofar as it was evidence of the breakdown in Mr and Mrs A's relationship. Thus s.29(2)(a) was not applicable. Could s.29(2)(b) apply?

Can separation be a 'special reason'?

The Tribunal stated that s.29(2)(a) did not prevent the application of paragraph (b) to some situations where the spouses were living apart. In other words, spouses could live apart other than pursuant to a court order or separation agreement and this could be a 'special reason' for disregarding a spouse's income.

Counsel for the Director-General argued that s.29(2)(b) referred to matters either solely or principally of an economic character; for example, the provisions concerned the extent to which each spouse supported the other. The Tribunal preferred the broader statement in *Reid* 3 *SSR* 31:

> There must be some factor or factors in the circumstances of the particular case which take it outside the common run of cases . . . The decision-maker must nevertheless be prepared to respond to the circumstances of a particular case if for any special reason the application of the general rule would be unjust, unreasonable or otherwise inappropriate having regard to the scope and object of the Act.

The Tribunal considered a number of cases under the *Matrimonial Causes Act* and the *Family Law Act* which have held that a married couple may be living apart or separately and apart although they are living under one roof. The Tribunal said that if a married couple were living apart under the one roof, this was undoubtedly special and could come under s.29(2)(b).

The AAT's assessment

The Tribunal found that the marital relationship between Mr and Mrs A had finished in the middle 1960's. They had separate bedrooms and led basically separate lives. For many years they each paid half the joint expenses of the household. More recently, Mrs A had paid the household costs and mortgage payments as Mr A's only income was his pension. Mrs A had also recently paid for the registration on Mr A's car.

The AAT concluded that 'The marital relationship, the *consortium vitae*, ceased many years ago. Mr and Mrs A have continued to reside in the same home because of their financial circumstances. They have lived separately *notwithstanding that Mrs A provides financial support for Mr A and performs some tasks for him*' (emphasis added). This, the AAT stated, was enough for the exercise of the discretion under s.29(2)(b).

The Tribunal specifically noted that it did not consider Mrs A's contribution to Mr A's support was a relevant factor. It pointed out that, if a married couple were living apart pursuant to a court order or separation agreement, they were treated as single persons by s.29(2)(a), even though one spouse may be paying maintenance to the other either voluntarily or under a court order.

The Tribunal further noted that, though s.29(2) was not an appropriate authority in these circumstances for reducing Mr A's pension, the Director-General does have a discretion to vary the rate of pension. The Tribunal suggested that s.28(2) enabled the Director-General to vary the rate of pension payable so that it was reasonable and sufficient in all the circumstances. The Director-General could use this section, or s.18 in the calculation of income, to vary the rate of pension 'in so far as a rate of pension should be adjusted by reason that a married couple are living in the one house though not as husband and wife'.

Formal decision

The AAT set aside the decision under review, and determined that Mr A's income should not be deemed to be half of the total income of Mr A and Mrs A. The Tribunal remitted the matter to the Director-General for calculation of the level of pension.