

the CES. Apart from this incident it appeared that she was taking reasonable steps to obtain work.

However, the AAT considered that her refusal to accept the referral was unjustified.

Since leaving school, the longest time she had spent in a job was eight months and she had been dismissed on two occasions. When the referral arose in December 1981, she had been out of work since the previous month. She lives in a comparatively small centre where there would be considerably less jobs available for her than for instance in the metropolitan area of Perth. Naturally she would wish to stay where her family and friends were, but at the same time she

must recognise the restricted opportunities for employment that wish carries with it.

She gave the impression she was a person who could easily take offence and I can understand that she felt angry and humiliated in her previous employment, but all employers are not the same, and I do not think that without any discussion with Mr Cassie she was entitled to assume that his reactions would be the same as those of her previous employer.

(Reasons, p. 10)

It was therefore a proper case for the operation of s.131(1)(c) of the Act by which the Director-General may cancel or suspend a benefit 'for any reason'.

Suspension of benefit : job no longer available

However, such a suspension should not have lasted beyond the time when the job with the building supplies company had been filled. After that time there was no point in referring the applicant to that employer.

Formal decision

The AAT set aside the decision under review and remitted the matter for reconsideration with the recommendation that the benefit be suspended from 2 December 1981 to the end of the benefit week in which the referral by the CES to Cassie's Building Supplies ceased to be available to the applicant.

Widow's pension: cohabitation

NICKLASON and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. T83/5)

Decided: 30 May 1983 by I.R. Thompson. The applicant had applied for a widow's pension but was refused on the basis that she was 'living with a man as his wife on a bona fide domestic basis although not legally married to him' and so did not come within the definition of 'widow' set out in s.59(1) of the *Social Security Act*. She appealed to the AAT.

The AAT's view

There was no doubt that Nicklason was living with a man on a bona fide domestic basis: but was she living with him as his wife?

There was no evidence of any sexual relationship, nor a common social life. They did not pool their financial resources. They took separate holidays.

The Tribunal referred to *Donald* (1983) 14 SSR 140 where it was said that in assessing 'whether a marital relationship exists one should not have regard to a relationship which is merely an approximation to that in what may be called a run-down marriage . . . where there has never been a full marital relationship, it is not sufficient that there is a relationship equivalent to that in a run-down marriage'. That case also emphasised the mutual commitment which was the essence of a marital relationship.

This did not seem to exist here.

While certain inconsistencies (regarding sleeping arrangements) raised some suspicion, that alone was insufficient to base any findings (see *Shearing* (1983) 13 SSR 132).

The Tribunal was satisfied that on the balance of probabilities this was an arrangement of convenience.

Formal decision

The AAT set aside the determination under review and remitted the matter to the Director-General with a direction that the applicant has been at all relevant times and is now a widow for the purposes of Part IV of the *Social Security Act*.

Sickness benefit: compensation payments

MARTINOVICH and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. W82/73)

Decided: 4 August 1983
by G.D. Clarkson.

Martinovich suffered back injuries in a traffic accident in December 1976. He was paid sickness benefit from January 1977 until an action he had instituted in respect of the accident was settled in November 1980. That settlement included a sum of \$55,000 for general damages.

A sum representing the total amount of sickness benefit received by the applicant (\$16,980.99) was paid direct to the DSS by the insurers of the defendant in that action (see now, s.115D *Social Security Act*).

The applicant appealed against this decision to recover the payment of sickness benefit on the basis that:

The general damages paid were for pain and suffering and did not contain any component for loss of earnings. The calculation for the award of damages was not referable to the period during which sickness benefits were paid.

(Reasons, p. 2)

An SSAT recommended that the

appeal be allowed but a delegate of the Director-General did not accept that recommendation. The applicant applied to the AAT for review of that decision.

The legislation

Section 115 then read:

(2) Where a person is or has been qualified to receive a sickness benefit in respect of an incapacity and the Director-General is of opinion that the whole or part of a payment by way of a lump sum that the person has received, or is qualified or entitled to receive, can reasonably be regarded for the purposes of this section as being a payment that -

- (a) is by way of compensation in respect of the incapacity; and
 - (b) is in respect of a period during which that person is or was qualified to receive that sickness benefit,
- the payment, or that part of the payment, as the case may be, shall, for the purposes of this section, be deemed to be such a payment.

The question the AAT had to decide was whether the Act, as it then read, authorised the DSS to demand and receive from the insurer any part of the judgment moneys making up the general damages.

Economic loss: no specified amount required

The judgment obtained by the applicant in his common law action did not specify a figure for past economic loss nor an amount for a specified period. This, argued the applicant, prevented s.115(2) from operating as that section required the identification of a sum in respect of the incapacity and in respect of a period during which sickness benefit was received.

The AAT did not accept this. The Tribunal said:

I read the sub-section [s.115(2)] to mean that where as in the present case the applicant is entitled to a payment of a lump sum and the Director-General is of the opinion that part of that sum can reasonably be regarded as a payment by way of compensation in respect of an incapacity for which sickness benefit has been paid for a particular period then notwithstanding that the sum or any part thereof cannot strictly be regarded as a payment by way of compensation in respect of such an incapacity for which benefit has been paid for such a period, it is nevertheless to be treated as such a payment for such a period for the purposes of s.115.