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.

Matinovich 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 ot 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.

(Reasons, pp. 11-12)

The AAT was satisfied that the DSS had formed the opinion 'that part of the general damanges could reasonably be regarded as a payment to the applicant as compensation meeting the requirements of s.115(a)' and that it was a reasonable conclusion that at the time of settlement of the court action the sum paid to the DSS was reasonably attributable to the applicant's economic loss at that time.

**Formal decision**

The AAT affirmed the decision under review.

# Invalid pension: residence

**WILSON and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. V81/465)**

**Decided:** 5 May 1983 by J.O. Ballard.

Wilson applied to the AAT for the stay of a decision by the DSS to cancel his invalid pension.

Wilson left Australia for New Zealand on 1 August 1980. He had been in receipt of invalid pension since his arrival from New Zealand in 1971. He intended to return to Australia and claimed to have been informed by the DSS that he could take his pension overseas for up to 12 months. However, the DSS cancelled his invalid pension on the ground that being permanently incapacitated for work on arrival in Australia and not having completed 10 years residence in Australia, he was receiving his pension by virtue of the reciprocal agreement between Australia and New Zealand (and not under s.25(2)) and under that agreement was eligible for the Australian pension only for a period of up to six months following his departure.

**Residence: opinion to be formed**

The applicant was in receipt of invalid pension while in Australia pursuant to regulation 6 of the *Social Security (Reciprocity with New Zealand) Regulations*. (These regulations give effect to the reciprocity agreement beween Australia and New Zealand).

That regulation reads:

(1) This Part shall apply to any person who, having at any time resided in New Zealand, is permanently resident in Australia.

(2) For the purposes of this Part, a person shall be deemed to be permanently resident in Australia –
(a) if he is resident in Australia and satisfies the Director-General that he is residing permanently in Australia; or
(b) if he is resident in Australia and his residence has been continuous for not less than six months, unless the appropriate authorities of Australia and New Zealand agree to the contrary.

Regulation 11 was also applicable in relation to Wilson's absence from Australia. That regulation provides:

(1) This Part shall apply to any person ordinarily resident in Australia who is temporarily resident in New Zealand.

(2) Subject to the next succeeding subregulation, a person who, in the opinion of the Social Security Commission, is not residing permanently in New Zealand shall not, by reason only of his temporary absence from Australia, be disqualified from claiming or receiving any pension, allowance, endowment or benefit under the Act to which he would have been entitled if he had remained in Australia.

(3) The Director-General may, in his discretion, withhold payment of the whole or such part of the pension, allowance, endowment or benefit as he thinks fit until the return of that person to Australia.

This regulation entitled the applicant to apply to the New Zealand Social Security Commission for a determination that being a person ordinarily resident in Australia, he was not residing permanently in New Zealand. If that opinion was formed by the Commission then he remained entitled to his Australian pension.

However, as no opinion had been formed one way or the other there was no *prima facie* case for restoration of the benefit on the facts. There existed only an assertion of facts by the applicant which if true would entitle him to the pension. On that basis, the AAT could not grant the stay order.

**Formal decision**

The Tribunal decided not to grant a stay order pursuant to s.41(2) of the *Administrative Appeals Tribunal Act*.

# Invalid pension: 'permanent incapacity'

**SYNTAGEROS and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. Q82/67)**

**Decided:** 12 July 1983 by J.B.K. Williams.

The Tribunal *set aside* a DSS refusal to grant invalid pension to a 54-year-old former labourer who suffered an injury to his right hand at work.

**PYE and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. N82/176)**

**Decided:** 20 July 1983 by E. Smith.

The AAT *set aside* A DSS decision to cancel an invalid pension held by a 40-year-old former labourer who suffered from spinal problems, headaches and partial deafness.

**DABBAGH and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. N82/63)**

**Decided:** 20 July 1983 by E. Smith.

The AAT *set aside* a DSS decision to cancel an invalid pension held by a 42-year-old former factory worker who had injured his back at work.

**BEGOVIC and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. S82/97)**

**Decided:** 21 June 1983 by R.A. Balmford.

The AAT *affirmed* a DSS refusal to grant an invalid pension to a 45-year-old glazier whose wrist was severely lacerated in an industrial accident and who had not worked since.

The Tribunal could not accept that he was 85% permanently incapacitated for work and considered that with rehabilitation and retraining he could expect to be attractive to an employer in any capacity which did not require the full use of both hands.

**ALVARO and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. W82/59)**

**Decided:** 30 May 1983 by G. D. Clarkson.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 30-year-old woman who had lost all power of movement in her ankles and toes. While she was unable to do the work which she had performed before her injury, she was capable of doing a wide range of work.

**HARDACRE and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. N82/107)**

**Decided:** 13 July 1983 by E. Smith.

The AAT *set aside* a DSS refusal to grant invalid pension to a 49-year-old former forklift driver who suffered from unstable angina and high blood pressure.

**AZIZI and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. N82/93)**

**Decided:** 6 June 1983 by E. Smith.

The AAT *set aside* a DSS decision to reject a claim for invalid pension lodged by a 47-year-old former factory labourer, with very limited English, who had not worked since injuring his back in 1973.

Taking into account Azizi's history (which included injury, workers' compensation award, sickness benefit, an earlier grant of invalid pension and acceptance by several doctors of his inability to work), the AAT said 'it would be flying in the face of reality to take the view that the applicant has any meaningful residual capacity for work or to attract an employer': Reasons, para. 34.