Procedure: late application for review

BONAVIA and SECRETARY TO DSS (No. V85/61)

Decided: 6 August 1985 by R. Balmford.

This was an application, under s.29(7) of the *AAT Act* for extension of the standard 28-day time limit for lodging an application for review of a DSS decision.

Con Bonavia had applied to the DSS for an invalid pension in February 1983. That application had been rejected and, after review by an SSAT, a delegate of the Secretary had notified Bonavia on 4 May 1984 that the rejection of his application had been confirmed. That letter contained information about Bonavia's rights of review by the AAT.

As the time for seeking that review had expired on 1 June 1984, Bonavia's solicitor applied to the Tribunal for an extension of time for the lodging of the application for review. The DSS was not advised of this application (through oversight on the part of the Tribunal) until June 1985 and it then objected to the application for extension of time.

The DSS objected to the extension of time because it had destroyed the file relating to Bonavia's original application. That destruction was in accordance with normal departmental practice, although the file had been destroyed somewhat earlier than usual because of a reorganisation of DSS regional offices. However, the DSS did have access to material in the records of the SSAT and, because Bonavia had received sickness benefit over the past 2 years, the DSS did have access to Bonavia's sickness benefit file which contained regular medical certificates on Bonavia's incapacity for work.

The AAT referred to a decision of the Federal Court, *Hunter Developments Pty Ltd* v *Minister for Home Affairs and Environment* (5 July 1984), where Wilcox J had considered the principles applicable to applications for extension of time under the *Administrative Decisions (Judicial Review) Act*. In that case Wilcox J had said that, although special circumstances did not need to be shown, the court would not extend the time 'unless positively satisfied that it is proper to do so'. It was necessary for the applicant to show an 'acceptable explanation of the delay' and that it was 'fair and equitable in the circumstances' to extend the time. Factors which could be taken into account, according to Wilcox J, include the following:

- any action taken by the applicant, such as indicating to the decision maker that the decision would be challenged;
- any prejudice to the decision maker;
- the possibility of unsettling other people or unsettling established practices;
- the merits of the application for review;
- considerations of fairness as between the applicants and other persons in a similar position.

In the present case, the AAT said, the delay in lodging the application had arisen from the incorrect advice given to Bonavia by the social worker. It had not been unreasonable for Bonavia to reply on that advice; but the AAT rejected the possibility that Bonavia might sue the social worker for negligent advice:

> it would seem more appropriate for him to be permitted to proceed with his claim for an invalid pension rather than to initiate legal proceedings of that kind based on the expectation that he might have obtained a pension had he lodged his application for review within time.

(Reasons, para. 9)

The AAT accepted that there might 'be some administrative inconvenience caused to the respondent in contesting this matter without a complete file'. However, this inconvenience was not

> so significant as on balance to outweigh the potential financial loss for the applicant which would ensue if the Tribunal rejects his application for extension of time. Further, Mr Bonavia's claim is for a pension under the *Social Security Act*. If he is shown to satisfy the eligibility requirements for that pension, then he is entitled to it. The duty of the respondent is to process claims and to make payments to persons who are shown to be entitled to pensions, allowances or benefits which they have claimed. The respondent does not suffer by the granting of a claim; it merely pays moneys to persons who are shown to be so entitled. If Mr Bonavia should prove successful in his application for review, nobody will be unsettled and no established practices affected.

(Reasons, para. 10)

The AAT said that it was not in a position to make any finding on the merits of the claim and that there was no significant question of fairness as between the applicant and any other person. In the view of the Tribunal, it was 'fair and equitable in all circumstances to grant the application': Reasons, para. 12.

Formal decision

The AAT directed, pursuant to s.29 of the *AAT Act*, that the time for lodging the application for review be extended.

Sickness benefit: recovery from compensation award

KNIGHT and SECRETARY TO DSS (No. W85/54)

Decided: 12 September 1985 by J. R. Dwyer.

Michael Knight had been injured in a motor vehicle collision in April 1983. He was paid sickness benefit between July 1983 and July 1984. In February and May 1984, his solicitors wrote to the DSS asking whether the latter intended to recover the payments of sickness benefit from any personal injury damages which Knight might recover. The DSS did not respond to these letters.

In November 1984, Knight's third party action for damages was settled for $51 430, of which $50 000 were general damages. In January 1985, the third party insurers paid to the DSS the sum of $11 259, as a refund of all sickness benefit and rehabilitation allowance payments received by Knight. According to the DSS records, this amount had been paid over to the DSS without the DSS making any request for the payment of this amount.

Knight applied to the AAT for review of the DSS decision to recover the sum of $11 259 from his damages settlement.

The legislation

Section 115B(3) of the *Social Security Act* authorises the Secretary to the DSS to recover from a person, who has received sickness benefit and compensation or damages (at least equal to the amount of sickness benefit) for the same incapacity, the amount of sickness benefit paid to that person.

Under s.115D(4) the Secretary, in the alternative, may recover that sickness benefit from an insurer liable to pay compensation or damages. But this alternative right of recovery is subject to the requirement that the Secretary first serve a notice on the insurer under s.115D(2), specifying the amount which the Secretary proposes to recover.

Section 115E gives the Secretary a discretion to ignore the whole or part of a payment of compensation,

> if the Secretary considers that, in the special circumstances of the case, it is appropriate to do so.

Similar provisions dealing with the recovery of rehabilitation allowance from payments of compensation or damages are set out in s.135R.

Sickness benefit recoverable

According to the third party insurer, the damages settlement in favour of Knight had included a sum of $15 000 to cover his loss of earning capacity during the period from the date of his injury to the date of the settlement. The AAT said that this information established that Knight had received damages for his incapacity which exceeded the total of sickness benefit and rehabilitation allowance paid to him for that incapacity. It followed that the DSS had the power to recover from Knight or from the third party insurer the total amount of sickness benefit and rehabilitation allowance paid to Knight during that period.

'Special circumstances' to disregard damages

The AAT said that, following the approach taken by the Tribunal in *Ivovic* (1981) 3

SSR 25 and *Beadle* (1984) 20 *SSR* 210, it had to decide whether there were—

> unusual circumstances in this case such that it would be unjust, unreasonable or otherwise inappropriate for the Secretary to require the whole of the sickness benefit and rehabilitation received by Mr Knight to be repaid.

(Reasons, para. 19)

There were no financial circumstances which would justify the exercise of the discretion in s.115E—Knight had about $14 000 in a bank account, no outstanding debts and was being paid $569 a fortnight in rehabilitation and training allowance. The only relevant matter arose out of the failure of the DSS to serve a notice on the third party insurer before that insurer paid the sickness benefit etc. to the DSS. Of this failure, the AAT said:

> The provisions in the Act should be complied with as they have been inserted to provide protection for recipients of benefit and to ensure that the correct amount of sickness benefit is requested by way of refund. I find that failure to comply with those procedures frustrates the objects of the legislation and hence constitutes 'special circumstances' in this case.

(Reasons, para. 21)

The AAT noted that a similar question had arisen in *Fulcomer* (1985) 24 *SSR* 289. But, the AAT said, the present case differed from *Fulcomer*; the DSS had held the money for a much shorter time in this case; there was no room for argument in this case about the amount of sickness benefit payments which could be recovered; and the procedures followed by the DSS came closer in this case to compliance with the *Social Security Act*. Despite those differences, it was, the AAT said,

> appropriate that the amount ultimately recovered from the applicant should in some way be reduced because the proper procedures were not complied with and thus some of the safeguards provided for in the legislation were not available to Mr Knight.

(Reasons, para. 24)

The AAT then adopted the same resolution as in *Fulcomer*. Because Knight had agreed not to put the DSS to the extra expense and effort of repaying the total amount wrongly obtained and then recovering it in accordance with the correct procedure, 'it would be appropriate for the Secretary to disregard so much of the compensation received as would cause a refund to be made to Mr Knight of $600': Reasons, para. 25.

Formal decision

The AAT directed that the sum of $600 should be refunded to the applicant.

SIVIERO and SECRETARY TO DSS (No.S84/136)

Decided: 23 September 1985 by R.A.Layton, F.A.Pascoe and B.C.Lock.

Giovanni Siviero had been injured at work in April 1980. Following a recurrence of that injury in 1982, he was paid sickness benefit by the DSS between February and October 1982. These payments totalled $3679.

At about the same time he began a claim for workers' compensation in the Industrial Court of South Australia. This claim was settled in January 1984 on the basis that Siviero's employer pay him $20 000 under s.70 of the *Workers' Compensation Act* 1971 (SA), $12 900 under s.69 of that Act and relatively small amounts to cover medical expenses and legal costs.

Following this settlement, the DSS decided that the sum of $1866, part of the sickness benefits paid to Siviero, was recoverable from the award of $20 000 made under s.70 of the *Workers' Compensation Act*. The DSS subsequently reviewed this decision and reduced the amount which it sought to recover to $878. Siviero asked the AAT to review that decision.

The legislation

Section 115B(3) of the *Social Security Act* provides that the Secretary to the DSS may direct a person to repay an amount of sickness benefit received by the person in respect of an incapacity, where the Secretary is of the opinion that a compensation payment received by the person 'is a payment that is . . . in whole or in part, a payment . . . by way of compensation in respect of that incapacity. . .' The section limits the amount of sickness benefit which can be recovered in this way to the amount of the compensation payment or such part of that compensation payment as, in the opinion of the Secretary, relates to that incapacity.

Section 69 of the *Workers' Compensation Act* (SA) provides for the payment of specified amounts of compensation for specified injuries (as set out in a table).

Section 70 of the *Workers' Compensation Act* establishes a procedure for adapting the s.69 table to 'a permanent injury not mentioned in the table set forth in s.69'.

Section 69(2) provides as follows:

> '(2) Nothing in this section or s.70 shall limit the amount of compensation payable for any injury referred to in either of those sections during any period of incapacity resulting from that injury occurring before an assessment of compensation is made in accordance with either of those sections.'

'That incapacity' - the same injury and the same period

The central question before the AAT related to the interpretation of s.115B(3) of the *Social Security Act*. The DSS argued that this provision allowed it to recover sickness benefit from any compensation payment which related to the same injury for which a person had received sickness benefit, regardless of whether the compensation payment and the sickness benefit covered the same period. On the other hand, Siviero argued that the right of the DSS to recover sickness benefit only arose where a person had received a compensation payment for the same injury covering the same period as the sickness benefit payment.

The AAT noted that s.115B (and a number of associated sections) had been added to the *Social Security Act* from October 1982. Until that time, the previous s.115 had expressly limited the DSS right to recover sickness benefit to those situations where the person had received sickness benefit and compensation in respect of the same incapacity and in respect of the same period. However, the AAT concluded that the changes to the Act in 1982 had not made any substantial difference to the recovery rights of the DSS. It adopted the comments made in an earlier decision (dealing with the previous s.115), *Edwards* (1981) 3 *SSR* 26:

> 'The underlying nature of the injury is irrelevant for the purposes of s.115 and what must be looked at is the nature of the incapacity for which compensation is received - if it is an incapacity for work (and it relates to a relevant period) then it is the same incapacity in respect of which the sickness benefit is granted.'

In the present case, the AAT said that the approach adopted in *Edwards* was still applicable to s.115B and that -

> 'pursuant to s.115B the [Secretary] must satisfy himself that in the case of the lump sum, either the whole or part of the payment of that lump sum is a payment in respect of the same period of incapacity for work in respect of which the person has been in receipt of a sickness benefit.'

(Reasons, para.22)

What period did this compensation cover?

The AAT then turned to the provisions of the *Workers' Compensation Act* under which the award to Siviero had been made. It concluded that, in making an award under s.70 of that Act, the Industrial Court was prevented (by s.69(2)) from considering any past period of incapacity of the worker up until the time of assessment. A worker was entitled to a weekly payment of compensation for incapacity for any period prior to the assessment of a lump sum award under s.70. But, in making an award under that section, the Industrial Court could only take account of the 'present nature of the injury and the effect on the present and future employment or occupation of the worker': Reasons, para.41. The AAT said that any period of incapacity that a worker may have had prior to assessment under s.70 was

> 'not a component for which a monetary amount made be allocated in making an assessment . . . As a consequence, the necessary matters required to be considered by [the Secretary] in forming his opinion can never be established as the [Secretary] will be unable to identify, in any s.70 assessment made by a Court or Tribunal, any amount which represents a payment in respect of incapacity for which sickness benefit has been received.'

(Reasons, para.42)

No chance of recovery from award under s.70

The AAT acknowledged that this decision produced 'a most vexatious and serious problem for the DSS.' It was clear, the AAT said, that the intention of s.115B was to prevent a person being doubly paid or compensated by both an insurer and the DSS for the same period of incapacity. But, as the *Social Security Act* was presently framed, the Secretary had to be satisfied that a double payment had occurred before any money was recoverable; and, where a compensation award had

been made under s.70 of the *Workers' Compensation Act* (SA), it would be impossible for the Secretary to be satisfied of this because an assessment under that section excluded any payment for a period of incapacity prior to the assessment:

> 'Unless there is a legislative amendment to [s.115B], a lump sum settlement pursuant to s.70 of the South Australian *Workers' Compensation Act* will usually present a situation whereby recovery of sickness benefits cannot be made.'

Formal decision
The AAT set aside the decision under review and substituted a decision that the sum of $878 was not recoverable by the Secretary under s.115B(3).

Cohabitation

FLANNERY and SECRETARY TO DSS (No.V84/87)
Decided: 10 October 1985 by J.R.Dwyer, H.Trinick and L.Rodopoulos.
Ruby Flannery asked the AAT to review a DSS decision that her age pension should be suspended until the DSS received information on the income of her former husband, with whom the DSS believed that she was living 'as his wife on a *bona fide* domestic basis although not legally married to him'.

The legislation
At the time of the decision under review, s.28 of the *Social Security Act* provided for a pensioner's pension to be reduced by reference to her income. According to s.29(2), the income of the pensioner included half the income of the pensioner's spouse. Section 18 defined 'wife' in such a way as to include a woman who was living with a man (referred to as her husband) as his wife on a *bona fide* domestic basis although not legally married to him.

The evidence
Mr and Mrs Flannery had married in April 1942 and were divorced in February 1973. Despite their divorce, they continued to live under the same roof. They claimed that they had independent finances, no sexual relationship and that they did not provide each other with society or support. However, the AAT said that it was important to treat the 'subjective evidence' given by the applicant with caution and that objective factors were more persuasive. This was particularly so because various statements made by Flannery as to her living arrangements and her earnings from employment had been shown to be false.

A continuing relationship
The AAT said that the fact that Flannery and her ex-husband continued to live under the same roof after their divorce 'allows an inference to be drawn that there is a continuing commitment between them": Reasons, para.21. That inference was supported by the fact that, since the DSS had decided to suspend Flannery's pension, neither she nor her ex-husband had attempted to sell the house which they jointly owned.

The AAT accepted that Flannery and her ex-husband did not have a sexual relationship but concluded that there was more companionship than Flannery and her ex-husband had indicated and that they 'must derive some comfort and support from living together.' The AAT also found that Flannery and her ex-husband shared household expenses on a random basis (with the bulk of the expenses being met by the ex-husband) and that her ex-husband met all the mortgage payments on their jointly owned house. In some ways, the AAT said, the financial arrangements between Flannery and her ex-husband amounted to an effective pooling of resources.

The AAT also accepted that Flannery and her ex-husband did not have an exclusive relationship: each of them had a relationship with other people. But this situation had continued for many years and it did not appear to be generating any tension between Flannery and her ex-husband. The AAT also found that there was a substantial degree of permanence in the relationship between Flannery and her ex-husband. The AAT concluded:

> 'On the whole the evidence seems to indicate that Mr and Mrs Flannery have decided to ignore the divorce and to continue to live as man and wife for at least another 2 years in a relationship which allows for each party to have another companion. Although the circumstances are unusual we find that they are not significantly different from the circumstances when Mr and Mrs Flannery were married . . . Neither Mr or Mrs Flannery appears to have a strong desire to bring the situation to what might be considered a logical conclusion. Since their divorce more than 12 years ago they seem to have decided that they were better off living together in spite of the difficulties in their marriage rather than living apart.'

(Reasons, para.45, 46)
Formal decision
The AAT affirmed the decision under review.

DAY and SECRETARY TO DSS (No. N84/198)
Decided: 5 August 1985 by A. P. Renouf.
The AAT *affirmed* a DSS decision to reduce the rate of invalid pension paid to a woman by taking into account the income of a man with whom she was living as his wife on a *bona fide* domestic basis although not legally married to him.

On the basis of the evidence presented to it, the Tribunal found that the man, R, had moved into Day's house as a boarder in 1978; but that there had been more to the relationship than that of landlady and boarder because Day saw R as her protection against harassment by her husband, from whom she was separated.

Day and R continued to live together until 1984. Over that period, Day adopted R's surname, assisted R in running his business and lent him $10 500 without security. When Day was ill, R cared for her and her children. When R's business declined, Day supported him entirely.

Over this period, both Day and R claimed in official documents that they were living in a *de facto* relationship; but they insisted to the Tribunal that they had never had a sexual relationship.

The AAT said that, despite the absence of a sexual relationship, the lack of a common social life and the lack of evidence as to how their acquaintances regarded the relationship, the evidence established,

> on the balance of probabilities, that at the relevant time, the applicant and R were living together as man and wife on a *bona fide* domestic basis while not being legally married.

(Reasons, para. 59)

SCHAEFER and SECRETARY TO DSS (No.Q85/4)
Decided: 13 September 1985 by R.Balmford
Lyell Schaefer appealed against a DSS decision to treat him as a married person for the purposes of calculating his rate of age pension. The DSS had decided that he was living with Mrs Brennan as her spouse on a *bona fide* domestic basis. (See now s.6(1) of the *Social Security Act*.)

A marriage-like relationship?
The Tribunal looked at past Tribunal and Federal Court decisions (*Waterford* (1981) 1 *SSR* 1, *Lambe* (1981) 4 *SSR* 43) and suggested that the matters to consider were -

> 'dwelling under the same roof, permanence, exclusiveness, sexual intercourse, mutual society and protection, the existence of a household, relationships within that household and whether those relationships show the *indicia* of a family unit, the way in which the relationship is presented to the outside world, financial support, the nurture and support of the children of the relationship.'

(Reasons, para.11)