

As a result the applicant could not meet the necessary criteria and was not eligible for family allowance. There was some suggestion that as a result of this decision the applicant may not

have been entitled to the resumption of payment which took place after the applicant's family had been granted visas. However, the DSS did not pursue this issue.

Formal decision

The AAT affirmed the decision under review.

Recovery from compensation

CARDER and SECRETARY TO DSS (No. V85/456)

Decided: 27 October 1986 by H. E. Hallowes

The applicant asked the AAT to review a DSS decision to recover payments of sickness benefit he received in respect of a period for which he received payment for loss of wages from the Motor Accidents Board (MAB). The sum involved was \$883.80. The DSS also sought to recover an overpayment of \$147.30 in unemployment benefit which the applicant asked the AAT to review.

The legislation

Section 115B of the *Social Security Act* allows the DSS to recover payments of sickness benefit where a person receives payments as compensation for that incapacity.

Sub-s.115(2) provides that a payment by way of compensation shall include payment of damages, payments under insurance or compensation schemes under State laws and other payments which are in the nature of compensation or damages.

Section 115E allows the Secretary to disregard the payment of compensation if there are 'special circumstances' in the case.

The facts

Mr Carder suffered a whiplash injury in a car accident in June 1983. This prevented him from working. He received payments from the MAB to the sum of \$1,240. He received at least some of this amount while in receipt of unemployment or sickness benefits.

Was the MAB payment 'compensation'?

The Tribunal had before it some evidence that suggested the MAB did not consider its payments compensation payments. This view appeared to have given rise to the practice of requiring the client to repay the DSS and then receive the relevant amount from the MAB rather than the MAB refunding the amount directly to the DSS as is the purpose of the procedure set down in sub-s.115B(3). [That procedure allows the DSS to notify the person paying compensation that they are required to pay the Department directly.]

There was thus a question as to whether the MAB payment was by way of compensation for the

incapacity. The AAT referred to s.25 of the *Motor Accidents Act* which is headed 'Compensation for deprivation or impairment of earning capacity'. Reference was also made to the Federal Court decision in *Siviero*, unreported, 12.9.86 which said that compensation for loss of wages would presumably be regarded as compensation in respect of the incapacity.

The conclusion of the AAT was that the MAB payments were compensation payments in respect of the incapacity within the meaning of sub-s.115(3).

Did special circumstances exist?

The AAT then turned to whether 'special circumstances' existed such as would allow the Secretary to treat the payment as not having been made pursuant to sub-s.115(3).

Referring to *Ivovic* (1981) 3 SSR 25 the Tribunal asked whether there were circumstances in the case which would render recovery of the amount 'unjust, unreasonable or otherwise inappropriate'.

The applicant was deeply in debt and his wife and daughter both were in ill health. The applicant's wife had notified the DSS immediately she received the MAB payments but had been advised that the MAB would pay the DSS back. In the meantime she was told the payments of benefit were in order. In April 1984 the applicant's second child died. This raised funeral expenses in addition to mortgage commitments at that time. The applicant separated from his wife in December 1985 and his income fluctuated depending upon the demand for his skills as a carpenter.

The misleading advice as to the payment to the DSS by the MAB was not considered to be a special circumstance such as would make recovery unjust, unreasonable or inappropriate. The AAT considered the precarious financial position of the applicant but the fact that public moneys have been expended was regarded by the AAT as the paramount consideration. The Tribunal had heard from the applicant that he expected to be able to get over his unfortunate position and was satisfied that he would then be able to repay the money.

Thus the AAT affirmed the decision with respect to the recovery of sickness benefit.

The DSS argued that the applicant had failed to notify them of receipt of income (the MAB payment) while in receipt of unemployment benefit.

The AAT found on the evidence that the applicant's wife had informed the DSS of the payment. They were aware of the receipt by him of the payments and chose to continue payment of the benefit. The AAT concluded that there was no debt due to the Commonwealth in respect of the unemployment benefit. He had not failed to disclose the payment and had not been a contributory cause of the overpayment. The DSS would have paid the benefit according to the AAT even if the applicant had produced a receipt from the MAB.

The AAT set aside the decision in relation to the overpayment of unemployment benefit.

PAPAGEORGIU and SECRETARY TO DSS

(No. V86/245)

Decided: 27 October 1986 by H. E. Hallowes, G. Brewer and R. W. Webster

Helen Papeorgiou sought review of a DSS decision to recover payment of rehabilitation allowance to the sum of \$15,394.95 after she recovered \$200,000 in a common law settlement.

The applicant had been hit by a car in 1981 when aged 13 and sustained severe head injuries. She attended a rehabilitation centre after the accident for about one year and returned to school where she completed Year 11. She subsequently developed tremors in her left hand and both legs and suffered from dizziness. Her parents had not been supportive and she assisted in the home. She could generally care for herself. Her employment prospects had been described as 'bleak' although she remained optimistic about overcoming her disability.

The legislation

Section 135R(1A) of the *Social Security Act* allows the Secretary to recover from a person who has received a rehabilitation training allowance the amount paid in that allowance from any compensation they receive in respect of the disability which necessitated that training.

Section 135R(1B) allows the Secretary to release the person from

the obligation to repay the allowance where 'special circumstances' exist.

Did 'special circumstances' exist?

The applicant argued that special circumstances existed that should release her from the liability. The principles which governed the exercise of the discretion to waive recovery of sickness benefit under s.115(4A) were held in *Izard* (1984) 22 SSR 255 to be relevant to the exercise of the discretion contained in s.135R(1B).

Referring then to the discussion of those principles in *Ivovic* (1981) 3 SSR 25 the Tribunal asked whether imposition of the liability would be 'unjust, unreasonable or otherwise inappropriate'.

It was argued by the applicant that it should be taken into account that the rehabilitation she underwent did not prepare her for work but was directed to enabling her to cope with everyday life. She had little chance of ever obtaining employment and at only 18 years of age her only asset was the compensation payment she had received.

The AAT noted that the applicant and her legal advisers were aware of the demand the DSS had made with respect to the cost of training prior to the settlement of her common law claim. The Tribunal was also aware that her settlement was much lower than the assessment of her damages by her legal advisers but was accepted because of the concern that her contributory negligence might have on any award.

The AAT in rejecting the claim that special circumstances existed which would justify her release from the liability commented:

'...Although the sum received by the applicant may not adequately compensate her for her injuries and loss of enjoyment of life, it is nonetheless a considerable sum and was accepted following sound legal advice. The applicant cannot be said to be suffering from severe financial hardship. She lives with her parents and has to date few financial needs. Were the applicant to choose to live independently

from her parents sufficient funds are available in court for her to establish herself alone or with a friend in suitable accommodation.' (Reasons, para 13)

The Tribunal also remarked on the effect of the reduction in the settlement for her contributory negligence. Such an occurrence was not of itself 'special circumstances' although it assists in deciding whether it would be unjust, unreasonable or inappropriate in enforcing the liability.

The applicant had received a substantial amount of compensation. Public moneys had been expended. This was a paramount consideration in determining whether recovery should be waived. To make the applicant pay for her own rehabilitation would not be unreasonable nor impose financial hardship.

Formal decision

The AAT affirmed the decision under review.

Assets test: valuation

BENNETT and SECRETARY TO DSS
(No. N86/520)

Decided: 11 December 1986 by B. J. McMahon, M. S. McLelland and J. H. McClintock

Robert Bennett had his age pension cancelled on 7 March 1986 because of the value of his assets. He applied to the AAT for review of that decision.

The assets in question were two blocks of land which flanked both sides of the block of land on which the house in which he resided was situated.

The legislation

Section 6AA(1) of the *Social Security Act* provides that in calculating the property of a person their interest in their principal home shall be disregarded. Sub-section (3)(a) defines principal home to include the private land adjacent to the house up to a total area of 2 hectares. Sub-section (4) then read:

'Where the area of private land adjacent to a dwelling-house exceeds substantially the average area of private land adjacent to other dwelling-houses in the same

locality, so much only of the first-mentioned area as the Secretary determines in writing not to be in excess of the average area shall be taken into account for the purposes of paragraph (3)(a).'

That sub-section was subsequently repealed. As a result the applicant again qualified for the full pension having satisfied the other sub-sections. The issue for the Tribunal was whether his pension was properly cancelled pursuant to sub-s.(4) prior to its restoration.

Did the two blocks exceed the average?

The total area of land did not exceed 2 hectares. The only issue was whether the land adjacent to the applicant's house exceeded the average for other houses in the same locality.

The Tribunal required the DSS to demonstrate that the determination under sub-s.(4) was based upon adequate evidence [*McDonald* (1984) 18 SSR 188]. The DSS called no evidence at the hearing and relied on two valuations supplied by the Taxation Office. Those valuations

deduced a value for the applicant's land based upon sale prices of comparable land in the area. The valuations contained no description of the area in general and no statement that the land adjacent to the applicant's land substantially exceeds the average area of land adjacent to other houses in the area. There was no evidence to support the case for cancellation.

The applicant on the other hand made a statement at the hearing that there were several houses near his which stood on large blocks of land. The AAT accepted the truth of his statement which the DSS had no means of contradicting.

Formal decision

The AAT set aside the decision and remitted the decision to the DSS with the direction that payment of the applicant's pension be made on the basis that at all relevant times the private land adjacent to his dwelling did not exceed substantially the average area of private land adjacent to other dwelling houses in the same locality.

Assets test: date of deprivation

WOLFGANG and SECRETARY TO DSS
(No. N85/352)

Decided: 7 July 1986 by C. J. Bannon

Mr Wolfgang had applied for a pension but apparently was refused

after the application of the assets test. In particular it had been decided that he had deprived himself of property in order to qualify for the pension and so s.6AC operated which allowed the DSS to include that property for the purposes of the assets test. [The

legislation is set out in *Gibbons*, this issue.] He applied to the AAT for review of that decision.

The facts

The applicant decided to sell his dairy farming, cattle and wheat growing