restitution payments came within the first part of the definition of income relating to 'moneys' etc.

Formal decision

The AAT affirmed the decision under review, refusing to adjust Krampel's pension rate for the period prior to 8 March 1985.

[D.M.]

Compensation payment: preclusion

LATOUR and SECRETARY TO DSS
(No. 4749)

Decided: 28 September 1988 by H.E. Hallowes.

In July 1987, Serge Latour settled a claim for damages, arising out of personal injury, for the sum of $50 000, of which $45 000 represented compensation for Latour's incapacity for work. In September 1987, Latour lodged a claim for sickness benefit, which claim was rejected by the DSS on the basis that he was precluded from receiving 'pension' (including sickness benefit) until June 1989, through the operation of s.153(1) of the *Social Security Act*.

'Special circumstances'?

Latour asked the AAT to review that decision, on the basis that there were 'special circumstances' which would justify the exercise of the discretion, in s.156 of the *Social Security Act*, to 'treat the whole or a part of a payment by way of compensation ... as not having been made'.

It appeared that Latour had become aware of the intention of the DSS to preclude him from receiving sickness benefit by September 1987; and that, despite this, he had not made any attempt to abandon an overseas trip (of some 5 weeks), paid for out of the damages settlement.

Latour and his wife now had no cash resources and their only income was $56 a week from family allowance and family allowance supplement (they had two young children). Latour and his wife were unable to meet their rental commitments and owed the Ministry of Housing $2000.

The AAT said that Latour had acted irresponsibly in spending his damages payment. However, the Tribunal decided that the situation of Latour's 2 children supported an exercise of the s.156 discretion, so as to ensure that he would become eligible for sickness benefit from 5 October 1988:

> 'I am satisfied that it is inappropriate that his two children should be left with no means of support. The degree of hardship this family now faces has a greater influence on me than the reasons out of which that hardship arose. It is Mr Latour's responsibility for his two young children which I consider the circumstance which is special within the provisions of s.156 of the Act. It is appropriate that these children remain in the custody, care and control of the applicant's wife and that he provide for them. I would not want these children taken into care because of lack of food in the household when their parents are capable of looking after them. It is for this reason that the decision under review is set aside with an appropriate direction.'

(Reasons, para.12)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that the discretion under s.156 of the *Social Security Act* should be exercised so as to treat that amount of compensation which was attributable to the period commencing on 5 October 1988 as not having been paid.

[P.H.]

NATIS and SECRETARY TO DSS
(No. 4850)

Decided: 22 December 1988 by H.E. Hallowes.

Chris Natis claimed an invalid pension in September 1987. He advised the DSS that he had settled his worker's compensation claim for $80 000 in June 1987. The DSS then decided that Natis was precluded from receiving invalid pension until 26 October 1989. After Natis appealed against that decision to the SSAT, a review officer of the DSS varied the decision and extended the preclusion period to 24 August 1990. The SSAT recommended that that decision be upheld, a recommendation which the DSS accepted. Natis then asked the AAT to review that decision.

The legislation

At the time of the DSS decision, s.153(1) of the *Socal Security Act* provided that a pension was not payable to a person 'during the lump sum period' [a period which was calculated under s.152(2)(e)] where that person, while 'receiving a pension', received a lump sum compensation payment. From 16 December 1987, s.153(1) was amended so that it precluded payment of pension during a lump sum payment period where a person or the person's spouse 'while qualified to receive a pension', received lump sum compensation payment. That amendment took effect from 16 December 1987.

The Social Security Amendment Act 1988 amended s.153(1), with effect from 1 May 1987. The result of this retrospective amendment was that, between 1 May and 16 December 1987, s.153(1) precluded payment of pension where a 'person who is receiving a pension receives or has received (whether before or after becoming so qualified) ... a lump sum payment by way of compensation'; and, from 16 December 1987, s.153(1) precluded payment of pension 'where a person or the spouse of a person who is qualified to receive a pension receives or has received (whether before or after becoming so qualified) ... a lump sum payment by way of compensation'. Section 156 of the Act gives the Secretary 'a discretion to treat the whole or part of a lump sum compensation payment as not having been made ... if the Secretary considers it appropriate to do so in the special circumstances of the case'.

Preclusion

The initial calculations of the preclusion period had been based on a DSS policy to treat 70% of any compensation settlement as relating to incapacity for work. However, the second calculation of the preclusion period had abandoned that policy in the light of the fact that the Victorian Accident Compensation Tribunal had endorsed Natis' settlement with an order that Natis be paid '$75 000 in full settlement of all other forms of future compensation in respect of all injuries arising out of or in the course of [his] employment'.

The Tribunal referred to the earlier AAT decision in *Krzywak* (1988) 45 *SSR* 580, and adopted the interpretation of s.153(1), as amended by the 1988 Amendment Act, from that decision. It followed, the AAT said, that if Natis was qualified for invalid pension, he was precluded from receiving that pension until the end of the preclusion period. The preclusion period had to be calculated on the basis that the $75 000 referred to in the order of the Accident Compensation Tribunal was the 'compensation part of [the lump sum]

payment by way of compensation'. Because the award had been made before 9 February 1988, the 50% formula introduced into the *Social Security Act* from that date was not applicable.

Discretion to ignore part of the award

The AAT noted that, in *Krzywak* (above), the Tribunal had considered whether the applicant was subject to financial hardship, the effect of the legislative changes, incorrect legal advice given to the applicant and the applicant's ill health. In the present case, Natis had spent a large proportion of his compensation payment on a trip to Europe, furniture, a new motor vehicle, and gifts to his two daughters. He owned his home and another property, which returned income of $90 per week. Neither of these properties was encumbered. The AAT said that, given the value of his assets, Natis did not fall into the category of a person 'suffering severe financial hardship'. The AAT noted that, because Natis had received his compensation payment before the introduction of the 50% formula in February 1988, 'the legislation has operated harshly on Mr Natis': Reasons, para.19. The AAT also noted that Natis had agreed to accept the settlement on 26 June 1987 and that, according to Natis, his solicitors had not advised him as to the effects of the Act on his position. The AAT said that at that date the legislation did not apply to Natis and it was not until the 1988 amendment (which took effect from 1 May 1987) that Natis was caught by the legislation. The AAT said, 'his solicitors were therefore not in a position to advise him of the future amendments at that time': Reasons, para.20.

The AAT noted that Natis' medical condition did affect his capacity for work in that he was unemployable; and then expressed the following conclusion:

> '22. Having considered all the evidence before me, I am satisfied that Mr Natis' circumstances are not "special" so as to render it appropriate that I exercise the discretion in s.156 of the Act. The matters referred to [above] do not justify making an exception in this case. For these reasons the decision under review will be affirmed.'

Formal decision

The AAT affirmed the decision under review.

[P.H.]

HAJAR and SECRETARY TO DSS (No. 4859)

Decided: 23 December 1988 by B.J. McMahon.

Jalal Hajar was forced to give up work as a result of an industrial injury in February 1986. He received regular payments of worker's compensation until 12 December 1987, when he received a lump sum payment of compensation of $50 000.

On 19 November 1987 Hajar applied to the DSS for unemployment benefit. The DSS decided that, because Hajar had received a lump sum payment of compensation, he was precluded from receiving unemployment benefit by the operation of s.153(1) of the *Social Security Act*.

Hajar asked the AAT to review that decision.

The legislation

The legislation relevant to this review, ss. 152, 153 and 156 of the *Social Security Act*, is set out in the report of *Natis* (in this issue of the *Reporter*). The chronology of the various admendments set out in that report is directly applicable to the facts of the present matter.

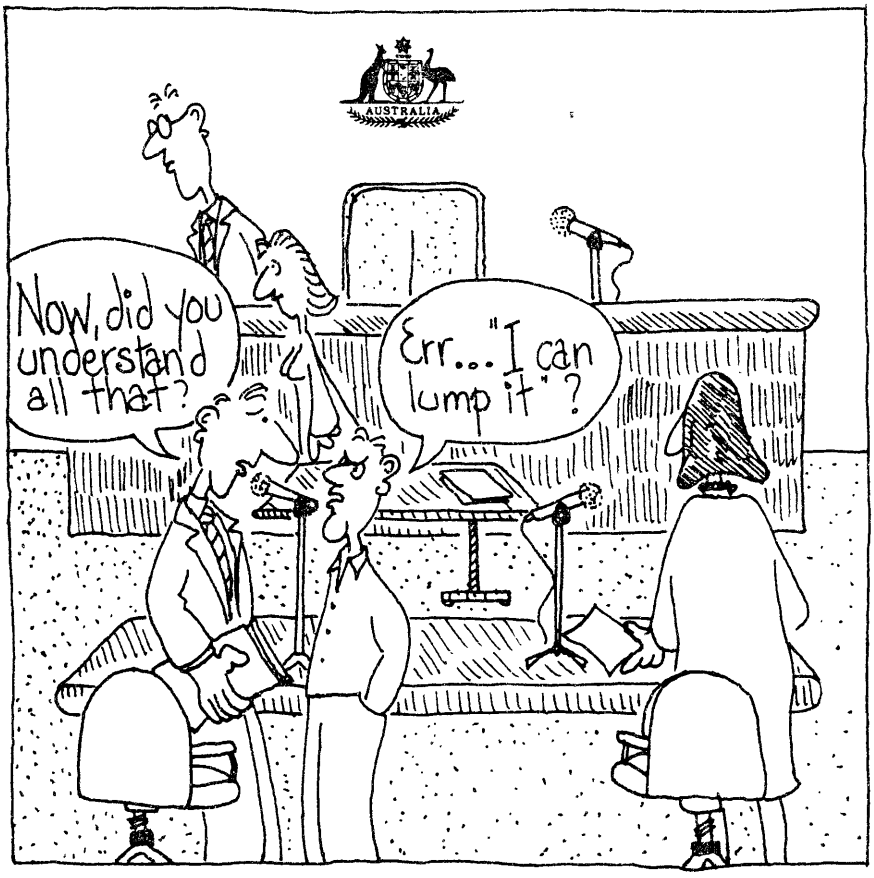
Preclusion

The initial calculation of the preclusion period made by the DSS had treated the whole of the $50 000 compensation payment as relating to incapacity for work. However, following representations made by Hajar's solicitors, the DSS decided to apply its usual policy of treating 70% of the compensation payment as 'in respect of incapacity for work' and calculating the preclusion period on that basis.

The AAT said that the first question to consider was whether Hajar was caught by any of the versions of s.153. The Tribunal referred to the decisions in *Jovanovic* (1988) 45 *SSR* 581 (where the AAT had used s.15AB of the *Acts Interpretation Act* to resolve some of the uncertainties produced by the May 1988 amendments to s.153), and *Krzywak* (1988) 45 *SSR* 580 (where the Tribunal had decided that s.153, as it stood after 16 December 1987, was sufficient to catch a person who received a lump sum compensation payment before 16 December 1987).

The AAT noted that *Krzywak* had been followed in *Grima* (1988) 46 *SSR* 598 and *Cristallo* (1988) 46 *SSR* 597. The AAT said that the result achieved in *Krzywak* was 'consistent with the purposive approach to construction favoured increasingly by the High Court'; and noted that such an approach to the interpretation of legislation was emphasised by s.15AA of the *Acts Interpretation Act*, which declared that-

> 'In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act



(whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.'

The AAT said that the purpose or object underlying the amendments to s.153 had been described by the Tribunal in *Jovanovic*: its purpose was to 'clarify that [s.153(1)] may apply whether compensation was received before or after the date on which the person became qualified to receive a pension'.

Discretion to ignore part of award

The AAT then turned to the question whether there were special circumstances in this case which would justify the exercise of the discretion in s.156. Hajar was separated from his wife and children (who were receiving supporting parent's benefit). Although he had spent most of the compensation payment he was the joint owner (with his wife) of a house with the value of $175 000. It was, the AAT said, 'inequitable for the applicant to claim financial hardship when he owns such a valuable asset and does nothing to realise on it'. The Tribunal pointed out that although it might be impractical for Hajar to borrow money on the house there was no reason why he should not take proceedings in the Family Court for a property settlement, which would lead to the house being sold and the proceedings divided between himself and his wife.

Hajar claimed that he had been poorly advised by his solicitors when he accepted the compensation settlement. He said that his solicitor had told him, at the time of the settlement, that he would remain eligible for social security payments. The AAT said that if Hajar had been misled by poor legal advice and had suffered a loss as a result, it was up to Hajar to take legal action against his solicitors, for damages for breach of contract or negligence:

'Hardship that can be resolved by actions of the complainant is not hardship at all.'

(Reasons, para 46)

In any event, the AAT said, it was clear that Hajar had continued to worsen his financial position after it became clear to him that the DSS would not pay him unemployment benefit:

'He cannot have been in doubt at that stage that he was disbursing what the Act regarded as the proper source of his support for a long time to come.'

(Reasons, para 47)

The AAT was not able to identify any other circumstances which could be regarded as special.

Formal decision

The AAT varied the decision under review by substituting for the original preclusion period the preclusion period as based on the calculations agreed between the parties.

[P.H.]

Federal Court decisions

Unemployment benefit: full-time student

HARRADINE v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 14 October 1988

by Davies J.

This was an appeal against an AAT decision, which had affirmed a DSS decision that Brendan Harradine was not eligible for unemployment benefits for a period from October to November 1987.

At the time, Harradine was enrolled as a full-time student for a university law degree. During most of the academic year, Harradine had been employed on a half-time basis as a school teacher while pursuing his university studies. It was only after he had ceased his part-time work that he applied for unemployment benefits.

The legislation

The DSS had rejected Harradine's claim because of s.136(1) of the Social Security Act which provided that benefit was 'not payable to a person ... in respect of any period during which ... the person is engaged in a course of education on a fulltime basis'.

The evidence

The evidence before the AAT was that Harradine had been enrolled in his law course since the beginning of 1985 and, by 1987, he had completed all the requirements expected of a full-time student in the first three years of a law course.

'Full-time' studies

The AAT had decided that Harradine was precluded from receiving unemployment benefit because 'he was enrolled as a full-time student' and because he was 'engaged in a full-time course of study'.

The Federal Court said that s.136(1) referred to engagement in a course of education:

'Thus, I do not read s.136(1)(a) as requiring a consideration of the hours each day which a student spends in attendance at lectures and tutorials and in study. The provision does not refer to the hours spent on study and says nothing as to engagement in part or fulltime employment or in other absence from study. The provision turns its attention to the character of the study.'

(Judgment, p.6)

The Court said that enrolment in a full-time course of education did not necessarily exclude a person from receiving a benefit:

'The question as to whether a claimant is engaged in a course of education on a full-time basis must be, I think, primarily a question of fact. The provision does not use the word "enrolled" or the term "a full-time course of education".'

(Judgment, p.7)

An error of law?

The Federal Court pointed out that, in the present case, the AAT had expressed itself rather ambiguously: but the evidence before the Tribunal had been sufficient to support a finding that Harradine had been engaged in his course of education on a fulltime basis:

'Mr Harradine had been enrolled as a full-time student in what was classified by the University as a fulltime course of study. He maintained normal progress. It accords with ordinary parlance to describe him as engaged in study on a fulltime basis. It would not seem to accord with ordinary parlance to describe him as engaged in study on a part-time basis. This was not a case where a student, because of the exigencies of his employment, proceeded through his course in a manner similar to that of a part-time student and it was not a case where the student's course was interrupted from time to time by his employment ...