

because the exercise of that discretion had not been considered by the SSAT nor by the delegate.

The Tribunal referred to a decision in *Cranswick and Repatriation Commission* (1988) 15 ALD 459, where the AAT had concluded —

'that the Tribunal did not have jurisdiction to review decisions made under completely separate sections of an Act which required different criteria and considerations when those matters were not considered by previous decision-makers, nor was it statutorily required that such sections be considered, nor was a request made by a party for such issues to be considered.'

(Reasons, para. 27).

It might well be, the AAT said, 'a preferable practice' for the s.186 discretion to be considered whenever an overpayment was raised —

'but where this has not been done, I cannot see how this Tribunal has jurisdiction to review what has never been decided. A different conclusion may have been reached if there had been an application made for the exercise of that discretion, and the relevant decision-makers had neglected or failed to consider such application. For these reasons, I find it is not within the jurisdiction of this Tribunal to consider the provisions of s.186 of the Act.'

(Reasons, para. 28).

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Compensation award: recovery of sickness benefit

SUTERS and SECRETARY TO DSS (No. 4999)

Decided: 7 February 1989
by E.T. Perignon.

Graham Suters suffered an industrial injury in September 1986. Between May and December 1987 he received sickness and unemployment benefits, totalling \$7677.

In December 1987 Suters settled a worker's compensation claim for \$36 290. The DSS then recovered the full amount of the sickness and unemployment benefits \$7677, direct

from the insurer of Suters' employer. When the DSS refused to waive full recovery of the sickness and unemployment benefits, Suters applied to the AAT for review.

The legislation

Section 155(1) of the *Social Security Act* authorises the DSS to recover amounts of sickness and unemployment benefit (and other payments) made to a person direct from any insurer who is liable to pay compensation to that person, where the compensation has been paid for an incapacity for work.

Section 156 gives the Secretary to the DSS a discretion to treat all or part of the compensation payment received by a person as not having been received if the Secretary considers it appropriate 'in the special circumstances of the case'.

'Special circumstances'

Suters argued that he had settled his compensation claim for \$36 290 because the DSS had led him to believe that it proposed to recover only \$3844 from him.

In August 1987 the DSS had advised Suters that, if he received a compensation award, 'some or all of the sickness benefit paid to you might have to be paid to this Department'.

In response to enquiries from Suters' solicitors, the DSS had told those solicitors, on 2 November 1987, that the sum of \$3844 had been paid to Suters between June and September 1987, but that the amount to be repaid to the DSS could only be calculated when the full details of any settlement were known. The compensation recovery section of the DSS had written this letter in the belief that Suters' compensation claim had been settled in September. However, Suters had told the relevant regional office of the DSS that his claim was scheduled for hearing in late November.

Suters claimed that the two letters from the DSS (one warning him that he would have to repay sickness benefits, and the other indicating that he had received \$3844 from the Department) had led him to believe that this was the total amount which the Department would seek to recover from his compensation award.

The AAT decided that Suters and his solicitors had been misled by the correspondence from the DSS; and that Suters would not have settled his worker's compensation claim for \$36 290 if he had known that the DSS would insist on repayment of \$7677.

However, the AAT thought that there had been some neglect on the part of Suters or his solicitors in not making an up-to-date enquiry of the DSS as to the amount which it proposed to recover immediately before settling the matter in December 1987.

Because of these considerations, the Tribunal decided that the discretion in s.156 should be exercised so as to allow for a refund to Suters, from the recovered sickness and unemployment benefits, of \$2000, thereby permitting the DSS to recover \$5677.

Formal decision

The AAT set aside the decision under review and substituted a decision that so much of the compensation payment should be treated as not having been made as would result in the repayment to Suters of \$2000.

[P.H.]

Compensation award: discretion to disregard

MINDA and SECRETARY TO DSS (No. 4969)

Decided: 10 March 1989
by B.M. Forrest.

The AAT affirmed a DSS decision that the applicant, Aurel Minda, was precluded from receiving pension from September 1987 to January 1989 because of a lump sum award of compensation made in his favour in September 1987.

On that date, Minda had settled his common law and accident compensation claims for \$47 500, of which \$27 500 had been paid as 'future compensation' for Minda's work-caused injuries. The DSS had calculated the preclusion on the basis that only \$27 500 was a payment in respect of incapacity for work within s.152(2) of the *Social Security Act*.

'Special circumstances'

This application for review focused on s.156 which allowed the Secretary to treat all or part of a compensation payment as not having been made if the Secretary thought this was appropriate 'in the special circumstances of the case'.