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SOCIAL SECURITY

Opinion

Number 50

This issue of the Reporter represents a modest achievement — 50 issues in 9 years. Our first issue was published in June 1981, and we've managed to come out every 2 months since then. The credit for that goes to our writing and production team - listed below. Meanwhile, the AAT and Federal Court continue to pour out social security decisions; and the Government continues to develop legislative and administrative changes — so there is no prospect of the Reporter running out of work. Here's to the next 50 issues!

This issue carries the usual fascinating range of decisions. For example . . .

Incapacity and impairment

Two decisions noted in this issue throw a bright light on the relationship between 'impairment' and 'incapacity for work' — referred to in s.27(b) of the *Social Security Act*. In *Zanos* (p.658), the AAT was critical of the DSS procedures for calculating a level of impairment and matching that to incapacity. The procedures, the AAT said, were contrary to the Act, internally inconsistent and showed 'considerable confusion of mind'.

That critical approach follows the general ideas developed in *Kadir* (1989) 49 *SSR* 638; and is reinforced by *Sumanovich* (p.657 of this issue).

Compensation and preclusion — a tight regime

Over the past 12 months, AAT decisions have regularly applied the retrospective amendment to s.153(1) of the *Social Security Act* (the preclusion provision) made in June 1988, despite the crude drafting of the amendment, reinforcing the Government's policy to prevent 'double-dipping' into compensation and social security funds. Now, in *McKenzie* (p.663 of this *Reporter*), the Federal Court has endorsed the AAT's approach and declared that the June 1988 amendments to s.153(1) were effective to 'catch' any compensation payment made after 1 May 1987.

Over the same period, the AAT has confirmed the generally conservative approach of the DSS to the discretionary power (conferred by s.156), further reinforcing the Government's policy. Examples of this conservative approach in this Reporter are *Bolton* (p.650), *Gibala* (p.651) and *Stevens* (p.651). *Bolton* contains a thorough review of the range of factors which could amount to 'special circumstances' — financial hardship; the retrospective legislative change to the Act; incorrect legal advice; and ill health.

Gibala raised an interesting rationalisation which could be used to deny 'special circumstances' where a person settled her or his compensation claim at a 'discount' in ignorance of the preclusion rule. The AAT suggested that, in such a case, the person would not suffer, because the lower the settlement figure, the shorter the preclusion period: the well-advised person who insisted on a higher compensation settlement (to see them through the preclusion period) would have to serve a longer preclusion. This the AAT described as a mechanism, provided by the Social Security Act, for 'a self-adjusting preclusion period'.

P.H.

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