

# Administrative Appeals Tribunal decisions

## Compensation

SECRETARY TO DSS and BOLTON  
(No. 5238)

**Decided:** 7 July 1989 by R.K. Todd.

Roy Bolton recovered a lump sum compensation in September 1987 and the DSS then decided that he was precluded from receiving pension until 1992. On appeal, the SSAT *set aside* that decision.

The DSS then appealed to the AAT under s.207 of the *Social Security Act*.

### The facts

Bolton suffered a work-related injury in June 1984. He received intermittent payments of workers' compensation, including payments for lost wages and medical expenses, until September 1987 but failed to claim all recoverable expenses and incurred substantial living expenses.

In September 1987 he recovered \$210 000 compensation. The DSS accepted Bolton's estimate of \$102 000 as his economic loss. He told DSS he had spent his lump sum on solicitors' costs and debts, the purchase of a property at H Springs and improvements to it, and a motor vehicle. He also owned a further property at L, the market value of which was \$25 000.

Bolton told the AAT that at the time of purchase of the H Springs property he had intended to become self-sufficient. Subsequently his health deteriorated with heart trouble and tuberculosis. He applied for an invalid pension in March 1988. He was advised that his lump sum precluded payment of pension until January 1992. He had not been advised by his solicitors that this was likely to happen.

### The legislation

Sections 152, 153(1) and 156 of the *Social Security Act* were considered by the Tribunal.

The AAT noted that s.153(1), as amended by the *Social Security Amendment Act* 1988 (with retrospective effect) covered Bolton's receipt of compensation. (In its original form, at the time when Bolton received compensation, he would not have been covered.)

The AAT noted that the compensation had been paid before 9

February 1988 so the expression 'lump sum payment by way of compensation' meant, according to s.152(2)(c)(ii), 'so much of the lump sum as is, in the opinion of the Secretary, in respect of an incapacity for work' — the economic loss component. This was correctly calculated under s.153(2)(e) to give a preclusion date ending in January 1992.

### 'Special circumstances'

The DSS appealed to the AAT on the grounds that the SSAT had erred in determining that deteriorating health constituted 'special circumstances' and that the preclusion period should be reduced by 75%. The SSAT found 'special circumstances' had existed in the dramatic change in Bolton's health which had not been reasonably foreseeable by him at the time he purchased the H Springs property.

The AAT adopted the guidelines set out in *Krzywak* (1988) 45 SSR 580 under the headings of financial hardship; legislative changes; incorrect legal advice; and ill health; and considered each separately.

**Financial hardship:** Financial hardship alone is not sufficient, it must be exceptional. As Bolton owned a further property at L, financial hardship was not considered to be a factor so significant as to be crucial.

**Legislative change:** The AAT discussed the changes to s.153 as amended by the *Social Security and Veterans' Entitlements Amendment Act* 1987 and the *Social Security Amendment Act* 1988. Although retrospective changes affected Bolton, this was not unusual or uncommon. In *Krzywak* the change was a relevant factor because the DSS had wrongly denied pension by straining the words 'who is receiving' in the original s.153(1) to mean 'qualified to receive', which was the phrase used by the amendments. Here, however, the application for a pension was made in March 1988, and the legislation had been properly applied by the DSS.

**Incorrect legal advice:** The AAT considered this to be largely irrelevant as it was generally capable of redress by the client against a negligent solicitor. The cases of *Venables* (1988) 43 SSR 548, *Zito* (1987) 42 SSR 533 and *Jerkin* (1988) 42 SSR 533 were accepted as authorities for this view.

In *Krzywak*, however, it was said the position was not so clear and incorrect legal advice was a matter which should

be taken into account. In the present case the pay-out was made at a time when the opening words of s.153(2) stated 'where a person who is receiving a pension . . .'; and, if Mr Bolton had been correctly advised as to his potential preclusion he may not have gone ahead with the purchase and improvement of the H Springs property nor the purchase of the L property. The Tribunal concluded:

'Overall, this factor is not persuasive or determinative and the best view is that the matter is one, if at all, as between solicitor and client.'

(Reasons, para. 24)

**Ill health:** The Tribunal considered this to be the prominent feature of the present case. Bolton's health had deteriorated considerably since his accident and his award.

The Tribunal distinguished *Walsh*, where the applicant's deteriorating health was an exacerbation of his work-related injury. In the present case the subsequent illness was not work-related. The DSS submission was that Bolton was 85% incapacitated for work at the time he received his compensation pay-out in November 1987 and could never have run his farm in the way he wanted, so the SSAT finding of 'special circumstances' arising from his new condition was in error.

The AAT said this was —

'possibly correct, although a rather harsh conclusion for the respondent. However, given the existence of the \$25 000 realisable property at L, the consequences for him would not be so drastic.'

(Reasons, para. 24)

### Conclusion

The AAT concluded:

'Ultimately it is not just a matter of simply taking each of the factors discussed above separately, important as it is to do so. It is essential to keep an overview of the whole matter. If it were simply a matter of feeling sympathy for a battling working man who has had more than his share of trouble, I would have no difficulty in finding for the respondent in this case. But given in particular the extent of his assets, especially the L property, I cannot do so. No special circumstances exist here to justify exercising the discretion given by s.156 of the Act.'

(Reasons, para. 25)

### Formal decision

The AAT set aside the decision of the SSAT and decided that Bolton was precluded from receiving invalid pension until 20 January 1992.

[B.W.]