Compensation award: discretion to disregard

SECRETARY TO DSS and GIBALA
(No. 5077)

Decided: 12 May 1989 by B.J. McMahon.

John Gibala had been injured in an industrial accident. He began to receive weekly payments of workers' compensation and, in April 1988, he was granted an invalid pension by the DSS.

Although Gibala told the DSS that he was receiving weekly compensation payments, the DSS did not deduct the value of those payments directly from Gibala's invalid pension entitlements (as required by s.153(1)(c) of the *Social Security Act*), but took the weekly compensation payments into account as if they were income, under the pension income test. This led to Gibala receiving a considerably higher rate of invalid pension than he should have.

In August 1988, Gibala told the DSS that he had settled a workers' compensation claim and expected to receive a lump sum in a few weeks, and that his weekly payments had ceased. The DSS then adjusted Gibala's invalid pension to the full rate; but did not advise him that his receipt of a lump sum payment would preclude payment of invalid pension for a period.

The DSS then realised that it had overpaid Gibala his invalid pension and proceeded to recover $3238 direct from the insurer involved. Following Gibala's receipt of his compensation award (of some $52 583), the DSS cancelled Gibala's invalid pension and decided that he was precluded from receiving a pension until March 1990.

On review, the SSAT decided that the DSS should not recover the sum of $3238 wrongly paid to Gibala, because that payment had been the responsibility of the Department. The SSAT also decided that the preclusion period should be set aside.

The DSS appealed to the AAT against the two SSAT decisions; but at the hearing accepted the first decision as correct.

The legislation

The decision made by the DSS that Gibala was precluded from receiving invalid pension until March 1990 had been made under s.153(1) of the *Social Security Act*, which requires such a preclusion where a person recovers a lump sum payment by way of compensation.

The AAT said that the only basis on which that preclusion period could be set aside or varied would be under s.156 of the Act, which allows a lump sum payment to be treated as not having been made where this was appropriate 'in the special circumstances of the case'.

'Special circumstances'

The AAT said that Gibala had been 'open and frank' with the DSS throughout his dealings with the Department, and had been misled by the conduct of the DSS. In particular, the restoration by the DSS of Gibala's invalid pension to its full rate after he had told the DSS that he expected to receive a lump sum award of compensation, 'indicated to him, and probably quite reasonably in the absence of any other information, that he was to have an on-going full pension': Reasons, para. 24.

On the other hand, Gibala was not likely to suffer financial hardship during the preclusion period and there was a need to avoid 'double dipping' into, first, the insurance fund and, then, the public purse. The AAT also referred to the way in which s.153(1), and its associated sections, could operate so as to take account of 'misleading advice' cases like the present:

> '[T]he very nature of the legislative scheme provides for a mechanism of a self-adjusting preclusion period. Mr. Gibala made much of the fact that he was not made aware of his exposure to possible preclusion liability and that otherwise, he would have held out for a higher settlement figure. The self-adjusting nature of the period, which is fixed by reference to the amount of compensation and a formula based on average weekly earnings, means that the higher the settlement, the longer the period. Conversely, if he settled for a lower amount by virtue of his ignorance then he has, at the same time, achieved a shorter preclusion period.'

(Reasons, para. 21)

On balance, the AAT said, this was a case where there should be some compromise; and reducing the preclusion period by 25% would be an appropriate departure 'from the paramount consideration of protecting public moneys': Reasons, para. 30.

Formal decision

The AAT affirmed the SSAT decision to set aside recovery of the sum of $3238 overpaid to Gibala.

The AAT varied the SSAT decision to set aside the preclusion period and substituted a new preclusion period of 63 weeks, calculated from August 1988.

[P.H.]

Compensation payment: preclusion

STEVENS and SECRETARY TO DSS
(No. 5147)

Decided: 13 June 1989 by K.J. Lynch.

Albert Stevens sought review of a DSS decision that he was precluded from receiving invalid pension and sickness benefit by reason of his receipt of a lump sum payment of compensation of $17 140.

The facts

Stevens suffered from industrial dermatitis, for which he received weekly payments from the Queensland Workers' Compensation Board.

On 18 November 1987, he received a lump sum payment of $17 140. At that time neither Stevens nor his spouse was in receipt of invalid pension or sickness benefit.

On 2 December 1987 Stevens claimed invalid pension and sickness benefit. The invalid pension claim was accepted but the DSS decided that payment was precluded under s.153(1) of the *Social Security Act*, until July 1988.

Stevens argued that the preclusion period was based on an incorrect calculation and an incorrect understanding of the Act. He claimed that the sum of $17 140 represented compensation for factors other than economic loss.

The decision

The AAT said that, although Stevens was not in receipt of pension or benefit when he received his lump sum, the decision in *Krzywak* (1988) 45 *SSR* 580 had made it clear that subsequent legislation given retrospective operation introduced the preclusion requirements. The amendments were made by the *Social Security Amendment Act* 1988 and took effect from 1 May 1987. Notwithstanding the advice Stevens may have received

when he settled his compensation claim, s.153(1) meant he was not entitled to have the part of the lump sum attributable to his incapacity for work disregarded.

'Special circumstances'

The AAT took *Krzywak* and *Walsh* into account in considering whether legislative change had caused hardship. It said that if the present legislation had been in force when Stevens accepted the lump sum payment, he might not have done so because the new legislation offered him little or no advantage.

On the other hand, by accepting the lump sum, the operation of s.152(2)(e) accelerated the time when Stevens became eligible for invalid pension. He would become eligible for that pension much earlier than if weekly payments of workers' compensation had continued. If he continued to budget on the same amount as he would have spent had he been in receipt of weekly workers' compensation, he could save some of the lump sum by the time he became qualified for pension. The AAT was thus unable to find that a 'special circumstance' existed by reason of the Act itself.

Future medical expenses

The AAT examined the *Workers' Compensation Act* 1916 (Qld) and said that, although the uncertainties concerning the nature of compensation settlements in other States did not occur under Queensland legislation, the matters considered in *Cocks* (1989) 48 *SSR* 622 were relevant. While in this case there was no evidence as to future probable medical expenses, the AAT concluded it was proper, under s.156, to deduct $300 from the lump sum figure for future medical expenses.

Formal decision

The AAT varied the decision under review by remitting the matter to the Secretary with a direction to disregard $300 of the lump sum payment.

[B.W.]

Preclusion: looking behind a compensation award

VUCKOVIC and SECRETARY TO DSS

(No. 5112)

Decided: 26 May 1989 by R.A. Balmford.

Andrija Vuckovic was injured in an industrial accident in July 1985. In September 1987, the Victorian Accident Compensation Tribunal made a consent award of compensation in his favour under the *Accident Compensation Act* 1985 (Vic). Under that award, Vuckovic was paid $25 000 for future compensation for all injuries arising out of his employment.

In October 1987, Vuckovic claimed an invalid pension for himself and a wife's pension for his wife. The DSS decided that payment of these pensions was precluded for 55 weeks, under s.153(1) of the *Social Security Act*. Following an unsuccessful appeal to the SSAT, Mr and Mrs Vuckovic asked the AAT to review the DSS decision.

The legislation

Section 153(1) of the *Social Security Act* provides that, where a person received a lump sum payment by way of compensation, then pension was not payable to the person or person's spouse 'during the lump sum payment period'.

According to s.152(2)(e), a 'lump sum payment period' was to be calculated by reference to 'the compensation part of the lump sum payment'.

According to s.152(2)(c) 'the compensation part of the lump sum payment' was —

> 'so much of the lump sum payment as is, in the opinion of the Secretary, in respect of incapacity for work'.

Elements in the compensation award

In the present case, the DSS had treated all of the compensation payment made to Vuckovic as 'the compensation part of the lump sum payment'. However, Vuckovic argued that a part of that payment had been intended to provide compensation, not for incapacity for work but for pain, suffering and loss of enjoyment of life - that is, as compensation for general damages which Vuckovic might have recovered in common law proceedings.

This submission was supported by a letter, written by Vuckovic's legal counsel. According to that letter, it had been agreed in negotiations with Vuckovic's employer that 'a figure somewhere in the order of $10 000 was not unreasonable to allow in respect of pain and suffering and loss of enjoyment of life . . . in order to avoid the cost and uncertainty of common law proceedings.'

However, the AAT pointed out that the *Accident Compensation Act* 1985 (Vic.) only allowed the Accident Compensation Tribunal to make payments for a worker's death, for total or partial incapacity for work, for injuries set out in a Table in s.98 of that Act and for medical expenses. There was no provision in the Act for the Tribunal to award compensation for pain and suffering or loss of enjoyment of life.

Moreover, in the present case there had been clear evidence available at the time of the consent award by the Accident Compensation Tribunal that Vuckovic was permanently incapacitated for work. The AAT concluded:

> 'On that basis I am satisfied that, despite the evidence contained in the letter [from counsel] there is no error apparent which would enable me to ignore the limited jurisdiction of the Accident Compensation Tribunal so as to assume that it is to be taken as having made an award which it has no power to make in respect of a matter beyond its jurisdiction. . . . Accordingly I accept the decision of the Secretary that the whole amount of the compensation award is, for the purposes of [s.]152(2)(c)(ii), "in respect of an incapacity for work".'

(Reasons, para. 14)

The AAT also found that there were no 'special circumstances' to support an exercise of the s.156 discretion to disregard all or part of the compensation payment received by Vuckovic.

Formal decision

The AAT affirmed the decision under review.

[P.H.]