

The 'special circumstances' which the Tribunal found included the substantial delay on the part of Raffai's solicitors in settling his compensation claims — if the claims had been settled promptly, Raffai would not have been affected by the preclusion rule introduced from May 1987.

The Tribunal also found that the conflicting advice given to Raffai, by his solicitors and a DSS officer, and an improper recovery from Raffai of moneys which were not recoverable from him, contributed to the 'special circumstances' in this case.

Taking into account those circumstances, the AAT decided to disregard one-half of each of the 2 lump sum compensation payments.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with directions that the 2 compensation payments should not be aggregated and that one-half of each of the 2 payments should be disregarded in calculating the preclusion periods (which would run concurrently).

[P.H.]



SECRETARY TO DSS and PAZIOS (No. 5206)

Decided: 3 July 1989 by W.J.F. Purcell.

In June 1988, Peter Pazios received a lump sum compensation payment of \$77 500. The DSS then calculated the period during which Pazios was precluded from receiving pension payments by taking half of that compensation award, namely \$38 750.

Pazios appealed to the SSAT, which varied the DSS decision by deducting \$10 000 from the \$77 500 before calculating the preclusion period.

The DSS applied to the AAT for review of the SSAT decision.

The legislation

Section 153(1) of the *Social Security Act* provides that a person who has received a lump sum compensation payment is precluded from receiving pension 'during the lump sum payment period'.

The 'lump sum payment period' is calculated under s.152(2) by taking 50% of any lump sum compensation payment made on or after 9 February 1988.

The *Workers' Compensation Act* 1971 (SA) provides for payment of compensation for incapacity for work and, in s.70, for the loss of use of various parts of the body.

Could \$10 000 be deducted?

In Pazios' case the compensation award made in his favour had included \$10 000 under s.70 of the *Workers' Compensation Act*, for the loss of the use of his back and neck. The SSAT had decided that this amount should be deducted from his compensation payment before taking 50% of that compensation payment as the basis for the calculation of the preclusion period in accordance with s.152(2) of the *Social Security Act*. The SSAT said that this deduction was supported by s.156 of the *Social Security Act*, which permits all or part of a compensation payment to be disregarded in 'special circumstances'.

The AAT disagreed with the approach adopted by the SSAT:

'13. I consider that it was not open to the SSAT to reduce the compensation part of the lump sum by deducting the s.70 payment, in a purported exercise of discretion under s.156 of the Act. The current legislation provides specifically for calculation of the compensation part of the lump sum payment by way of formula. Once it is established that a person has received a lump sum payment (after 9 February 1988) the compensation part must be assessed at 50% of the lump sum.'

Formal decision

The AAT set aside the decision under review and affirmed the decision of the Secretary.



Compensation award: discretion to disregard

YOUSSEF and SECRETARY TO DSS (No. 5170)

Decided: 22 June 1989 by J.A. Kiosoglous.

The AAT affirmed a DSS decision to recover \$1933 paid to Youssef by way of sickness benefit, following his receipt of a compensation payment.

The DSS had refused to exercise the discretion, conferred by s.115E of the

Social Security Act, to disregard the compensation payment received by Youssef.

In support of his claim that there were 'special circumstances' which would support the exercise of the s.115E discretion, Youssef told the Tribunal that he was 'in dire financial straits'. The AAT accepted this, but noted that Youssef had lent \$900 to his sister and spent \$500 on a wedding present for his nephew:

'Thus it appears to the Tribunal that the applicant's financial distress has been contributed to quite considerably by these voluntary actions of the applicant himself.'

(Reasons, para. 8)

The AAT concluded with the following comments:

'The only ground on which the applicant relies in his application for the discretion to be exercised in his favour is that of financial hardship which, as the authorities made quite clear, does not of itself establish special circumstances, distressing though it undoubtedly is. To adopt the words of *Re Ivovic* (1981) 3 125 the Tribunal sees no reason "within the scope and object of the Act why the applicant should be allowed to retain the double advantage of sickness benefit and damages in respect of the same period of incapacity".'

(Reasons, para.10)

[P.H.]



MICHOR and SECRETARY TO DSS

(No. 5180)

Decided: 23 June 1989 by P.M. Roach.

The AAT affirmed a DSS decision that Michor was precluded from receiving pension for 99 weeks, following his receipt of a lump sum compensation award.

The DSS had refused to exercise the s.156 discretion to disregard all or part of the compensation award because of what Michor claimed were 'special circumstances'.

The AAT agreed that there were not, in the present case, 'special circumstances' within s.156 to justify an exercise of that discretion. The fact that Michor was suffering from a 'crippling disability' was not special because this was the circumstance which made him eligible for invalid pension:

'It is not a circumstance so "special" as to confer on the applicant entitlements greater than others similarly qualified by such disabilities. The second consideration which

creates difficulties for the applicant in the short term is that he has applied the bulk of the compensation moneys in the purchase of a home to provide long-term benefits to his family and himself. That was a prudent act which has no doubt created short-term difficulties and, hopefully, will confer long-term benefits. But it does not give rise to any "special circumstances" such as would warrant exceptional treatment for the applicant.'

(Reasons, para. 8)

[P.H.]



MOORE and SECRETARY TO DSS (No. 5239)

Decided: 12 July 1989 by
W.J.F. Purcell, B.C. Lock, and
J.T.B. Linn.

The AAT *affirmed* an SSAT decision, which had in turn affirmed a DSS decision that Francis Moore and his wife were precluded from receiving pension for 233 weeks, following his receipt of a lump sum payment of compensation in July 1987.

Moore argued that the s.156 discretion, to disregard all or part of the compensation payment, should be exercised in his favour in this case. He said that the 'special circumstances' to justify an exercise of the discretion were that he and his wife had visited a DSS office, where they had been told that the compensation payment could not have any effect on his wife's eligibility for unemployment benefit.

Acting on that advice, Moore said, they had left their Housing Trust home and purchased their own home for \$70 000, spending other moneys on a holiday and various consumer durables. It appeared that they spent some \$140 000 within two months of receiving the compensation payment.

The AAT said that it was satisfied that Moore had made only a general enquiry at the DSS office — that is, an enquiry as to whether having \$150 000 in a bank account could affect eligibility for unemployment benefit. The AAT was not satisfied that Moore had been wrongly advised by a DSS officer.

Nor was the AAT satisfied that there was financial hardship in this case. Any hardship which Moore might be suffering was due to the 'dissipation' of the substantial amounts of money which he had received.

[P.H.]



Late application for review

AKSOY and SECRETARY TO DSS (No. V89/242)

Decided: 18 May 1989 by
H.E. Hallows.

Isminaz Aksoy claimed an invalid pension in January 1987. When the DSS rejected that claim, she appealed to the SSAT, which recommended that her appeal be dismissed. In October 1987, the Secretary advised Aksoy that the original decision to reject her invalid pension was affirmed.

In January 1989, Aksoy's legal representative lodged an application with the AAT for review of the Secretary's decision, together with an application for extension of time.

The Secretary then advised that it opposed the granting of any extension of time in the present case.

The legislation

Section 29(2) of the *AAT Act* fixes a time limit of 28 days for lodging an application with the AAT for review of a decision. The 28 days is to run from the date when the person is furnished with a copy of the decision and the supporting reasons.

Section 29(7) of the *AAT Act* allows the Tribunal to extend the time for lodging an application for review.

The decision

Aksoy's representative told the AAT that she had little understanding of the system for reviewing DSS decisions and had not sought legal advice until December 1988. She had come to Australia from Turkey at the age of 13 and was now aged 34. Her English was adequate for communication.

The AAT referred to the Federal Court decision in *Hunter Valley Development Pty Ltd v The Minister for Home Affairs and Environment* (1984) 58 ALR 305 and to the AAT decision in *CSIRO and Barbara* (1987) 6 AAR 300. These two decisions, the AAT said, had established that —

'the extension should not be granted unless the applicant shows an acceptable explanation of the delay and it is fair and equitable in the circumstances to extend time.'

(Reasons, para. 6)

The AAT noted that Aksoy had applied for and received supporting parent's benefit during 1984 and 1985;

that she had applied for and obtained workers' compensation; and that she felt capable of communicating without an interpreter. Despite the disadvantages which she had faced in coming to Australia at the age of 13 and her lack of educational opportunities, it was not, the AAT said, unfair to refuse to extend the time in which she could apply to the AAT for review of the decision to refuse an invalid pension:

'It is open to her to apply for an appropriate pension or benefit at any time. I am not satisfied that she has shown an acceptable explanation of the delay. There must be some finality in decision-making with appropriate safeguards for applicants. I am satisfied that it is fair and equitable in the circumstances not to extend the time for this application to be lodged.'

(Reasons, para. 9)

Formal decision

The AAT decided not to extend the time within which the applicant could lodge an application for review of the Secretary's decision of 30 September 1987.

[P.H.]



QUINN and SECRETARY TO DSS (No. W89/70)

Decided: 15 June 1989 by
G.L. McDonald.

Raylene Quinn claimed handicapped child's allowance for her son, D, in November 1981. The DSS granted the claim from December 1981.

In June 1984, Quinn claimed back payment of the allowance for the period between 1974 and 1981 but the DSS rejected that claim. In December 1985, the Secretary affirmed that decision, rejecting a recommendation from the SSAT. Quinn was advised of the Secretary's decision in December 1985 and told that she could appeal to the AAT.

In June 1988, Quinn consulted a solicitor and, 10 months later, the solicitor lodged an appeal to the AAT, together with an application for extension of time in which to lodge that appeal. The DSS opposed the application for extension of time.

The legislation

Section 29(2) of the *AAT Act* provides a time limit of 28 days for lodging an appeal to the AAT. The 28 days is to run from the date when the applicant is furnished with a copy of the decision (and the relevant reasons)