

The Tribunal accepted the Department's argument and found that the SSAT was wrong in directing that the moneys already recovered from Rowe should be refunded to him.

In view of the inadequacy of the material placed before it by the DSS, the Tribunal chose not to make any finding that 'an amount has been paid by way of benefit . . . that should not have been paid'. The Tribunal remarked that it was unclear that the Secretary had power to make such a determination.

At the time of the hearing, Rowe was not receiving or entitled to receive any pension, benefit or allowance and therefore recovery under s.246(2) was not available. The AAT decided that any recovery action should be deferred until such time as that condition of s.246(2) should be met. At that time the Secretary would need to consider whether to exercise the power of waiver under s.251(1).

[P.O'C.]

Compensation award: recovery of sickness benefits

MORGANTE and SECRETARY TO DSS

(No. 6136)

Decided: 24 August 1990 by S.A. Forgie.

Pasquale Morgante suffered a work injury in 1984 and 1985. He received worker's compensation payments until April 1985, when he was granted sickness benefit, which continued until May 1987.

In March 1987, Morgante settled a claim for a lump sum worker's compensation for \$5000, made up as follows:

- \$4000 for compensation under ss.69 and 70 of the *Workers' Compensation Act 1971* (SA);
- \$5000 for redemption of the employer's liability to pay future medical expenses; and
- \$10000 for redemption of Pilgrim's right to bring a common law action against the employer.

The DSS then decided that \$22 856 of the compensation award was a payment for the same incapacity for which Morgante had received sickness benefit; and that he should repay \$5949.40 of the benefit payments.

After an unsuccessful appeal to the SSAT, Morgante asked the AAT to review the DSS decision.

The legislation

At the time when Morgante received his sickness benefit and the compensation award was made, s.115B(3A) of the *Social Security Act* provided that a person, who received sickness benefit payments for an incapacity and also received (after June 1986) compensation payments 'in respect of that incapacity', was liable to repay part of those sickness payments to the DSS. The part to be repaid was to be calculated under s.115B(2A), (2B) and (2C).

A payment in respect of the same incapacity?

On behalf of Morgante, it was conceded that he had received sickness benefit payments and a payment of compensation. But it was argued that the compensation payments were for Morgante's 'degree of disability' rather than an incapacity for work. This argument was based on the Federal Court decision in *Siviero* (1986) 68 ALR 147.

On the other hand, the DSS relied on the AAT decision in *Cocks* (1989) 48 SSR 622, to the effect that the Tribunal could go behind the terms of the compensation award, and conclude that it had included a component for past incapacity for work. It also relied on a 'concession' made by Morgante's legal representative before the SSAT, that the compensation award may have included a component for past economic loss.

After referring to the AAT decision in *Hunt* (1989) 53 SSR 698, the Tribunal examined the available evidence. This included medical opinions, the bulk of which declared that Morgante had a continuing disability from his work injury which prevented him from returning to his former occupation.

The AAT pointed out that ss.69 and 70 of the *Workers' Compensation Act 1971* (SA) did not allow for payment in respect of past periods of incapacity. The medical evidence of Morgante's continuing disability was sufficient to support a claim under s.69 of the *Workers' Compensation Act*. There was, the AAT said, no evidence upon which it could be satisfied on the balance of probabilities that part of the compensation payment was paid for the same incapacity as that for which Morgante had received sickness benefits.

Formal decision

The AAT set aside the decision under review and decided that the sum of \$5949.40 was not recoverable from Morgante under s.115B.

[P.H.]

Compensation payment: preclusion

SECRETARY TO DSS and PILGRIM

(No. 6134)

Decided: 20 September 1990 by R.A. Balmford.

Harold Pilgrim was injured in a motor car accident in October 1985. In November 1988, he settled an action for damages for the sum of \$80 902.55, from which \$60 902.55 was deducted as a refund of payments received by Pilgrim under the *Accident Compensation Act* (Vic).

Two days after this settlement, Pilgrim applied for unemployment benefit. The DSS accepted that he was qualified for unemployment benefit; but decided that he was precluded from receiving benefit until March 1989.

On review, the SSAT set aside that decision. The DSS then applied to the AAT for review of the SSAT decision.

The legislation

Section 153(1) of the *Social Security Act* provides that where a person, qualified to receive a pension under the Act, has received a lump sum payment by way of compensation, pension is not payable to the person during the lump sum payment period.

Section 152(1) defines 'pension' to include unemployment benefits.

Section 152(2)(a) defines a payment by way of compensation as including a payment in settlement of a claim for damages, being a payment made after 1 May 1987 in whole or in part 'in respect of an incapacity for work'.

Section 152(2)(e) requires the lump sum payment period to be calculated on the basis of 'the compensation part of the lump sum payment'.

Section 152(2)(c)(i) defines the compensation part of a lump sum payment, where the payment is made in settlement of a claim on or after 9 February 1988, as 50% of the lump sum payment.

Section 156 gives the Secretary a discretion to treat the whole or a part of a lump sum payment as not having been made, 'if the Secretary considers it appropriate to do so in the special circumstances of the case'.

Payment received

The AAT decided that Pilgrim had received a payment in settlement of a claim for damages within s.152(2)(a), and this payment amounted to \$20 000.

This was the only amount 'received' by Pilgrim; and treating the balance of the damages award as received by Pilgrim would not be consistent with the purpose of the *Social Security Act*:

'The purpose of the legislative provisions . . . is surely to ensure that a person who has received a "payment by way of compensation" as defined in s.152(2) does not also receive a pension or benefit under the Act during the period, also defined in that sub-section, during which it is considered that the person should be able to use that payment for his or her support. It would not promote that purpose (see s.15AA of the *Acts Interpretation Act 1901*) to adopt an interpretation of those provisions by which an amount expressly withheld by the court, and directed to be paid elsewhere, in respect of compensation payments already paid, was deemed to form part of the "payment by way of compensation".'

(Reasons, para. 5)

Payment in respect of an incapacity for work

The AAT then turned to the question whether the \$20 000 received by Pilgrim was a payment by way of compensation as defined in s.152(2)(a) – that is, whether it was a payment in whole or in part 'in respect of an incapacity for work'.

The AAT referred to an opinion given by the barrister who had appeared for Pilgrim in the action for damages, to the effect that the payment could not have included 'any substantial component for loss of earnings in the future', but was 'one substantially for general damages for pain and suffering in the past'.

The AAT also referred to the general concession by the DSS that, 2 days after the settlement of Pilgrim's action for damages, Pilgrim had been qualified for unemployment benefit. This meant that he had been capable of undertaking work, within s.116(1)(c)(i) of the *Social Security Act* at that time.

There was no evidence, the AAT said, on which it could find that any part of the \$20 000 was a payment in respect of incapacity for work: the balance of the settlement figure, which Pilgrim had not received, had covered past incapacity for work. Any component of the \$20 000 which represented incapacity for work (a possibility allowed for by the barrister's use of the word 'substantially') was too trivial to be taken into account.

Accordingly, the \$20 000 received by Pilgrim was not a payment by way of compensation and did not 'trigger' any preclusion period under s.153(1) of the *Social Security Act*.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Bereavement allowance: act of grace payment

GRILLO and SECRETARY TO DSS (No. 6348)

Decided: 24 October 1990 by P.W. Johnston.

Mrs Grillo's husband died in February 1990, a few weeks before his 65th birthday (when he would have qualified for age pension). At the time of his death, he had been receiving unemployment benefit for several years, and his wife was receiving an age pension.

On behalf of Mrs Grillo, her daughter, S, applied to the local office of the DSS for a bereavement allowance. S later gave evidence to the AAT that she was told that her mother was not eligible (because her late husband was not a pensioner), but that the allowance would be paid because this was a 'special case'.

However, although S signed a request that her mother be paid the allowance, no action was taken by the DSS. When again advised that no allowance was payable, S appealed to the SSAT.

The SSAT affirmed the decision that Mrs Grillo was not eligible for bereavement allowance but recommended that an act of grace payment be made to Mrs Grillo.

A senior officer of the DSS then spoke with the DSS officers who had dealt with S's inquiry, and concluded that they had not told S that her mother would be paid the allowance. Another officer of the DSS then decided that an act of grace payment should not be made to Mrs Grillo because it was unlikely that S had been told by the local DSS officers that the allowance could be paid in special circumstances.

Mrs Grillo then asked the AAT to review the decision not to pay her a bereavement allowance.

The legislation

Section 66 of the *Social Security Act*, which came into effect on 1 January 1990, provides that a bereavement allowance is payable to the surviving pensioner of a pensioner couple for the next 7 pay days after the death of one of the pensioners.

The allowance consists of the combined rate of pension that would have been payable to the pensioner couple.

No discretion

The AAT pointed out that the legislation gave it no discretion, other than to affirm the decision that bereavement

allowance was not payable to Mrs Grillo, because she and her husband had not been a 'pensioner couple', her husband having died while being paid unemployment benefit and before he qualified for age pension.

Act of grace payment

However, on behalf of Mrs Grillo, it was argued that the DSS had not given proper consideration to the SSAT's recommendation for an act of grace payment.

The AAT said that the act of grace payment appeared to have been rejected 'on the basis of an immutable policy that a bereavement allowance would not be paid under any circumstances': Reasons, p.6.

The AAT noted that the DSS Benefits Manual supported an act of grace payment where applying the legislation 'would produce a result that was unintended, anomalous, inequitable or otherwise unacceptable in the particular circumstances'. The AAT said:

'Equity . . . was devised to compensate for those situations where strict application of the law works harshly. It might be too much to attribute such a degree of sophistication to a departmental guideline, but the reference to "inequitable" suggests that the strict legal situation should not be the sole consideration.'

(Reasons, p.6)

The AAT noted, from the second reading speech of the Minister when introducing the legislation for bereavement allowance, that the purpose of the allowance was to allow 'a period of readjustment for the bereaved before having to establish a new structure of income support'. That purpose could be served, the AAT said, by reconsidering at this late stage the decision not to grant.

In addition, the AAT said, proper consideration of the SSAT's recommendation required careful consideration of the degree of credibility to be given to S's account of her discussion with the local DSS office. (The AAT expressed the opinion that this account was more credible than the denials by the local DSS officers.)

Noting that it could make no effective decision to qualify the decision under review, the AAT strongly recommended that the act of grace payment be reconsidered, so that the DSS could decide whether an amount equivalent to the allowance, or some reduced portion, should be paid to Grillo.

[P.H.]

