

Administrative Appeals Tribunal decisions

Widow's pension: overpayment

JYW and SECRETARY TO DSS (No. 5661)

Decided: 31 January 1990 by D.P. Breen.

The decision of the DSS that JYW had been living in a *de facto* relationship during 1984 was set aside. However, the AAT found that JYW was employed from 24 March 1984 until March 1988 as a prostitute and her earnings for the period 24 March 1984 to 9 November 1984 amounted to approximately \$1000 per week. This should have disentitled her from receiving widow's pension under the *Social Security Act*, and had led to an overpayment.

The decision under review

On 10 April 1978, JYW lodged the first of a number of applications for widow's pension. It was paid to her for diverse periods between April 1978 and November 1984. On 9 March 1981, she lodged a claim for widow's pension which was granted and paid to March 1984.

In March 1984 the DSS decided that:

- (a) JYW had resided with J on a *bona fide* domestic basis since January 1984 and was not a 'widow' and was thus ineligible for widow's pension pursuant to s.59(1) and 60(1) of the *Social Security Act*;
- (b) she failed to notify the DSS of her increased income and commencing to live with J on 24 January 1984 in accordance with s.74(1) and (5); and
- (c) as a consequence of her failure to notify, an amount of \$6554.80 was paid which was a debt to the Commonwealth pursuant to s.140(1).

After further investigations the DSS also decided:

- (d) JYW was employed and earned in excess of \$1500 per week from 30 July 1983 to 1 May 1984 but failed to advise the DSS pursuant to s.74(1);
- (e) she was paid \$5352.90 widow's pension for the period 25 August 1983 to 19 April 1984 as a result of her failure to comply with s.74(1) and the then s.63; and

(f) that amount was a debt due to the Commonwealth pursuant to s.246(1).

The facts

The Australian Government Solicitor conceded that there was no factual basis upon which a determination that there was a *de facto* relationship could rest. That decision was set aside.

The Tribunal heard evidence from a Senior Field Officer of the DSS that JYW had worked as a prostitute at premises known as 'The European Hot Spot' and 'Le Chic Massage Parlour'. 'Le Chic' was owned by Barbara B, who gave evidence that JYW had worked for her as a prostitute, earning \$1000 a day. Barbara B's evidence was largely rejected by the Tribunal as 'tainted with malice towards the applicant'. However, it accepted Barbara B's evidence regarding prostitute's earnings because this referred to prostitutes generally, and not the applicant in particular, so lacking the malicious element operative elsewhere.

The applicant's evidence that her initial involvement in the prostitution industry was confined to answering the 'phone and cleaning was also rejected. She said her earnings were limited to \$60 a week, the maximum amount allowable without affecting her pension entitlement.

The Tribunal found the Senior Field Officer to be truthful and responsible in determining the date on which JYW entered into prostitution with Barbara B. The statements by JYW as recorded by the Field Officer were accepted. Medical evidence in the form of a doctor's case history also indicated that JYW had been engaged as a prostitute in April 1984. Police evidence of numerous prostitution related offences recorded against JYW was also accepted.

[B.W.]



Compensation award: preclusion

SECRETARY TO DSS and WEIR (No. 5571)

Decided: 21 December 1989 by B.H. Burns.

The DSS applied to the Tribunal for review of an SSAT decision relating to the period during which Alfred Weir was to be precluded from receiving an invalid pension, following his receipt of two lump sum compensation payments.

Weir, who had suffered an industrial injury, settled his worker's compensation claim for \$60 000 in September 1988. At the same time, he accepted a settlement of \$20 000 in a common law action for damages against his employer. The terms of settlement for the latter payment described it as being 'inclusive of costs'.

The DSS had decided that Weir should be precluded from receiving invalid pension during a period to be calculated on the basis that he had received a lump sum payment of compensation amounting to \$80 000.

The SSAT had concluded that the common law settlement of \$20 000 should be excluded from this calculation because all of that payment had been intended to cover Weir's legal costs; and the SSAT had remitted the matter to the DSS for recalculation of the preclusion period.

The legislation

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

According to s.152(2)(a), a compensation payment is a payment by way of compensation or damages 'received on or after 1 May 1987 that is, in whole or in part, in respect of an incapacity for work'.

'Payment . . . in respect of an incapacity for work'

The AAT said that, in order for a payment to be 'in whole, or in part, in respect of an incapacity for work', then