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

there must be 'a specific and direct relationship' between that payment and incapacity for work. That is, the payment must provide some form of compensation for some form of financial loss which has resulted from incapacity for work.

The AAT accepted that Weir had suffered an incapacity for work and that the settlement of his worker's compensation claim provided compensation for financial loss directly attributable to Weir's incapacity for work.

However, the evidence in the present case established that the $20 000 paid in settlement of the common law action had not included any component to compensate Weir for loss resulting from his incapacity for work. Rather, the whole of that payment had been intended to cover Weir's legal costs associated with his common law action. The terms of the settlement (which described the payment as 'inclusive of costs') were not conclusive for the purpose of determining whether the payment included a payment in respect of incapacity for work. 'One must', the AAT said, 'examine all of the available evidence to ascertain what the true position is': (Reasons, para. 11)

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision to the effect that Weir had received a lump sum payment by way of compensation in the sum of $60 000; and remitted the matter to the DSS to recalculate the preclusion period.

[P.H.]

Compensation award: 'special circumstances'

SECRETARY TO DSS and MEYER (No. 5564)
Decided: 22 December 1989 by D.P. Breen.

The Secretary to the DSS applied to the Tribunal for review of an SSAT decision which reduced the period during which Barrie Meyer would be precluded from receiving payments of pension.

The appropriate legislation

The first question decided by the AAT was that the current preclusion provisions (ss.152-156 of the *Social Security Act*) applied in the present case, rather than the former Division 3A Part VII (ss.115-115E) of the *Social Security Act*, which was replaced by the current provisions from 1 May 1987.

Meyer had been paid sickness benefit from March 1987 to February 1988. The sickness benefits were then replaced with a rehabilitation allowance. If Meyer's social security payments could be said to have begun before 1 May 1987, then the former ss.115-115E applied to his case; but if they could be said to have begun after that date, then the current ss.152-156 would apply.

The AAT decided that the rehabilitation allowance was a separate payment from sickness benefits. The latter were paid under s.117 of the *Social Security Act*, the former under s.150. It followed that, with Meyer's transfer from sickness benefits to rehabilitation allowance in February 1988, the continuity in social security payments was broken: Reasons, para. 13.

'Special circumstances'

In the present case, Meyer had received a compensation award (in settlement of his common law action for damages) of $165 000. From this amount a number of deductions had been made, representing worker's compensation, sickness benefits, and rehabilitation payments. These amounts had been refunded to the paying authorities.

The AAT said that this was an appropriate case in which to exercise the discretion in s.156 of the *Social Security Act*, to treat part of the compensation payment as not having been made:

> 'The effect of the SSAT's decision is that they have discounted from the $165 000 lump sum payment the repayments that Mr Meyer was required to make by statute as it was felt that this would be effectively "double-dipping" to include these payments in the calculation of a preclusion period under s.152. The resultant incapacity component is $92 602.35. I am of the view that s.156 has been validly triggered and it would be a special circumstance to include the repayments in the calculation of the preclusion period in that the double-dipping effected by this would be unjust, unreasonable or otherwise inappropriate.'

(Reasons, para. 15)

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Compensation award: recovery of sickness benefits

BAKER and SECRETARY TO DSS (No. 5690)
Decided: 13 February 1990 by B.J. McMahon.

Brett Baker suffered an industrial injury in 1986. He began worker's compensation proceedings against his employer. He then agreed to abandon those proceedings and his employer agreed to pay him a total of $15 000 (including $5000 for medical expenses) as an *ex gratia* payment.

Following Baker's receipt of that payment, the DSS decided that it was a payment by way of compensation, within s.152(2)(a) of the *Social Security Act*; and that Baker should repay to the DSS some $2717 paid to him as sickness benefits. The SSAT affirmed that decision and Baker then brought this appeal to the AAT.

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

The central question in the present matter was whether the *ex gratia* payment made to Baker in return for his abandoning his worker's compensation claim fell within the definition of a payment by way of compensation in s.152(2)(a) of the *Social Security Act*: was it 'a payment by way of compensation ... in respect of an incapacity for work'?

The AAT noted that in *Cavaleri* (1989) 53 *SSR* 700 the AAT had attempted 'to narrow the meaning of the subject words ["in respect of an incapacity for work"] so that there is a specific and direct relationship between a payment by way of compensation and an incapacity for work'. The AAT commented:

> 'In my view this is reading the words down too far. They have an ordinary meaning recognised by dictionaries. Losses or substitutes for the statutory phrases are fraught with danger. If payments are made in relation to, in reference to, or in regard to a worker's incapacity, it is not essential that they have a specific relationship to any aspect of his incapacity in order to be caught up by the legislation.'

(Reasons, para. 19)