Administrative Appeals Tribunal decisions

Compensation award: identity of incapacity

SECRETARY TO DSS and MASTORAKOS
(No. 5891)
Decided: 11 May 1990 by W.J.F. Purcell.

The AAT *affirmed* an SSAT decision that, of a common law damages settlement of $41 964 received by Mastorakos, only $7000 was 'a payment by way of compensation in respect of [the same] incapacity' as the incapacity for which Mastorakos had received sickness benefit within s.115B(A) of the *Social Security Act*.

Mastorakas had been paid sickness benefit between December 1984 and February 1987. In May 1988, his common law action for damages was settled for $41 964. According to the insurer responsible for payment of the settlement, $7000 of the settlement represented past economic loss and $10 000 represented future economic loss.

The DSS had decided that $17 000 of the settlement was a payment in respect of incapacity for work and that this amount was available for recovery of the sickness benefits paid to Mastorakos.

On review, the SSAT had decided that only $7000 could be considered for the purposes of calculating recovery of sickness benefit, because only that amount related to the same incapacity as the incapacity for which the sickness benefit had been paid.

The AAT referred to the decision of the Federal Court *Littlejohn* (1989) 53 *SSR* 712, where the Court had said that, in the context of s.115B(2A), 'incapacity . . . has both a causal and a temporal aspect'. The AAT concluded:

> 'In my view the payment to the respondent of $10000 for future economic loss was in respect of an incapacity which was not the incapacity for which sickness benefit was paid, and the payment does not come, therefore, within the provisions of s.115B of the Act.'

(Reasons, para. 13)

[P.H.]

Capitalised maintenance income

HOPE and SECRETARY TO DSS
(No. 5842)
Decided: 8 March 1990 by C.J. Bannon.

Moreen Hope was being paid an age pension. This appeal concerned the treatment under the *Social Security Act* of an amount which the Family Court had ordered Hope's former husband to pay her as maintenance.

The Family Court order stated that Mr Hope was to pay Mrs Hope weekly maintenance or 'in lieu of $126 per week maintenance for the applicant for 3 years, the liability for that maintenance was to be taken in satisfaction by a transfer of interest between the husband and wife in the former matrimonial home,... together with a sum of $10 600 which the wife was required to pay the husband'. The AAT accepted that this was capitalised maintenance income.

The legislation

Section 3 of the *Social Security Act* defines 'capitalised maintenance income' as:

> '[M]aintenance income of the person:
> (a) that is not a periodic amount or a benefit provided on a periodic basis; and
> (b) the amount or value of which exceeds $1500'

The way this is to be dealt with by the Secretary is determined by s.4A. Under s.4A(2), where a court order specifies the period 'in relation to which the capitalised maintenance income was to be provided', the Secretary is required to use that period to calculate the effect of the capitalised maintenance income on the rate of pension.

However, s.4A(2) is expressed to be subject to s.4A(5). Section 4A(5) provides that, where the period 'is not appropriate in the circumstances of the case', the Secretary should determine a capitalisation period that is considered 'appropriate in the circumstances of the case'.

The AAT's assessment

The DSS had taken the 3 years specified in the Family Court order as the relevant period. This had the effect of reducing Hope's pension from some $133 per week to approximately $78 per week.

The AAT observed that the provisions of s.4A are mandatory and the Secretary must therefore consider the discretion in s.4A(5) in deciding how to deal with capitalised maintenance income.

The AAT noted that the Family Court judge was not concerned, in making his order with the question of the appropriate rate of pension to be paid to Mrs Hope. The rate being paid, the AAT found, was 'an insufficient amount of money to live on' (Reasons, p.4).

The Tribunal concluded that the discretion in s.4A(5) should be exercised to change the capitalised maintenance period from 3 years to 6 years. It noted that, at the end of the 3 year period, Mr Hope might well commence payment of regular maintenance, but until that time 'she does need extra help'.

Formal decision

The AAT directed that the discretion under s.4A(5) be exercised to extend the capitalised maintenance period from 3 years to 6 years.

[J.M.]

Family allowance supplement: income test

LINES and SECRETARY TO DSS
(No. 5984)
Decided: 22 June 1990 by D.W. Muller.

This application concerned a dispute between Lines and the DSS about the correct rate and date of effect of family allowance supplement (FAS) to be paid to her. (There were in fact 2 applications, one by the Secretary, but as the facts were so intertwined they were dealt with as one matter by the AAT.)

The facts

Rosemary Lines married Warren Lines in December 1987. On 27 July 1988, she claimed family allowance and FAS in respect of 2 children. At the time of her application, Mr Lines' income was $696.24 a fortnight, which under the legislation in force at the time was converted into a 4-weekly rate, allowing for the

grant of FAS (including rent assistance of $30) at the rate of $81.88 a fortnight.

On 29 December 1988, the *Social Security Act* was amended, affecting the way FAS was to be calculated. As of that date, the rate was determined to be $47.00 a fortnight and as of 26 January 1989 the rent component was removed as the Lines bought a home and the rate was set at $7.90 a fortnight.

The legislation

As of 29 December, s.74B(1) of the *Social Security Act* laid out a new formula for calculating the rate of FAS, dependent on 'the amount by which the relevant taxable income of the person in the base year of income exceeds the income threshold in relation to the person'.

Section 72(1) defines various terms:

'base year of income', in relation to a person at a particular time, means the year of income of the person that ended in the preceding calendar year.

'relevant taxable income' for a year means:

. . .

(b) in relation to a married person at a particular time — the sum of:

(i) the amount that is at that time the taxable income of the person for the year of income; and

(ii) the amount that is at that time the taxable income of the person's spouse for the year of income.

'year of income' has the same meaning as in the Income Tax Assessment Act 1936.

Income threshold is also defined and is dependent on the number of dependent children: for the Lines the relevant figure was $16 224.

The decisions under review

Lines, after various internal reviews, appealed against her reduced rate of FAS to the SSAT, objecting in particular the fact that the DSS had taken her husband's income into account for the whole of the 1987/88 financial year. The SSAT determined that:

'(a) the income to be included for calculation of the rate of FAS payable to Mrs Lines for the 1989 claendar year should include:

(i) Mrs Lines' taxable income from supporting parent's benefit for the 1987/88 financial year, and

(ii) Mr Lines' taxable income from 20 December [the date of their marriage up to and including 30 June 1988.

(b) Mrs Lines was advised of the Department's decision to reduce payments of FAS to her . . . in a letter of 20 January 1989. Mrs Lines first appealed to the SSAT for a review of that decison on 2 August 1989 (outside the 3-month limit). The earliest date therefore that the decision of this Tribunal can have effect is 2 August 1989.' [See s. 183 of the Act.]

The DSS appealed against that part of the decison contained in para.(a); and Lines against the date of effect of the SSAT decision, in para.(b).

The AAT's consideration

The AAT decided that there was no scope to exclude the income of Mr Lines which had been earned before the Lines were married:

'The words of the statute are clear and unambiguous. The words "year of income" clearly mean the whole year of income. To interpret the definiton as meaning only that part of the income derived after marriage could lead to many anomalies. If the Lines had married on, for example, 28 June 1988 and if Mr Lines' taxable income was taken to have been only that amount in respect of two days then clearly the financial resources available to the Vines family would not be accurately reflected in such figures. It is also possible to envisage anomalies which have the opposite effect. In any event the words of the statute are clear and must be followed.'

(Reasons, para.8)

Formal decision

The AAT set aside the decisions of the SSAT and reinstated the delegate's decision.

[J.M.]

Special benefit: 'unemployable'

SECRETARY to DSS and CHAN (No. 5998)
Decided: 22 June 1990 by R.A. Balmford.

The Secretary applied for review of an SSAT decision, setting aside a DSS decision to cancel Yin Chan's special benefit when he left Australia on 23 November 1989.

Chan had notified the DSS of his proposed absence and his intention to visit Malaysia for family reasons. He was to be away for a period of up to 6 months (he returned to Australia on 3 May 1990).

Chan had arrived in Australia in 1982. He was paid unemployment benefit from his arrival until August 1985, when he was granted special benefit, after a recommendation from his local CES office that he be transferred from unemployment benefit on the basis that he was 'unemployable'.

Since August 1985, he had been receiving special benefit, including for a period of absence in Malaysia in 1987. However, when he notified the DSS of his plans in October 1989, the benefit was cancelled, on the ground that DSS policy was not to pay during absences overseas except in cases of 'extreme personal hardship'. The policy (as amended during his absence) also limited any such payment to 3 months.

The DSS argued before the AAT that the policy should be applied. Further, it was submitted that because Chan was to be supported by his daughter while in Malaysia, the discretion in s.129 should not be exercised.

The legislation

Section 116 of the *Social Security Act* governs payment of unemployment benefit. Under s.116(1)(b), a person must be an Australian resident and be in Australia throughout the relevant period and on the day on which she or he lodges a claim.

Section 129(1) provides the Secretary with a broad discretion to pay special benefit to a person who is 'unable to earn a sufficient livelihood' and who meets a number of other criteria, including that the claimant must not be a person to whom an unemployment benefit is payable (s.129(1)(b)).

Person to whom unemployment benefit not payable?

The DSS had conceded Chan's basic eligibility for special benefit at the hearing but maintained that the benefit should be cancelled in the exercise of the discretion, relying in particular on DSS Policy concerning Chan's absence from Australia.

However, the AAT, referring to a decision of the Federal Court of Australia in *Kuswardana v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186, decided that it must consider for itself the question of Chan's eligibility for special benefit. Having satisfied itself that Chan was an Australian resident and that he was not a person to whom sickness benefit, or any pension was payable, the AAT went on to consider whether he was 'not a person to whom an unemployment benefit . . . is payable', under s.129(1)(b).

After referring extensively to the decisions in *Guven* (1983) 17 *SSR* 173 and *Dowling* (1987) 37 *SSR* 466, the AAT decided that the expression 'a person to whom an unemployment benefit . . . is payable' means 'a person who is qualified to receive an unemployment benefit . . . ' The AAT then considered whether Chan was so qualified when the special benefit was granted in August 1985.

The AAT pointed out that the decision that Chan was 'unemployable', that is, that he did not have the capacity to attract an employer, was a matter which, while relevant to the qualifications for invalid pension, was not relevant to unemployment benefit: