

## Administrative Appeals Tribunal decisions

### Compensation award: discretion to disregard

**HULLS and SECRETARY TO DSS (No. 6134)**

**Decided:** 24 August 1990 by S.A. Forgie and J.A. Kiosoglous.

Paul Hulls was injured in a motor vehicle accident in December 1984, while travelling from his workplace. His medical expenses and some compensation payments were paid by his employer, Australia Post.

In March 1988, he resigned from Australia Post and was paid unemployment benefits (\$3615) between April and August 1988.

In July 1988, Hulls settled a common law action for damages arising out of the motor vehicle accident for \$70 000. From this amount, \$25 191 was paid to Australia Post to cover the medical expenses and weekly compensation paid by Australia Post, and \$11 966 was paid to his solicitors to cover their costs and disbursements.

The DSS then decided that the \$70000 was lump sum payment by way of compensation, so as to trigger s.153(2) of the *Social Security Act*. The preclusion period was calculated as the period from 9 April 1988 to 24 February 1989; and the DSS then decided that Hulls was liable to refund the \$3615 paid by way of unemployment benefits.

Hulls asked the AAT to review the DSS decision.

#### The legislation

Section 153(2) of the *Social Security Act* provides that where a person has received a lump sum payment by way of compensation and has received, during the lump sum payment period, payments of pension, the Secretary may decide that the person is liable to refund the payments of pension received during that 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'.

#### A compensation payment within s.153

The AAT decided that the payment received by Hulls was at least in part, a payment for incapacity for work; and that, because the payment was received as a consequence of a settlement made on or after 9 February 1988, the lump sum payment period would normally be calculated by reference to 50% of that payment.

The payment had apparently not made a separate allowance for legal costs, so that Hulls' legal costs could not be excluded from the calculation.

#### Discretion to disregard part of payment

However, the AAT decided that it was appropriate to exercise the s.156 discretion, to disregard the receipt of all or part of a lump sum payment of compensation, so as to exclude the amounts paid out of the payment on account of medical expenses, weekly compensation and legal costs.

The Tribunal said that the deduction of those payments from Hulls' award, for payment to his former employer and to his solicitors, was not unique or unusual; but their deduction did constitute 'special circumstances' which made it appropriate to treat those parts of the settlement moneys as not having been made to the applicant.

This had the effect of reducing the compensation award received by the applicant to \$32 842; and it was to that figure that the 50% formula in s.152(2)(c)(i) should be applied. Carrying out the calculation in s.152(2)(e) (dividing \$32 842 by average weekly earnings of \$477), the lump sum payment period should be 34 weeks, the AAT decided.

#### Formal decision

The AAT set aside the decision under review and substituted a decision that the lump sum payment period ran from 9 April to 3 December 1988. It

adjourned consideration of the amount recoverable from Hulls pending receipt of evidence as to the amount of pension paid to Hulls during that period.

[P.H.]

### Unemployment benefit: 'unemployed'

**McAULIFFE and SECRETARY TO DSS (No. 5953)**

**Decided:** 7 June 1990 by J.A. Kiosoglous, D.B. Williams, and J.T.B. Linn.

The applicant asked the AAT to review a decision to cancel his unemployment benefit and a decision to raise an overpayment of \$10 265.70 in unemployment benefit paid between August 1986 and July 1987. The reason for the cancellation was that he was not unemployed but engaged in a business of real estate and building during the relevant period. As the applicant had also failed to advise the DSS of his earnings the overpayment was raised.

#### The facts

McAuliffe was a qualified real estate agent and also held a builder's licence. He was employed by Telecom as a technician until 1984 when he took part-time employment as a real estate agent. In 1986 he failed in a city fitness centre business venture, incurring heavy debts. He gave up the business in mid-1988.

He applied for unemployment benefit in August 1986. After that date McAuliffe looked for work. He also used his real estate licence to conduct a business from his home and attended to a building operation registered under his building licence during this period. McAuliffe gave evidence to the Tribunal that this operation was in his name to assist a friend. He said that he received commission of \$2000 to \$3000 during the time he was in receipt of unemployment benefit. In October 1986 he successfully tendered for the right to build a house for the South Australian Housing Trust.

McAuliffe had interpreted a DSS form, which required him to provide