

Administrative Appeals Tribunal decisions

Compensation preclusion: special circumstances

MILLWARD and SECRETARY TO DSS

(No. W90/195)

Decided: 28 November 1990 by T.E. Barnett.

Mr Millward applied to the AAT for review of a decision precluding him from receiving invalid pension for 50 weeks as a result of a \$55 530.83 compensation settlement. The only issue discussed by the AAT in its reasons for decision was whether there were 'special circumstances' that justified treating whole or part of this compensation payment as not having been made, pursuant to s.156 of the *Social Security Act*.

Applicant's arguments/facts

The Tribunal accepted as fact all the matters put by Millward.

The solicitor who handled Millward's compensation claim was 'not the full bottle' on invalid pension matters and failed to warn him about the lump sum compensation preclusion period. Neither did Millward's treating specialist, who suggested he terminate his employment and apply for invalid pension. After settling his compensation claim, Millward attended at a regional office of the DSS and told the counter officer that he intended using all his lump sum to build his own home, but again was not advised about the preclusion period.

Following this, Millward spent all but \$5000 of the compensation lump sum on building a new simple home with no unnecessary luxuries. (Millward had been forced to sell his previous home because it was on steep and uneven ground which he could no longer negotiate because of his leg injuries.)

The cost of the new home left Millward and his wife with extremely limited funds which would not have been enough to support them until the preclusion period expired.

Following the settlement, Millward's health deteriorated substantially leading to increased medical expenses. His wife had also been very ill since the settlement and was not fit for employment.

'Special circumstances'

The AAT considered the factors regarded as relevant in *Krzywak* (1988) 45

SSR 580 and concluded that special circumstances existed in this case. In doing so the Tribunal said it had -

'been most influenced by the deteriorating health and the financial hardship and also by the fact that the applicant's pressing need to build a house arose from the fact that it was the accident itself which forced him to sell off his previous home and that his decision to invest in a new home was a reasonable and responsible one granted his belief in the entitlement to invalid pension'.

(Reasons, p.7)

As far as the various failures to advise him about the preclusion period were concerned, the AAT was not influenced by the treating specialist's omission but regarded the lack of warning from the solicitor and departmental officer as amounting to 'inadequate professional advice of a similar nature to wrong legal advice which was considered in . . . *Krzywak*': Reasons, p.7.

Formal decision

The AAT set aside the decision under review and substituted a decision which reduced the preclusion period by 10 weeks.

[D.M.]

Unemployment benefit: recovery of overpayment

SECRETARY TO DSS and SMITHERMAN

(No. 6591)

Decided: 21 January 1991 by P.W. Johnston.

Kevin Smitherman was receiving unemployment benefit when, on 6 March 1990, a delegate cancelled his payment and determined that \$1072.85, representing unemployment benefit paid for the period 26 December 1989 to 19 February 1990, be recovered from him.

Smitherman asked the SSAT to review this decision and the SSAT affirmed the decision to cancel benefit but 'purported to set aside the decision to raise and recover the overpayment and instead, substituted the decision that recovery of the amount of the overpayment be waived'.

The Secretary appealed to the AAT concerning the second decision and Smitherman asked that the cancellation be reviewed.

Background

In October 1989, Smitherman (who was receiving unemployment benefit) approached a DSS office to enquire as to his position if he accepted a job offer from an estate agent, working on a part time commission basis only. He was informed that he would continue to qualify for unemployment benefit and he then attended a course for 2 weeks prior to commencing employment. He subsequently returned his fortnightly continuation forms and declared his employment as part-time by marking the appropriate place on the form.

On 20 February 1990, he received a notice of cancellation. After querying this, he was interviewed and made a statement in which he said that he had been employed since January 1990 on a part-time basis but had not earned any income. A recommendation was made for his benefit to continue.

However, his employer completed an Employment Verification Report in which he indicated that Smitherman had been employed since 21 December 1989 on a full-time basis.

On 22 February 1990, benefit was cancelled with effect from 2 December. Smitherman made another statement and benefit was restored on 1 March but cancelled again on 6 March 1990. At this time, the delegate determined that the amount paid for the period 26 December 1989 to 19 February 1990 should not have been paid and raised an overpayment.

Smitherman told the AAT that he had worked part time, had a desk, a seat, a telephone and some 'Home Open' signs and was entitled to receive 35% of the office commission for any property he sold. He was available at the clients' convenience and he stated that during the time he was employed by the agent, he was looking for other work.

However, a letter from his employer stated that employment was full-time, though with flexible hours, and had commenced on 15 December 1989.

The legislation

Section 116(1)(c) of the *Social Security Act* provides that a person is qualified to receive unemployment