approached as a matter of any precise apportionment of causation. Accepting the sense of 'dominant' given in the *Shorter Oxford Dictionary* as 'governing' or 'most influential', the AAT found that the incapacity was the most influential factor in causing Ms Weston to delay submitting her claim.

Her unawareness of the time limit was a contributory cause to her failure, but that was due in part to departmental default in misinforming her and failing to alert her to the time limit. The relevance of administrative default in assessing whether the incapacity was the sole or dominant cause of late lodgment was explained as follows:

> 'Thus if someone in the applicant's situation had been informed of the need to lodge within time, an injury which made it difficult but not impossible to travel could not be said to be the sole or dominant cause. But where the claimant is left in ignorance of the need to lodge promptly, either in person or through an alternative means such as the post or by a friend, an incapacitating injury, if of sufficient magnitude, may be so regarded because its effect should be measured relatively to the perceived urgency or lack of it.'

**Formal decision**

The AAT set aside the decision under review and substituted a decision that sickness benefit should be payable from the earliest allowable date. Since under s.125(4)(a) this could not be earlier than 27 December 1989, the AAT considered the question of whether to recommend an *ex gratia* payment in accordance with Finance Direction 21/3.

***Ex gratia* payment under Finance Direction 21/3**

A delegate of the DSS had considered the SSAT's recommendation for an *ex gratia* payment and decided that there was no case for such a payment because Ms Weston had failed to act promptly upon the advice given by the Hotline that she should go to a departmental office and make a claim.

The AAT approved of the guidelines relating to such payments set out in Chapter 35 of the Department's Benefits Manual, but found that they had been misapplied.

The advice given on the Hotline was not the only instance of incomplete or misleading advice by the Department to the applicant. Furthermore, the question of whether the applicant contributed by her slowness to act to the situation did not exclude negligence on the part of the Department, but should lead to an apportionment when assessing the amount of the *ex gratia* payment.

The AAT recommended that the Department reconsider its decision not to make an *ex gratia* payment of the whole or a substantial part of an amount equivalent to sickness benefit for the period prior to 26 December 1989.

**[P.O'C.]**

# Australian resident

**OPITZ and REPATRIATION COMMISSION**

**(No. N89/753)**

**Decided:** 27 July 1990 by C.J. Bannon.

Mr Opitz sought review by the AAT of decisions by the Repatriation Commission cancelling his service pension and demanding repayment of $13 540.84, the entire amount of service pension paid to him over the 2 years since he lodged his claim. These decisions were apparently based on a finding that Mr Opitz was not and had not been an Australian resident.

**The legislation**

Under s.43(4) of the *Veterans' Entitlements Act* 1986:

> 'A veteran is not eligible to lodge a claim for service pension unless the veteran is an Australian resident and is in Australia.'

'Australian resident' is defined in s.35(1) (which is identical to the definition in s.3(1) of the *Social Security Act*) to mean:

> 'A person who resides in Australia and who is (a) an Australian citizen . . .'

**The evidence**

Mr Opitz was an Australian citizen and had family, including grandchildren, in Australia. He was divorced from his first wife. In 1983 he entered into a *de facto* relationship with a Philippino woman, whom he married in 1985; and he then lived in the Philippines with her and her son for some years.

On 26 July 1986, Mr Opitz returned to Australia. He was arrested at the airport, subsequently charged with offences committed between 1979 and 1981, and was kept in custody for 2 to 3 weeks until bail was arranged.

On 19 August 1986, Mr Opitz lodged a claim for service pension. In a statement lodged with the claim he said:

'I will be residing permanently in Australia. My wife and child are still living in the Philippines and will be joining me in the not too distant future approximately 6-12 months . . . '

Service pension was granted.

Mr Opitz pleaded guilty to the 1979-81 charges and on 29 October 1986 was sentenced to 15 months gaol with a 6 months non-parole period. Before sentencing he gave evidence that his primary reason for returning to Australia was for medical attention and that he intended staying 4 to 6 weeks.

On 17 February 1987, Mr Opitz was released from prison and returned to the Philippines in March 1987. His service pension was cancelled from 11 August 1986 by a decision made on 27 July 1988. In addition, repayment of pension paid for the period 19 August 1986 to 10 August 1988 was demanded.

At the hearing before the AAT, a written statement was tendered in which Mr Opitz asserted that he intended to return to Australia, but lacked the necessary funds.

Two unsuccessful attempts were made by the AAT to obtain telephone evidence from Mr Opitz from Manila, the first attempt being thwarted by an earthquake. The AAT refused to adjourn to make further attempts to contact him. In so refusing, the Tribunal commented that:

> 'Oral statements by telephone are of extremely limited value when the demeanour of the witness cannot be observed, and there is an issue as to his credit.'

(Reasons, p.5)

**Not residing in Australia**

The AAT applied the Federal Court decision in *Hafza* (1985) 26 *SSR* 321, in which Wilcox J said:

> 'As a general concept residence includes two elements: physical presence in a particular place and the intention to treat the place as home, at least for the time being, not necessarily forever.'

(Reasons, p.6)

The AAT also commented that:

> 'A person may, of course, have more than one residence, and may even be a resident against his will when he prefers some other place as his permanent residence.'

(Reasons, p.6)

Relying on Mr Opitz's sworn evidence to the criminal court, which the AAT had no doubt should be preferred to his contrary assertions in unsworn documents and statements, it was concluded that:

> 'He was not in Australia as a resident, but simply as a visitor when he lodged his claim.'

(Reasons, pp.6-7)

**Backdating the decision**

Section 58(2) of the *Veterans' Entitlements Act* (which is practically identical to s.168(2) of the *Social Security Act*) permitted backdating of a decision where payment would not have been

Section 133(b) of the *Social Security Act* required a beneficiary to immediately notify DSS upon commencing to carry on a business (s.133 was repealed as from 1 June 1990).

The power to cancel a benefit is contained in s.168(1). Under s.168(2) the cancellation may take effect from a date earlier than the date of determination where there has been a failure to comply with the Act (with 2 exceptions not relevant here) or a false statement.

Although not stated by the AAT, it appears that the overpayment in this case was raised under s.246(1) of the *Social Security Act*, under which a 'debt due to the Commonwealth' was created if an overpayment resulted from 'a false statement or . . . a failure . . . to comply with any provision of this Act'. Section 251(1)(b) permits the waiving of recovery of whole or part of a debt.

**Application of assets test**

The Tribunal found that at all relevant times the Vines' assessable assets exceeded the permitted level of $127 000 and Mr Vines was therefore not eligible to receive sickness benefits. Accordingly the statement given to DSS by Mr Vines on 5 September 1988 that their assets did not exceed $100 000 was false.

However, the AAT did not find that there was any earlier failure to comply with the *Social Security Act*, essentially, it seems, because it accepted that Mr Vines had not received any earlier notice requiring him to inform DSS of an increase in assets.

**Failure to notify commencement of business**

The AAT had to determine when Mr Vines' hydroponic business commenced. Reliance was placed on the Full Federal Court's decision in *Federal Commissioner of Taxation v Osborne* (1990) ATC 4889, in which it was decided that a business of growing nuts commenced during the time when the trees grew but well before they began to bear.

The AAT concluded:

> 'There is no doubt that Mr Vines was in the business of farming by mid to late October 1988. All of the equipment had been installed and the first crop had been sown.'

(Reasons, para. 24)

> '. . . All things done prior to [mid-October 1988] were mere preparation for eventually commencing business. It follows that the Tribunal finds that Mr Vines was not in breach of s.133 . . . until he failed to notify the Department that he had commenced business as at late October 1988.'

(Reasons, para. 25)

**Recalculation of the overpayment**

Without clearly articulating what it was doing, the AAT took the earlier of Mr Vines' transgressions, the false statement of assets value on 5 September 1988, as the starting point and recalculated the overpayment from the next pay day, 12 September 1988, arriving at an overpayment amount of $5648.22.

**Waiver**

The AAT also found that, 'if Mr Vines had been declared ineligible for sickness benefit as from 5 September 1988, the family would have been entitled to the Family Allowance Supplement for the period 5 September 1988 to 30 January 1989': Reasons, para. 27. This resulted in a notional FAS entitlement of $1300.

The AAT considered comments of the Federal Court in *Salvona* (1990) 52 *SSR* 694, in which it was said that a DSS decision to recover a debt does not necessarily involve a decision not to waive recovery and therefore the Tribunal may not have had power to waive a debt where waiver has not been considered by the DSS.

In relation to Mr Vines, the AAT decided that it —

> 'will not determine the question of waiver or write-off. The matter was not argued before us and no body of evidence of sufficient cogency was placed before the Tribunal to allow a decision to be made one way or the other.'

(Reasons, para. 28)

**Formal decision**

The AAT decided:

(1) to set aside the SSAT decision;

(2) that at all relevant times between 18 July 1988 and 30 January 1989, the value of the Vines' property exceeded $139 500;

(3) that Mr Vines commenced to carry on the business of farming on or about 15 October 1988; and

(4) that between 5 September 1988 and 30 January 1989 Mr Vines was paid $5648.22 by way of sickness benefit to which he was not entitled and that sum is a debt owing to the Commonwealth.

It remitted the matter to the DSS with the recommendation that the $5648.22 debt be reduced by an amount of notional FAS of $1130 and that a decision be made under s.251 of the Act.

**[D.M.]**

# *Unemployment benefit: reduced employment prospects*

**BOROWIECKI and SECRETARY TO DSS**
**(No. 6914)**
**Decided:** 8 May 1991 by K.L. Beddoe.

Stefan Borowiecki had been unemployed for some 10 years, during which period he lived in Mackay in Queensland. He moved from Mackay to Brunswick Heads in north-east NSW.

The DSS then decided that Borowiecki had reduced his prospects of employment by moving his place of residence, and that he was not qualified for unemployment benefit.

**The legislation**

Section 116(6A) of the *Social Security Act* provides that a person is not qualified for unemployment benefit 'on a day on which the person reduces his or her employment prospects by moving to a new place of residence without sufficient reason'.

Section 116(6B) defines 'sufficient reason' in quite narrow terms, which were not relevant in the present matter.

Section 126(1)(aa), combined with s.126(4), provides that unemployment benefit is not payable to a person for a period of 12 weeks where the 'person has reduced his or her employment prospects by moving to a new place of residence without sufficient reason for the move'.

**No reduction in employment prospects**

Borowiecki was a certified master of small marine vessels operating between Bundaberg and Townsville, and qualified through experience as a deck hand and a marine maintenance worker.

Before moving from Mackay to Brunswick Heads, Borowiecki had been receiving unemployment benefits for some 10 years.

He told the AAT that there were a number of fishing fleets operating from the far north coast of NSW, and that he had bought a motor-cycle so that he could seek work with those fleets.

The AAT said that a move from a place which had failed to provide Borowiecki with work over a long period to a place where the prospects of