

made but for a misrepresentation and provided the power for the backdating by the Commission in this case.

The AAT also said:

'I do not consider that an ineligible claim achieves eligibility because of an incorrect determination.'

(Reasons, p.7)

However, in this case s.58(1), which includes a power to cancel (and is identical to s.168(1) of the *Social Security Act*), provided 'express power to reverse wrongful determinations'.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Compensation recovery: 'lump sum'

SECRETARY TO DSS and VAN DER MOLEN

(No. 6618)

Decided: 4 February 1991 by H.E. Hallows.

The DSS decided that Mr Van Der Molen had been paid \$2193.86 in sickness benefits over the period 1 January 1989 to 1 March 1989 which was recoverable by the Department because he had received a series of periodical payments by way of compensation in respect of that period.

This decision was set aside by the SSAT which substituted a decision that only sickness benefit paid during the 2 weeks beginning 8 September 1988 (the day after periodical payments ceased) was recoverable. The DSS sought review by the AAT of this SSAT decision.

The legislation

The principal issue in this case was whether s.153(2) or s.153(3) of the *Social Security Act* should be applied. This in turn depended on whether Mr Van Der Molen had received a lump sum compensation payment or a series of periodical compensation payments.

Under s.153(2) —

'Where (a) a person has received a lump sum payment by way of compensation . . . the Secretary may . . . determine that the person is

liable to pay . . . the amount of pension paid to the person during the lump sum payment period . . .'

The 'lump sum payment period' is determined under s.152(2) and (3). Where the lump sum was paid pursuant to a settlement made on or after 9 February 1989, 50% of the sum is divided by average weekly earnings to determine the duration of the period. That period runs from the day on which the last periodical compensation payment was made, if such payments have been made in respect of the incapacity.

Under s.153(3) —

'Where (a) a person has received a series of periodical payments by way of compensation . . . the Secretary may . . . determine that the person is liable to pay . . . (d) the amount of pension paid to the person during [the period during which payments in the series of periodical payments were made] . . .'

For the purposes of all these provisions a 'pension' is defined in s.152(1) to include a sickness benefit.

A subsidiary issue involved the application of s.156 of the *Social Security Act* which permits the Secretary to treat whole or part of a compensation payment as not having been made 'if the Secretary considers it appropriate to do so in the special circumstances of the case'.

The facts

Mr Van Der Molen injured his back at work in May 1988. On legal and medical advice he resigned on 9 September 1988 after unsuccessfully attempting to return to work in June. Weekly compensation payments ceased on 7 September 1988.

A claim for sickness benefit was lodged on 13 September 1988 and granted from 12 September 1988.

In January 1989 Mr Van Der Molen lodged a claim for weekly payments of compensation under the *Accident Compensation Act* 1985 (Vic.). This claim was opposed on the basis that his injury was not caused by work. The hearing of this claim was listed before the Accident Compensation Tribunal on 18 September 1989.

Settlement negotiations resulted in the making of a consent award for 'weekly payments of compensation from 5 January 1989 until 1 March 1989 inclusive', which amounted to \$2777.80. Mr Van Der Molen gave evidence to the AAT that he was advised to settle this claim to avoid jeopardising a potential lump sum claim for permanent impairment under s.98 of the *Accident Compensation Act*. He was not consulted as to the dates in the award and merely understood that he was to receive a 2-month period of compensation.

When Mr Van Der Molen went to collect his settlement moneys, he found that his employers had already paid \$2039.06 to DSS. It was conceded by the Department that it had failed to comply with the correct notice procedures as required by Part XVII of the Act. DSS found itself in a position where the money turned up before it had a chance to issue the notices.

At the time of the AAT hearing, the Van Der Molens' only income was from social security payments. They experienced financial hardship in September 1989 but were back on an even keel after Mr Van Der Molen received \$8546 pursuant to s.98 of the *Accident Compensation Act* in July 1990 in respect of his back injury.

Looking behind the award

The AAT first decided whether it could look behind the award in this case. It considered the AAT's decisions in *Cocks* (1989) 48 SSR 622 and *Littlejohn* (1989) 49 SSR 637 and the Federal Court's decision in *Littlejohn* (1989) 53 SSR 712, commenting in relation to the latter case that —

'It was noted in the Federal Court judgment . . . that although the Secretary and, on application for review, the Administrative Appeals Tribunal, could look behind the terms of a compensation award in order to determine whether there was in truth an identity of the incapacity for which the sickness benefit and compensation had been paid, the refusal of the tribunal in *Littlejohn* to undertake that course had not involved an error of law, the Tribunal's finding that there was no evidence to suggest that the compensation award was anything other than what it purported to be having been open to the Tribunal.'

(Reasons, para. 16)

In relation to the case before it, the AAT decided that —

'Despite the wording of the award, the evidence as to the circumstances surrounding this application satisfy me that this is an application in which the Tribunal should look behind the award.'

(Reasons, para. 27)

Lump sum or periodical payments?

The AAT quoted the following passage from the Federal Court's decision in *Banks* (1990) 56 SSR 762:

'A "lump sum" payment is simply one which includes a number of items. Where a payment by way of compensation consists of the aggregate of several amounts which could have been paid separately or at different times the payment is one of a lump sum.'

(Reasons, para. 22)

Reliance was also placed on the Federal Court's decision in *a'Beckett* (1990) 57 SSR 779.

The AAT concluded that the payment here was a lump sum and said:

'Although the lump sum received by [Mr Van Der Molen] was expressed in the Award as weekly payments, the test is, what [he] received in his hands, that is, did he receive one sum of money or weekly or fortnightly payments . . .

The character of the lump sum is not altered because it was calculated by reference to a number of weeks.'

(Reasons, paras 27 and 28)

This meant that the lump sum payment recovery provisions applied resulted in Mr Van Der Molen only having to repay sickness benefit paid to him during the 2 weeks following 8 September 1988.

'Special circumstances'

In accordance with the Full Federal Court's decision in *Trimboli* (1989) 49 SSR 645, the AAT took into account the fact that Mr Van Der Molen had been deprived of moneys held by the Department as a result of its incorrect decision. However, the AAT decided that special circumstances did not exist because the sum was not large, Mr Van Der Molen's finances were now on an even keel and he had recognised he had some obligation to the department.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Compensation payment: special circumstances

MOURTITZIKOGLOU and SECRETARY TO DSS

(No. 6688)

Decided: 22 February 1991 by J.R. Dwyer.

Mrs Mourtitzikoglou lodged a claim for an invalid pension on 17 August 1987 which was granted with effect from 20 August 1987. On 22 February 1989 Mr Mourtitzikoglou was awarded a lump sum payment of compensation of \$14 500 by the Accident Compensation Tribunal. The DSS decided to preclude Mrs Mourtitzikoglou from receiving the invalid pension from 24 February 1989 to 2 June 1989. This decision was affirmed by the SSAT and Mrs Mourtitzikoglou applied to the AAT for

review of the decision to preclude her from payments.

Background

At the hearing a report from a DSS social worker, which described the condition of the Mourtitzikoglous' family home, was tendered in evidence. The house was described as a 30-year-old weatherboard which had been poorly maintained. Most windows were broken and the roof leaked. Even though the house had been freshly painted and carpeted, the kitchen was old and needed replacing. The bathroom should be updated and the toilet was located outside the house. There were problems with the water pressure, the back yard was overgrown and the fences needed replacing. Mrs Mourtitzikoglou told the AAT that the house had been paid for, but that she had little left over from her weekly expenses to pay for maintenance of the family home.

Special circumstances

The AAT referred to 'the classic passages' in *Ivovic* (1981) 3 SSR 25 and *Beadle* (1984) 20 SSR 210 as to the meaning of the term 'special circumstances'. The AAT said it did not have sufficient evidence to decide whether the living conditions of the family amounted to special circumstances:

'I considered whether it could be said that it is "special circumstances" for a family in receipt of social security payments to live in a house with a leaking roof and broken windows. I was satisfied that there are some standards of housing which are so poor that to live in such housing would be "special circumstances", such as to justify the exercise of the discretion under s.156 of the Act.'

Both parties were contacted and requested to provide further evidence on the state of disrepair of Mrs Mourtitzikoglou's home, the cost of repairs and whether this amounted to special circumstances.

On 14 February 1991 the AAT received a further report from a senior DSS social worker and a letter from the DSS advising that a delegate of the Secretary had decided that special circumstances did exist in this matter. The AAT was satisfied that this was the correct decision.

Formal decision

The AAT set aside the decision under review and substituted a decision that the whole of the payment by way of compensation be treated as having not been made.

[C.H.]

SECRETARY TO DSS and SMITH
(No. 6712)

Decided: 22 February 1991 by B.H. Burns.

DSS applied to the AAT for review of the decision of the SSAT that sickness benefit paid to David Smith was not recoverable given the special circumstances of the case. The SSAT had varied the original decision of the DSS to recover the total amount of sickness benefit and unemployment benefit paid to Smith between the date he was injured and the date he received his lump sum compensation payment.

Background

Smith was injured on 7 July 1987 and received weekly payments of compensation until 25 March 1988. He returned to work on light duties until 27 April 1988 and was retrenched on 17 August 1988. Sickness benefit was paid to Smith from 6 May 1988 to 1 January 1989 and thereafter unemployment benefit until 23 February 1989. Smith was paid sickness benefit because he contracted hepatitis. This disease was not related to his employment or the original injury.

On 12 October 1989 Smith received \$80 000 damages by way of a consent order. It was not in dispute that part of this settlement sum was in respect of an incapacity for work in relation to Smith's injury but not in relation to the hepatitis. The DSS then decided that Smith was precluded from receiving a benefit or pension for 77 weeks and the total amount paid to Smith by way of sickness and unemployment benefits was recovered by the DSS.

Special circumstances

The AAT adopted the meaning of special circumstances elucidated in *Krzywak* (1988) 45 SSR 580 and the Federal Court decision of *a'Beckett* (1990) 57 SSR 779. Before it could be decided whether special circumstances applied in this matter, it was necessary to look at the purpose of this part of the Act.

'The scheme of preclusion and recovery contained in Part XVII of the Act is in effect saying that periodic payments of compensation are being made throughout the lump sum payment period.'

The object of Part XVII is to prevent beneficiaries from receiving double payments for an incapacity for work. Smith did not receive compensation for the period when he was sick with hepatitis. Therefore he could not be said to be receiving double payments for that period when he was incapacitated with hepatitis.