

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.

The AAT found the facts in this matter unusual. The legislation presumes that, where an amount has been paid by way of sickness benefit for a period of incapacity for work, it is recoverable if the beneficiary later receives a lump sum payment of compensation. The AAT was of the opinion that, in the special circumstances of this case, it would be unjust for the legislation to operate in this way.

Formal decision

The AAT set aside the decision under review and substituted a decision that the amount of lump sum compensation representing the amount paid to Smith as sickness benefit be considered as not having been made and thus not recoverable.

[C.H.]

Family allowance supplement: estimated income too low

JOHNSON and SECRETARY TO DSS

(No. 6626)

Decided: 7 February 1991 by P.W. Johnston.

The applicant asked the AAT to review a decision to cancel her family allowance supplement (FAS) and to raise an overpayment of \$3312 in FAS.

The facts

Johnson had been in receipt of FAS since May 1988. In November 1988, she forwarded an income and assets return for 1988 to the DSS. She advised that at that date she was unemployed and her husband had commenced his own business with drawings of \$100 per week. They also received rental income of \$240 per week. Their total income was \$340 per week. Based on that information, the payments of FAS were continued.

A later review of Johnson's eligibility led to the cancellation of FAS from November 1989. The Taxation Office later assessed the family's taxable in-

come for 1988-89 at \$30902. This led to the overpayment of \$3312 being raised in respect of the period from December 1988 to November 1989. The overpayment was being recovered by deduction from Johnson's family allowance.

The legislation

It was not disputed that Johnson was qualified to receive FAS under s.73 of the *Social Security Act*. Section 74B provides for reduction of the rate of allowance by reference to 'relevant taxable income'. Section 72(1) defines 'relevant taxable income' to include, in the case of a married person, the taxable income of the person's spouse in addition to the taxable income of the person. Section 72(2) provides that the amount of taxable income of a person for a year of income shall be taken to be either the amount assessed by the Commissioner of Taxation or an estimate made by the person or the person's spouse.

Where there is a difference between the amount estimated by the person or their spouse and the amount subsequently assessed by the Commissioner of Taxation s.74B(5) applies. This provision treats as a recoverable overpayment payments of FAS based on a person's estimate of income where that estimate is less than 75% of the actual taxable income assessed by the Commissioner of Taxation.

Actual income versus assessed income

Johnson had put to the SSAT that the actual income of the family was considerably lower than the amount assessed by the Commissioner of Taxation. This occurred because the assessment took into account income on an accrual basis rather than on a cash basis. She had argued that, when it was considered that about \$12 000 was outstanding in debts to the partnership she had formed with her spouse, the actual income received from the business was much lower than the assessment.

Johnson conceded in the AAT that the SSAT were correct in rejecting this submission as to the application of s.74B(5). The section is mechanical. Once the actual figure assessed by the Commissioner of Taxation is determined, the section operates automatically. It is not open for the parties to go behind the figures to question the actual income of the applicant.

Discretion to waive recovery

The only issue for consideration for the AAT was whether the DSS should exercise its discretion under s.251 to

waive recovery of the overpayment or otherwise vary the terms of recovery.

The Tribunal referred to the decision in *Hales* (1983) 13 SSR 136, which set out the matters to be considered in the exercise of the discretion. The Federal Court in that case indicated that the matters to be considered included the fact that the applicant had received public moneys to which he or she was not entitled, whether the overpayment occurred as a result of innocent mistake or deliberate fraud, the financial circumstances of the applicant, the prospect of recovery, whether a compromise was offered, whether recovery should be delayed because there was a prospect that the applicant's circumstances may improve, and any other compassionate considerations including financial hardship.

Johnson had argued that the legislation was unfair and discriminated against self-employed persons. The AAT said that it could not comment on the fairness of the legislation. In any event the Tribunal noted that Johnson's argument could be debated either way. The trading situation of the partnership would be subject to artificial variations which could result in advantages as well as disadvantages at certain times.

The Tribunal still had to consider the criteria in *Hales*, even though it rejected Johnson's submission with respect to the fairness of the legislation. There was no question of dishonesty on the part of Johnson. The financial circumstances of Johnson and her spouse at the time of the SSAT decision had indicated that there was then no reason for the exercise of the discretion in their favour.

However, the family's financial circumstances had since deteriorated. The business had incurred debts which exceeded its income and the family were considering selling their home to pay those debts. Johnson's spouse was considering paid employment. The AAT commented:

'Even though in all this there is no suggestion of immediate dire financial hardship, the fact that the overall situation of the family has declined severely sets the stage for considering other factors. Remembering too that the purpose of FAS is basically to provide benefit for the children in a family (of which the applicant and her husband have three who are still fairly young) the Tribunal should also take into account against that background the continuing loss of FAS to the family unit for some considerable time yet.'

(Reasons, p.7)

The AAT also referred to the form which was used by the DSS to obtain the information upon which the payment of FAS was based. The form was entitled