During the period May to December 1987, s.153(1) of the Act was stated to apply 'where a person who is receiving a pension receives' a compensation payment. However, by virtue of the retrospective operation of the *Social Security Amendment Act* 1988 (which received royal assent on 15 June 1988), s.153(1) must be taken to have applied for the period 1 May 1987 to 15 December 1987 'where a person who is receiving a pension receives or has received (whether before or after becoming so qualified)' a compensation payment.

The significance of this is that s.153(1), as it was written at the time of Mr Gardiner's claim and the Department's decision, did not apply to him; but he was ultimately caught by the retrospective operation of the amendments.

To calculate the lump sum preclusion period it is necessary first to ascertain the 'compensation part of the lump sum payment' in accordance with s.152(2)(c). As the lump sum in this case was paid prior to 9 February 1988, the compensation part was 'so much of the lump sum as is, in the opinion of the Secretary, in respect of an incapacity for work': s.152(2)(c)(ii).

It was not disputed that the $100 000 future economic loss component of Mr Gardiner's settlement was the 'compensation part' of his lump sum and that the correct application of ss.152 and 153 produced the 224 week preclusion period calculated by the DSS.

The only issue was the application of s.156 of the Act, which permitted the Secretary to treat the whole or a part of a compensation payment that has been made as not having been made 'in the special circumstances of the case'.

The facts

In 1981 Gardiner injured his back at work. After a period during which he received regular compensation payments, he returned to work until 30 May 1987. His damages claim against his employer was settled on 6 June 1987 and on 11 June 1987 he lodged claims for invalid pension and sickness benefits at the Port Augusta office of the DSS.

Gardiner's doctor had told him his damages payment might preclude receipt of pension or benefit but a DSS officer told him it would make no difference.

On 31 July 1987 the Adelaide office of the DSS made the original preclusion decision under review in this case and informed the Port Augusta office by telex on 4 August 1987. However, it appears that Gardiner was not advised verbally of this decision until 28 September 1987 and did not receive written advice dated 9 November 1987 until 17 December 1987.

Meanwhile, Gardiner received the balance of his settlement moneys ($134 000) on 31 July 1987. He invested $50 000 of this and within a month had spent all but $718 of the balance on an LTD car for himself, a car for his mother, bills, a loan to a friend, furniture, a caravan, loan repayments, repairs to the LTD and living expenses.

On 5 August 1987 Gardiner called at the Port Augusta DSS office to notify receipt of the settlement moneys but was not advised of the preclusion decision which had been made.

Gardiner was married and, at the time of the AAT hearing, had 4 young children. Since 1987 he had had several jobs as an unqualified motor mechanic and operated an unsuccessful kangaroo shooting business between July 1988 and April 1989. Since May 1990 the family had been supported by Mrs Gardiner's earnings from employment, family allowance and family allowance supplement. Gardiner still had back pain.

By the time of the AAT hearing, nothing remained of the settlement moneys although the family still owned some of the items which had been purchased. Gardiner gave evidence that had he known he would not receive the pension, he would have purchased a cheaper car than the LTD, would not have bought the caravan for $6223 in late August/early September 1987 and would not have set up the kangaroo shooting business in 1988. Most of the other expenses were necessary.

'Special circumstances'

The AAT applied the Tribunal's decision in *Krzywak* (1988) 49 *SSR* 580 in relation to the meaning of 'special circumstances'; and decided that the circumstances of the delay until 29 September in notifying Gardiner of the 31 July preclusion decision had 'the particular quality of unusualness that permits them to be described as special'; Reasons, para. 19.

The AAT then considered which expenditures by Gardiner 'were directly attributable to the Department's delay in notifying Gardiner of the decision which had been made'; Reasons, para. 21. It concluded that only the $6223 spent on the caravan was such an expenditure. The purchase of the LTD was not, because all arrangements to buy it were made prior to the date of the DSS decision of 31 July 1987 and the purchase was completed on 31 July, the date when Gardiner received the settlement moneys. The AAT was also of the opinion that Gardiner had said he would have bought a cheaper car rather than the LTD chiefly because of defects which became apparent in the LTD after its purchase.

At the time of the original decision of 31 July 1987 the DSS in fact incorrectly interpreted s.153(1): see: *Tallon* (1988) 43 *SSR* 544. In relation to this factor the AAT commented:

> 'The making of the wrong decision, however, cannot be described as "special" in terms of the legislation: we are satisfied that similar decisions were made in respect of many other applicants who were not "receiving a pension" at the time.'

(Reasons, para. 19)

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS for reconsideration in accordance with the direction that it was appropriate, in the special circumstances of the case, to treat an amount of $6223 of the payment by way of compensation to Gardiner as not having been made, pursuant to s.156 of the Act.

[D.M.]

Sickness benefit: 'decision' to reject a claim

MECOZZI and SECRETARY TO DSS

(No. 7047)

Decided: 13 June 1991 by P. Gerber.

Tony Mecozzi was injured in a motor vehicle accident in November 1989. On 1 February 1990, he lodged a claim for sickness benefit at the West Ryde DSS office in NSW.

Mecozzi visited the DSS office again on 6 February 1990 and withdrew his claim, apparently because he was concerned about whether receipt of sickness benefit might compromise any other claim he had in respect of the accident. Having been unable to obtain sufficient advice on this matter from the office staff, he withdrew his claim in writing.

On 9 February 1990, Mecozzi received a letter from the DSS stating 'You will not be paid sickness benefit

because you withdrew your application'.

Two weeks later, Mecozzi went to the Haymarket DSS office to complain about his initial treatment but was sent back to West Ryde and he made no further attempt to obtain sickness benefit until further visits to West Ryde on 19 and 20 November 1990. There he was advised to reclaim sickness benefit as he was outside the 3 months review period to have full arrears paid, but he refused to fill in any more forms. He then 'appealed' to the SSAT.

The SSAT found that the visit to the Haymarket office did not constitute a request for a review of the decision to reject his claim. However, the SSAT apparently varied the DSS 'decision' to reject the claim by treating his 19 November 1990 visit to West Ryde as a request for review of the decision and decided that he should be paid sickness benefit from that date.

As the AAT put it, because of the withdrawal, it was —

> 'difficult to see how there could be said to be an "application" for sickness benefit before the Department to support a "decision" . . . Nevertheless, the applicant, the Department and the SSAT all regarded the letter of 9 February 1990 as constituting a "decision".'

(Reasons, para. 9).

The matter had been reviewed by an Authorised Review Officer prior to the SSAT and had also been treated there as a 'decision' for which a request for review had taken place more than 3 months later.

The legislation

Section 158(1) of the *Social Security Act* provided at the relevant time that the grant or payment of a benefit 'shall not be made except upon the making of a claim for that . . . benefit'.

Section 159(1) provided that a claim shall be made in writing in accordance with a form approved by the Secretary and shall be lodged at an office of the Department or at a place approved for the purpose by the Secretary.

Without referring to these provisions, the AAT decided that the Mecozzi's visits to the DSS on 19 and 20 November 1990 should have been treated as an application for sickness benefit. Since the original claim was withdrawn, there was nothing for the SSAT to review and the 'only role for this Tribunal therefore is to pronounce a decree of "nullity"': Reasons, para. 14.

Are arrears of sickness benefit payable?

The AAT then considered the issue of whether the applicant had a claim for arrears and if so for what period.

Section 125(3) of the *Social Security Act* provided that a claim is payable from the 7th day after the commencement of an incapacity if it is lodged within 5 weeks after the person becomes incapacitated.

Section 125(4) provided that if a claim is not lodged within that 5-week period, the Secretary may pay benefit from a date no earlier than 4 weeks prior to lodgment of the claim, if the 'sole or dominant cause of the failure to lodge the claim' in time was the incapacity concerned.

Having apparently found that a claim was 'lodged' on 19 November 1990, the AAT then considered whether Mecozzi's incapacity was the sole or dominant cause of his failure to claim earlier.

The AAT concluded, both from Mecozzi's demeanour (in particular, his hostility to the DSS and to the AAT), and from evidence given by his brother, that the accident had brought about a significant personality change. The AAT said that 'the main or dominant cause of the applicant's failure to lodge a valid claim for sickness benefit before 19 November 1990 was due to mental stress attributable to his accident in 1989 . . .'.

Because of the provisions of s.125(4), the earliest date from which Mecozzi could be paid was 22 October 1990. The AAT went on to express surprise at the limited arrears payable, from the vantage point of '. . . a comparative "stranger" in this jurisdiction . . .': Reasons, para. 21.

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS for reconsideration in accordance with the recommendation that (i) the applicant's visit to the Department on 19 February [sic] be treated as an application for sickness benefit; and (ii) that he be paid arrears as from 22 October 1990.

[R.G.]

SSAT jurisdiction: reviewable decision

SEBARATNAM and SECRETARY TO DSS

(No. 6936)

Decided: 14 May 1991 by P. Gerber.

Christopher Sebaratnam migrated to Australia on 13 July 1989.

At the time of his migration, Sebaratnam's son gave an assurance of support under sub-reg 22(1) of the Migration Regulations.

Seven weeks later, Sebaratnam lodged a claim for special benefits. He was advised by a DSS officer, if special benefits were granted to him, the amount paid would be recovered from his son under the assurance of support. The officer then made a file notation that Sebaratnam had withdrawn his claim for special benefits.

On 31 October 1989, Sebaratnam wrote to the Department, saying that he was entitled, under the *Social Security Act*, to unqualified special benefits. On 17 November 1989, a DSS officer wrote to Sebaratnam, advising him that, if Sebaratnam were granted special benefits, the amount paid to him would immediately be recoverable from his son; and that it was 'not acceptable' for his son to defer paying off any debt.

On 11 December 1989, Sebaratnam wrote to the DSS, advising that he had not withdrawn his earlier claim.

On 20 January 1990, Sebaratnam again told the DSS that he objected to the Department immediately recovering from his son any special benefit paid to him; and, on 9 February 1990, he advised a DSS officer that 'he wished to appeal the decision that the benefit is recoverable and should be repaid [by his son] each fortnight'.

On 14 February 1990, a DSS officer decided to grant special benefits to Sebaratnam, subject to immediate recovery of the amount paid each fortnight from Sebaratnam's son.

On 20 February 1990, Sebaratnam lodged an appeal with the SSAT. This application identified the decision, of which Sebaratnam sought review, as a decision communicated to him on 17 November 1989 and 12 January 1990.

The SSAT then dismissed Sebaratnam's appeal. The SSAT noted that Sebaratnam was seeking review of the question whether special benefits