

Administrative Appeals Tribunal decisions

Jurisdiction: dismissal of earlier application for review

**NICHOLSON and SECRETARY TO
DSS (No. 1)
(No. 7304)**

Decided: 9 September 1991 by D.W. Muller.

Ian Nicholson was injured in a motor accident in 1980 and paid sickness benefit between 1980 and 1984, when he was granted invalid pension, after a series of claims, rejections and appeals.

In November 1984, Nicholson settled his common law action for damages arising out of the motor accident and the DSS recovered some \$29488 in sickness benefits from Nicholson's solicitors. When the DSS refused to waive recovery of this amount, Nicholson applied to the AAT in March 1987 for review of the DSS decision.

On 2 March 1988, the AAT dismissed Nicholson's application, with the consent of both parties, under s.42A(1) of the *AAT Act 1975*. That section allows the AAT to dismiss an application without proceeding to review, or completing the review of, the decision under review, if all parties consent.

In June 1988, Nicholson lodged a second application for review of the DSS decision. On 2 May 1989, the AAT decided that it had no jurisdiction to review the second application, as its jurisdiction had been exhausted by the dismissal of 2 March 1988.

In March 1990, Nicholson lodged a third application for review of the DSS decision. On 11 September 1990, the Tribunal (differently constituted) held that it was *functus officio* in relation to the question of jurisdiction and therefore could not accept the third application for review: *Nicholson (No. 1)* (1990) 58 SSR 783; although the AAT expressed the opinion that the dismissal of an application for review under s.42A(1) should not have prevented the lodging of a fresh application in respect of the same decision.

In June 1990, the DSS decided that the amount recoverable from Nicholson

was \$8291 and refunded \$19 861 to him. In December 1990, the DSS refused to waive recovery of the balance.

In January 1991, Nicholson lodged a fourth application for review of the DSS decision. That application was the subject of the present decision.

■ Jurisdiction to review

The AAT noted that the DSS decision not to waive recovery made in December 1990 had never been the subject of AAT review, nor had the original decision ever been reviewed on its merits by the AAT. The AAT found that it had jurisdiction to review the decision of December 1990.

The AAT also concluded that, had there been no fresh decision in December 1990, it would have found jurisdiction to review the original decision and would have extended the time for Nicholson to seek review of that decision. In coming to this conclusion, the AAT followed a decision of the President, O'Connor J., in *Re Mulheron and Australian Telecommunications Corporation* (20 August 1991; No N91/352), which had in turn adopted observations in *Re Nolan and Minister for Immigration and Ethnic Affairs* (29 August 1987; No 3557) and *Re Nicholson (No. 1)* (above).

O'Connor J. had noted that a dismissal of an application under s.42A(1) simply terminated proceedings on an application and did not change the decision of which review was sought, so that the AAT's powers in respect of that decision remained unexercised.

According to O'Connor J., there is 'an underlying policy in the [AAT] Act that the Tribunal should provide substantial review on the merits and not allow undue technicalities to prevent this from happening'. There was some value in ensuring that litigation not be prolonged; but this could be controlled through the AAT's discretion not to allow an extension of time for lodging a subsequent (and inevitably out of time) application for review.

■ The review

Turning to the merits of the present application, the AAT noted that the former s.115E of the *Social Security Act 1947* gave the Secretary a discretion, 'in the special circumstances of the case', to treat the whole or part of a compensation payment as not having been made.

The 'special circumstances' raised

by Nicholson revolved around the delay in correctly diagnosing his condition in the period between 1980 and 1985. If his condition had been correctly diagnosed, he said, he would have been able to pursue a higher claim for damages and would have received an invalid pension in the early 1980s, rather than the mid-1980s, and would have incurred a substantially lower debt to the DSS. (Prior to May 1987, payments of invalid pension were not recoverable out of compensation payments.)

Without dealing in detail with this argument, the AAT said that it did not propose to recognise a 'new category' of 'special circumstances'. It observed that Nicholson's argument, that an earlier proper diagnosis would have allowed him to pursue a higher claim for damages was 'extremely speculative'.

The AAT noted that Nicholson was not destitute and that the decision not to waive recovery of the outstanding \$8291 would not cause him hardship.

■ Formal decision

The AAT affirmed the decision under review.

[P.H.]

Compensation payment: discretion to disregard

**BRODLEY and SECRETARY TO
DSS**

(No. 7239)

Decided: 14 August 1991 by J.A. Kiosoglous, D.B. Williams and D.J. Trowse.

Ian Brodley received \$170 000 in June 1990 in settlement of common law proceedings brought against his employer for injuries received in the course of his employment. Brodley applied for unemployment benefit in December 1990 but was denied payment because of the operation of a 155 week preclusion period ending in May 1993 which was calculated on the basis of the \$170 000 settlement.

The only issue in dispute before the AAT was whether it should exercise the