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 $29 488 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

discretion to disregard all or a part of the lump sum settlement. Both the DSS and the SSAT had declined to exercise that discretion.

The legislation

Section 156 of the *Social Security Act* allows the Secretary to treat all or part of a compensation award 'as not having been made... if the Secretary considers it appropriate to do so in the special circumstances of the case'.

The facts

Brodley was a 49-year-old married man with two non-dependent sons. He was actively seeking work despite constant (though improved) back pain. His wife was not employed and had not considered seeking work.

Of the $170 000 settlement Brodley received $144 000: $92 000 of this was spent on buying a house in which they lived, $14 000 on a car, and $10 000 on repaying debts. By June 1991 he had $2500 left. In addition he and his wife owned household contents and personal effects to the value of $16 000.

A secretary in his solicitor's office told Brodley he would be precluded from social security benefits for three to six months. Relying on this advice he purchased the house, car and household and personal effects.

The AAT found Brodley to be a 'truthful and sincere man who has not frittered money away' (Reasons, para. 15) and an organised and careful provider.

The AAT did not doubt Brodley would have acted differently had he known of the preclusion period and its effect.

Special circumstances

Following the seminal AAT decision of *Krzywak* (1988) 45 *SSR* 580, the AAT noted that 'special circumstances' required the demonstration of unusual, uncommon or exceptional circumstances that resulted in an unjust, unreasonable or otherwise inappropriate outcome. The four factors considered relevant in *Krzywak* were also applied here: the effect of legislative changes, incorrect legal advice, ill health and financial hardship.

There were no legislative changes of relevance here and Brodley's health was not a consideration in his favour because he was well enough to be actively seeking work.

Incorrect legal advice

Following AAT decisions in *Venables* (1988) 43 *SSR* 548; *Zito* (1987) 42 *SSR* 533; *Jerkin* (1988) 42 *SSR* 533 and particularly *Bolton* (1989) 50 *SSR* 650, the AAT stated that the question of incorrect legal advice 'is a largely irrelevant consideration given that such a matter is generally capable of redress by the client against a negligent solicitor' (Reasons, para. 17).

The AAT also noted that Brodley —

> 'appears to have been prepared to base his future financial arrangements on a somewhat general response from a secretary in the legal firm handling his compensation claim, without pursuing enquiries at an appropriate level within the firm'.

(Reasons, para. 17).

Financial hardship

The AAT followed earlier AAT decisions of *Colaiacolo* (24 April 1985) and *Hajar* (1988) 47 *SSR* 614 that for financial hardship alone to amount to a 'special circumstance' it must be 'exceptional'. 'Straitened' financial circumstances were insufficient. Here the AAT regarded the applicant's financial situation as 'straitened' but not 'exceptional' noting that —

> 'in situations where persons have a substantial unencumbered asset the Tribunal has been reluctant to find special circumstances'.

(Reasons, para. 17).

The AAT also pointed out that the applicant's wife had 'an untested capacity to contribute to their support' (Reasons, para. 19).

Formal decision

The AAT affirmed the decision under review that the discretion under s.156 should not be exercised.

[D.M.]

KULAKOV and SECRETARY TO DSS

(No. 7238)

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

Mr Kulakov received a lump sum compensation payment in July 1990 and was precluded from receiving invalid pension for 96 weeks until May 1992. The only issue to be decided by the AAT was whether 'special circumstances' existed for the exercise of the discretion to reduce the preclusion period under s.156 of the *Social Security Act* 1947. Neither the DSS nor the SSAT had thought it appropriate to exercise that discretion.

The facts

Mr Kulakov was 53 years old and had been living in Australia for 28 years. He was married and had 3 daughters.

Mr Kulakov was last employed in 1983, when he ceased work as a result of a series of injuries sustained in the course of his employment. Periodic compensation payments were made to him until July 1990 when the South Australian Supreme Court awarded him, by consent, a lump sum of $105 000, which was in part in respect of an incapacity for work.

After payment of legal expenses, he received a total of $108 400 from the award and long service leave entitlements. By the time of the AAT hearing he had retained none of this money.

On 12 August 1990 Mr Kulakov gave $68 000 to his daughter Helen and her husband David which helped them pay out their mortgage and also helped Mr Kulakov regain the title to his own house which had been lodged as collateral for Helen and David's property. This gift was made on the understanding that in the future Helen would help her sisters and also help Mr Kulakov when he was in need. After learning of the DSS decision to preclude invalid pension payments, the status of the $68 000 gift was changed to being an interest free loan for a maximum of 25 years with minimum yearly payments of $3000.

The remainder of the $108 400 was mostly spent on repaying loans, home repairs and living expenses.

The Kulakovs' only assets were their unencumbered home and 2 not very valuable cars. They did not have any substantial debts outside the family.

In addition to the $3000 loan repayments from Helen and David, Mr and Mrs Kulakov lived off unemployment benefits ($149 per fortnight) and Austudy ($124 per fortnight) paid to their other 2 daughters and some assistance from other relatives. Mr Kulakov grew his own vegetables and kept chickens. Household expenses were approximately $60 per week.

Mr Kulakov was unable to work and was medically qualified for invalid pension. Mrs Kulakov stopped working after receipt of the compensation money because she was finding her cleaning jobs difficult.

In addition to financial hardship, Mr Kulakov sought to rely on misleading legal and Departmental advice as constituting special circumstances.

The evidence in relation to the legal advice received by Mr Kulakov was equivocal. He gave evidence that his lawyer said he would have no problem getting the pension while his sister-in-law gave evidence that the solicitor had said he could see no reason why Mr Kulakov would not get a pension. The AAT regarded this difference as significant.

Mr Kulakov's complaint in relation to the DSS was that there had been ample opportunity from as early as 16 August 1990 for the Department to inform him of the preclusion period. Mr Kulakov first heard of the application of a preclusion period on 28 September 1990 when he received a letter from DSS rejecting his claim for invalid pension on that ground.

Circumstances not special

The AAT followed its previous decisions in *Krzywak* (1988) 45 *SSR* 580, *Bolton* (1989) 50 *SSR* 650 and *Di Pietro* (1988) 43 *SSR* 544, in relation to the factors to be taken into account in deciding whether 'special circumstances' existed.

The AAT was unable to make a finding that Mr Kulakov had received misleading advice from his solicitor and added:

> 'Even if the solicitor had given misleading advice and was negligent, he had no authority to make such assertions and should such be the case, the remedy would be for the applicant to seek redress against the solicitor.'

(Reasons, para. 23)

The allegation regarding DSS responsibility was not accepted because the AAT found that Mr Kulakov 'had already disposed of the bulk of the lump sum compensation settlement sum prior to making a claim for pension': Reasons, para. 25.

In relation to Mr Kulakov's financial situation, the AAT found that the family was able to make ends meet and that Helen and David (who had an unencumbered property and $51 000 combined income) clearly had a responsibility to assist Mr and Mrs Kulakov until the end of the preclusion period. The AAT decided that Mr Kulakov's financial position might be described as 'straitened' but not 'exceptional'. Accordingly 'financial hardship would not appear to be a factor so significant as to be crucial': Reasons, para. 29.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Social security and compensation payments

SECRETARY TO DSS and SMALLACOMBE

Decided: 28 June 1991 by P.W. Johnston.

In February 1988, Kym Smallacombe's husband suffered an industrial injury and was paid periodic workers' compensation for several months. During this period, Mrs Smallacombe received family allowance supplement and rent assistance.

Following cancellation of the periodic workers' compensation, Mr Smallacombe was granted unemployment and sickness benefits and Mrs Smallacombe's family allowance supplement and rent assistance then ceased, in accordance with s.73 of the *Social Security Act* 1947.

Some 2 years' later, Mr Smallacombe was awarded a lump sum payment of compensation of $7184, covering part of the period during which he had received social security payments. A delegate of the Secretary decided to recover $6111 from the compensation payment, representing the unemployment and sickness benefits paid to Mr Smallacombe.

On review, the SSAT found 'special circumstances' within s.156 of the *Social Security Act* 1947 in the cancellation of the periodic compensation payments made to Mr Smallacombe—but for that cancellation and his consequential receipt of social security payments, Mrs Smallacombe would have continued to receive family allowance supplement and rent assistance. The SSAT exercised the s.156 discretion so as to reduce the amount recovered by the Secretary from the compensation award by an amount equivalent to the family allowance supplement and rent assistance foregone by Mrs Smallacombe.

The DSS asked the AAT to review that decision.

Relieving the harsh operation of the Act

The AAT observed, without concluding the issue, that s.156 was 'not a proper way to redress what some might see as an anomalous operation of the Act in respect of beneficiaries of FAS who lose access to that allowance through no fault of their own': Reasons, para. 10.

The preferable approach to relieving any harsh operation of the Act would be to consider waiver of recovery of the debt arising under the Act, by virtue of the discretion conferred by s.251 of the 1947 Act, which allowed the write-off or waiver of debts 'arising under or as a result of this Act'.

The ambit of the decision under review

However, the AAT said, there was no need to consider the availability of the s.251 discretion because the ambit of the decision under review was not confined to the specific issue raised by the parties—whether a discretion should be exercised in favour of the respondent.

The elements of the decision under review, according to the AAT, included the determination of the amount which was recoverable by the Secretary out of the award of compensation made in favour of Mr Smallacombe.

Periodic payments or lump sum?

The Secretary had treated that award of compensation as providing for periodical payments of compensation, because the award had been expressed as compensation for wages lost in a specific past period. The effect of treating the award as periodical payments of compensation was to allow the Secretary to recover the social security benefits paid during the period specified in the award.

The AAT decided that the award was for a lump sum payment by way of compensation, rather than periodical payments of compensation, with the result that the Secretary could only recover the social security benefits paid during the substantially shorter period calculated by dividing half of the lump sum award (as required by s.152(2)(c)(i) of the 1947 Act) by average male weekly earnings (pursuant to s.152(2)(e) of the Act).

The AAT said that it did not accept the analysis of the compensation award put forward by the Secretary— that the amount of the award really represented a consolidated or aggregated series of periodical payments in arrears. The AAT said:

> 'Whilst it is true that regularity need not be an attendant feature of what would form a series of periodic payments, it rather stretches the meaning of that concept to say that a single and definitive payment in settlement of a claim could be regarded as constituting, exclusively of any other payment, part of a series of periodical payments.'

(Reasons, para. 16)