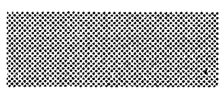
Taking into account all relevant circumstances, the AAT was of the opinion that special circumstances did not apply in this case.

With respect to the legal costs included in the lump sum, the AAT said that the same criteria were relevant when considering whether special circumstances applied. In this matter the legal costs were related to both the common law and compensation actions taken by Haining. Special circumstances may apply where the legal costs are a very large proportion of the lump sum. However, this was not the case here.

Formal decision

The AAT set aside the decision under review and substituted a decision that the sum of $250 000 was a lump sum payment of compensation and that the preclusion period applicable was 237 weeks from 30 January 1988.

[C.H.]



SECRETARY TO DSS and CHIDIAC

(No. 7733)

Decided: 4 February 1992 by O'Connor J, J. McAuley and T. Reeve.

Tony Chidiac was injured in an industrial accident in 1985. On 14 September 1990, he settled a claim for workers' compensation for $184 000 and a common law damages action against his former employer for $26 000.

On 26 September 1990, the DSS decided that the total of the two settlement figures, $210 000, was a lump sum payment by way of compensation within s.152(2) of the *Social Security Act* 1947; that 50% of this amount was the compensation part of the payment; that Chidiac was liable to repay $20 185.14 in sickness benefits received by him; and that Chidiac was precluded from receiving pension or benefit under the Act until 15 January 1993.

Chidiac appealed to the SSAT, which decided that the lump sum payment by way of compensation amounted to $184 000, because the common law settlement of $26 000 had been made to reimburse Chidiac for legal costs and not as a payment of compensation for an incapacity for work.

On 26 February 1991, the DSS applied to the AAT for review of the SSAT decision. On 1 July 1992, the *Social Security Act* 1991 came into operation, replacing the 1947 Act.

Which Act?

The AAT discussed the provisions of Schedule 1A to the *Social Security Act* 1991, which dealt with transitional matters.

The AAT repeated the views expressed in *Cirkovski* (noted in this issue of the *Reporter*).

Clause 15 of Schedule 1A to the *Social Security Act* 1991 kept alive applications for review to the AAT lodged before 1 July 1991 but not determined by that date. But cl.15 did not determine the substantive law to be applied in the review.

The effect of cl.4 of the Schedule was to provide that the provisions of the *Social Security Act* 1947 should be applied when reviewing the Secretary's decision that Chidiac was precluded from receiving pension, because that decision was a determination within cl.4(2)(a) and therefore an 'instrument' within cl.4(1).

The AAT's decision

The AAT decided that the 2 payments made to Chidiac, amounting to $210 000 in all, constituted a lump sum payment of compensation within s.152(2) of the *Social Security Act* 1947. The Federal Court's decision in *Hulls* (1991) 60 *SSR* 834 indicated that it was appropriate to treat the 2 payments as a single lump sum payment.

The compensation part of the lump sum payment was 50% of that payment. Any amount paid to Chidiac as recompense for legal costs could not be excluded from the payment before applying the 50% formula. That formula prevented any dissection of the lump sum and, in particular, prevented the exclusion of amounts paid for legal costs.

Formal decision

The AAT set aside the SSAT's decision and substituted a decision that, in calculating the period for which Chidiac was precluded from receiving benefit, the payment by way of compensation received by Chidiac was $210 000.

[P.H.]

Family allowance supplement: 'notional notifiable event'

SECRETARY TO DSS and DORAVELU

(No. 7952)

Decided: 13 May 1992 by R.A. Balmford.

Janita Doravelu was married and was receiving family allowance supplement (FAS) in 1990, based on the family's combined taxable income in 1989-90 (because of a substantial fall from the standard 'base year of income', 1988-89). At the time of the grant, she was given a notice requiring her to tell the DSS if she started work.

In July 1990, Doravelu told the DSS that she had just started work. The DSS decided that a 'notifiable event' had occurred, which was likely to increase the family's combined taxable income in 1990-91 to an amount more than 25% higher than their combined taxable income in 1989-90 (the tax year being used to calculate Doravelu's entitlement in 1990). The DSS calculated that, on the basis of the combined taxable income in 1990-91, no FAS was payable to Doravelu for the balance of 1990 and cancelled her FAS.

In May 1991, Doravelu was retrenched and made a new claim for FAS. In response to a question on the claim form, she wrote that she had started working in July 1990 and stopped working in May 1991. The DSS decided that Doravelu's commencement of work in July 1990 was a 'notional notifiable event', which required the DSS to base Doravelu's entitlement to FAS on the family's total taxable income in 1990-91 (rather than the standard 'base year' for 1991, 1989-90).

On review, the SSAT decided that one event could not simultaneously be a 'notifiable event' and a 'notional notifiable event', so that Doravelu's commencement of work in July 1990 was not a 'notional notifiable event'. The SSAT decided that Doravelu's entitlement to FAS in 1991 was to be determined by reference to combined family taxable income in 1989-90 and decided that she should be granted FAS from the date of her claim, found by the SSAT to be 16 May 1991.

The DSS applied to the AAT for review of the SSAT's decision.

The legislation

Under the *Social Security Act* 1947, eligibility for FAS was determined for a calendar year: s.76(1). That eligibility depended in part on the combined taxable income of the claimant and the claimant's spouse. The relevant taxable income would normally be taxable income in the 'base year of income', that is, the tax year which ended in the previous calendar year.

However, a more recent tax year could be used if a 'notifiable event' occurred while a person was receiving FAS, as a result of which the total taxable income in the more recent tax year was likely to be 25% higher than the total taxable income in the base year of income: s.74B(2).

Similarly, a more recent tax year could be used if a 'notional notifiable event' had occurred before a person claimed FAS but after the end of the base year of income, and if that event was likely to produce a total taxable income in the more recent tax 25% higher than the total taxable income in the base year of income: s.74B(1A).

According to s.72(1), a 'notifiable event' was an event (a) specified in a notice given to a person under s.163(1) relating to FAS and (b) described in that notice as a notifiable event for the purposes of s.72.

Section 72(1) also defined a 'notional notifiable event' as—

> 'an event specified by the Secretary in writing for the purposes of this definition, being an event that is specified in some or all notices given under s.163(1) to persons who are granted allowances'.

Equivalent provisions are found in the *Social Security Act* 1991, which uses the terms 'FAS notifiable event' and 'FAS assumed notifiable event'.

Which Act?

The AAT decided that the right of the Secretary to have the SSAT's decision reviewed under the 1947 Act and the right of Doravelu to have her claim for FAS determined under the 1947 Act were preserved by s.8 of the *Acts Interpretation Act* 1901.

This finding, the AAT said, was consistent with the decisions in *Reilly* (1987) 39 *SSR* 495 and *Szelag* (21 February 1992).

No 'notifiable event'

The AAT decided that to make an event a 'notifiable event', there must be strict compliance by the DSS with the requirements of the definition of that term in s.72(1). This was because failure by a FAS recipient to notify the DSS of such an event could lead to civil liability (a debt to the Commonwealth) under s.246(1) and criminal liability under s.239(1) of the 1947 Act. As the House of Lords had said in *London and North Eastern Railway Co v Berriman* [1946] AC 278, 313: 'A man is not to be put in peril upon an ambiguity'.

The notice issued to Doravelu in January 1990 had not described commencement of work as a 'notifiable event' for the purposes of s.72 of the Act, as required by para. (b) of the statutory definition of that term. Accordingly, the AAT decided, Doravelu's starting work in July 1990 was not a 'notifiable event'. However, as the decision to cancel payment of FAS was not under review, the AAT made no decision in relation to it.

No 'notional notifiable event'

For similar reasons, the AAT decided that Doravelu's starting work in July 1991 was not a 'notional notifiable event'. It was essential that the requirements of the definition of that term be strictly complied with. The inclusion in the claim form of a question asking whether Doravelu had started work did not specify that event in writing for the purposes of the definition of 'notional notifiable event', as required by the s.72(1) definition. It was probable, the AAT said, that the purpose of the requirement related 'to the need for precision in the definition of matters which may give rise to legal proceedings, both civil and criminal': Reasons, para. 28.

As there had been no 'notional notifiable event', the relevant tax year was the 1989-90 tax year (the year before Doravelu started work). It followed that Doravelu's entitlement to FAS was to be determined by reference to total taxable income in 1989-90 which, it was agreed, meant that she was eligible for FAS from the date of her claim in 1991.

The parties agreed, and the AAT found, that Doravelu had lodged her claim on 20 May 1991, not 16 May 1991 as found by the SSAT.

Formal decision

The AAT varied the SSAT's decision by substituting the date 20 May 1991 for the date 16 May 1991. In all other respects, the AAT affirmed the SSAT's decision.

[P.H.]

Bereavement allowance: 'pensioner couple'

ANDERSON and SECRETARY TO DSS

(No. 7773)

Decided: 21 February 1992 by P.W. Johnston.

Mr Anderson received carer's pension in respect of his father-in-law, who received an age pension. Following his father-in-law's death, Mr Anderson sought payment of a bereavement allowance under s.66 of the *Social Security Act* 1947. Both the DSS and the SSAT refused his application.

The legislation

Under s.66, where a member of a 'pensioner couple' dies, the surviving pensioner was entitled to 7 fortnightly payments of the combined amount that would have been payable to the deceased and the survivor, if the deceased had not died.

'Pensioner couple' was defined in s.3(1) of the Act as 2 pensioners 'each of whom is a married person because of being the spouse of the other pensioner'. Under the same section, 'spouse' was defined to include a '*de facto* spouse' which was in turn defined to cover persons of the opposite sex living in a marriage-like relationship.

A bereavement allowance was paid to Anderson pursuant to s.67 of the *Social Security Act 1947*. Under that section a person other than the deceased's spouse who qualified for carer's pension in respect of the deceased before his death, was qualified to receive a carer's pension for 14 weeks after the death at a rate 'to be determined having regard to the carer's actual circumstances'. (By contrast, the s.66 entitlement was to the total of both pensioners' pensions.)

Not a member of a pensioner couple

Mr Anderson argued that as he had lived in a family relationship in which he undertook the role of carer for his father-in-law and both of them had drawn pensions they should be equated with a pensioner couple.

However, the AAT decided that it was bound to apply the actual terms of the Act which confined the meaning of 'pensioner couple' to persons of the opposite sex as 'no other meaning, natural or artificial, can be given to that