Compensation: special circumstances

BEUS and SECRETARY TO DSS (No. 8000)

Decided: 4 June 1992 by S.D. Hotop.

Beus requested review of a decision of the SSAT of 26 November 1991, affirming a decision of the DSS, that Beus was precluded from receiving an invalid pension from 1 August 1989 to 28 November 1994 as a result of receiving a lump sum payment of compensation.

The facts

The facts were not in dispute at the AAT. Beus was injured on 19 November 1985, whilst working as a rigger, when a steel girder fell on his right foot. Beus' foot was subsequently amputated. He received weekly payments of compensation until 31 July 1989 and on 28 July 1989 his workers' compensation claim was settled for $285 000 exclusive of costs.

Beus, who was married with 2 children, spent this money buying a house for $176 000, renovations for $10 000 and furniture for $15 000. He applied for the invalid pension on 9 November 1989 but his claim was rejected because of the compensation settlement.

In April 1990 Beus left Australia with his family for a 7 week holiday in Europe. He was involved in a car accident in Croatia which resulted in his hospitalisation and treatment for 20 weeks. Altogether Beus' trip cost $45 000, $33 000 more than he had anticipated. Since his return to Australia Beus had required continuing medical treatment.

When he returned to Australia Beus requested review of the DSS decision of 21 November 1989 precluding him from receiving the pension until 28 November 1994.

At the time of this request, Beus' assets were his unencumbered house ($180 000), furniture etc. ($15 000), investments ($28 000), 2 cars ($6000) and bank account ($4500).

Beus' wife worked part-time earning $285 net per week, and received family allowance and family allowance supplement of $75.50 and $3 interest per week. Weekly expenses for the family were $453.

The law

The AAT decided that the correct legislation to apply when calculating the preclusion period was set out in Part XVII of the *Social Security Act* 1947 as the original claim and decision were made before the *Social Security Act* 1991 came into operation.

Beus did not dispute that the preclusion period had been correctly calculated, but requested that the discretion set out in s.1184 of the *Social Security Act* 1991 be exercised in his favour.

The AAT followed *Cirkovski* (1992) 67 *SSR* 955 and decided that this issue should be decided under the 1991 Act. Section 1184 provides that the Secretary may treat the whole or part of a compensation payment as not having been made in the special circumstances of the case. (The AAT noted that there was no material difference between s.156 of the *Social Security Act* 1947 and s.1184 of the *Social Security Act* 1991.)

As there is no definition in the Act of 'special circumstances', the AAT referred to previous AAT decisions of *Re Beadle* (1984) 6 ALD 1; 26 *SSR* 321 ; *Re Green* (1990) 21 ALD 772; and *Re Krzywak* (1988) 15 ALD 690; 45 *SSR* 580; amongst others and concluded that the circumstances would have to be 'unusual, uncommon or exceptional' *(Beadle).*

Although the AAT was sympathetic to Beus, it concluded that special circumstances were not present. The trip overseas had led to Beus having to spend an extra $33 000 and he required ongoing medical treatment. The cost of this treatment was met by his private health insurance. Beus' overall circumstances, including his assets, meant that it was not appropriate to exercise the discretion in his favour.

Formal decision

The AAT affirmed the decision under review.

[C.H.]

Federal Court decisions

Date of effect of AAT decision

SECRETARY, DSS v GARRATT

(Federal Court of Australia)

Decided: 17 July 1992 by Gummow J.

Cheryl Garratt's family allowance was cancelled by the DSS in November 1989, with effect from October 1989. This followed the return to the DSS of an envelope containing a review form, which the DSS had posted to Garrat's last known address, the envelope being marked 'not known at this address'.

The DSS posted a notice of the cancellation to Garrat at the same address. This too was returned, marked 'not known at this address'.

In July 1990, Garratt lodged a claim for family allowance, after she realised that payment of the allowance was no longer being made. The DSS re-granted the allowance from July 1990 but refused to pay Garratt for the period between October 1989 and July 1990. This decision was supported by the DSS on the ground that Garrat had sought review of the decision to cancel her pension more than 3 months after she was given notice of the cancellation, so that s.168(4)(b) of the *Social Security Act 1947* meant that any decision to reinstate Garratt's allowance could only take effect from the date when she had sought review.

On review, the AAT decided that the DSS had not given Garratt notice of the cancellation. The DSS knew that she was no longer at the address to which it posted the notice, so that s. 29 of the *Acts Interpretation Act 1901* did not operate to deem that notice as having been given to Garratt. Accordingly, s.168(4)(a)(ii) allowed Garratt's allowance to be reinstated from the date of cancellation. See *Garratt* (1991) 66 *SSR* 942.

The Secretary then appealed to the Federal Court, under s.44 of the *AAT Act 1975*, from the AAT's decision.

The legislation

Gummow J accepted that the substantive law applicable to the AAT's review was the *Social Security Act* 1947. He referred to the tribunal's reasoning in *Cirkovski* (1992) 67 *SSR* 955, as supporting that conclusion.