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.

The decision to cancel Garratt's family allowance was made under s.168(1)(a) of the Act, which allowed the Secretary to cancel an allowance, 'having regard to anything that affects the payment of [the] allowance'.

Section 168(3) of the Act gave the Secretary power to grant a claim for, or direct the payment of, a family allowance.

Section 168(4) fixed the date from which a decision under s.168(3) could take effect:

> '(a) where the s.168(3) decision was made following a person applying for review of a previous decision, from the date of that previous decision, if
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> (i) the review was requested within 3 months of the person being given notice of the previous decision; or
>
> (ii) no notice was given to the person of the previous decision;
>
> (b) where the s.168(3) decision was made following a person applying for review of a previous decision, from the date of the s.168(3) decision, if the person requested review more than 3 months after being given notice of the previous decision;
>
> (c) where the s.168(3) decision was made following a person advising a change in circumstances, from the date of the advice;
>
> (ca) where the s.168(3) decision granted a claim 'when none of the preceding paragraphs applies', on the day when the s.168(3) decision was made or such later day or earlier day as is specified in the s.168(3) decision;
>
> (d) in any other case, on the day when the s.168(3) decision was made or such later day or earlier day (no more than 3 months before the s.168(3) decision) as is specified in the s.168(3) decision.'

No request for review

Gummow J found that Garratt had not requested the Secretary to review the cancellation decision but had simply lodged a new claim for family allowance and asked that the grant of that claim take effect from the date of cancellation.

Accordingly, neither s.168(4)(a) nor s.168(4)(b) of the 1947 Act was applicable: those paragraphs could only apply where a person had requested a review by the Secretary of an earlier decision. Section 168(4)(c), dealing with advice of a change in circumstances, was also irrelevant.

This left s. 168(4)(ca), which was expressed to apply to a decision 'granting a claim when none of the preceding paragraphs applies'. Gummow J could see no reason to limit this provision to the situation where an earlier decision unfavourable to a person had been set aside, as the AAT had done in *Perkins* (1990) 56 *SSR* 754.

Section 168(4)(ca) gave the Secretary a discretion to fix, as the date of effect of the decision to re-grant family allowance in July 1990, such later or earlier date as the Secretary specified. Gummow J said that the Secretary's delegate had made an error of law in failing to exercise the discretion given by s.168(4)(ca); and the AAT had perpetuated that error.

As there had been no exercise of the discretion conferred by s.168(4)(ca), the AAT's decision should be set aside and the matter sent back to the AAT for determination according to law.

Gummow J observed that, on the point of the possible date of effect of the decision to re-grant family allowance, he had derived no assistance from the Federal Court decision in *O'Connell* (1992) 67 *SSR* 964, because the judge in that case had apparently not been referred to ss. 168(3) and 168(4), which Gummow J saw as central to the payment of 'arrears'.

Notice by post

Gummow J then considered the position which would have applied if Garratt had applied in July 1990 for review of the November 1989 cancellation decision, rather than claiming a new grant of allowance.

If she had applied for review by the Secretary, then any decision to set aside the earlier cancellation would have taken effect either on the date of the cancellation, if Garratt had not been given notice of the cancellation: s.168(4)(a); or on the date of her request for review, if she had been given notice of the cancellation: s.168(4)(b).

In the present case, Gummow J said, s.168(4)(a) would have been the applicable provision because Garratt had not been given notice of the cancellation. According to the judge, s.168(4) did not authorise or require a document to be served by post; so that s.29 of the *Acts Interpretation Act 1901* did not operate so as to treat the notice as having been given to Garratt when a letter containing that notice was posted to Garratt's last known address. The rights of persons to have decisions reviewed and altered by the Secretary, Gummow J said,

> 'should not readily be construed so as to fix upon something less than the giving of notice and to accept an imputed notification as sufficient for the operation of the legislation.'

(Reasons, pp. 17-18)

Gummow J also rejected the Secretary's argument that s.28A of the *Acts Interpretation Act* authorised the giving of notice of a decision by posting the notice to the last known address of the recipient. That provision, which declares that such a method may be used where an Act requires a document to be served on a person, is expressed to apply 'unless the contrary intention appears'. Section 168(4)(a) and s.168(4)(b) displayed a contrary intention because they provided

> 'that persons would not be subject to an adverse operation of those paragraphs by the fixing of the 3 months' period there referred to by reference to notice they never had.'

(Reasons, pp. 17-18)

Formal decision

Gummow J allowed the appeal and set aside the decision of the AAT. He remitted the matter to the AAT to be determined according to law.

[P.H.]

Overpayment: waiver and write-off of recovery

SECRETARY TO DSS v HODGSON

(Federal Court of Australia)

Decided: 17 July 1992 by Hill J.

Hodgson had received payments of unemployment benefit after concealing the fact that he was employed. A delegate of the Secretary decided that Hodgson was indebted to the Commonwealth under s.246 of the *Social Security Act* 1947 and that this amount should be recovered from Hodgson.

Hodgson was subsequently convicted on 43 counts of obtaining unemployment benefit which was not payable and making false statements contrary to s.239(1) of the *Social Security Act* 1947, and sentenced to imprisonment. While still in prison, he appealed to the SSAT against the recovery decision. The SSAT affirmed the decision to recover the debt and refused to exercise the Secretary's discretion, conferred by s.251 of the 1947 Act, to waive recovery of the debt.