

Paragraph (g) of the Directions allowed waiver where there were 'extremely unusual, uncommon or exceptional circumstances'. After referring to the criticism of this paragraph in *Hodgson* (1992) 68 SSR 977 and to the Federal Court decision in *Beadle* (1985) 26 SSR 321; 7 ALD 670, the AAT considered the financial circumstances of Mrs Edwards and her family.

The Edwards' small business had failed, they had been obliged to vacate their house (which they had rented out) and she and her husband now worked in an hotel in country Queensland. Their income exceeded their expenses by about \$60-70 a week.

The AAT said that, at a time when many people were suffering financial difficulties and having to make similar sacrifices, there was nothing in the Edwards' circumstances which was extremely unusual, uncommon or exceptional when the SSAT exercised the waiver power in October 1991. Noting that the family's financial situation was improving, the AAT said that there was even less basis for exercising the waiver power now, in accordance with para. (d) of the current Ministerial Directions of 5 May 1992: Reasons, para. 77.

Formal decision

The AAT varied the decision of the SSAT by deleting the decision that the outstanding moneys be waived and substituting a decision that recovery of the outstanding moneys not be waived. The AAT otherwise affirmed the SSAT's decision.

[P.H.]

Compensation: award 'compensation part'

SECRETARY TO DSS and
WISEMAN

(No. 8097)

Decided: 10 July 1992 by B.J. McMahon.

James Wiseman was injured at work in October 1985 and received periodic workers' compensation payments totalling \$22 360.20 until August 1987. In November 1991, he settled a com-

pensation claim arising out of the same accident for a gross sum of \$325 000. A consent award made to this effect did not state how the sum was calculated.

Wiseman also received a total of \$18 539.05 in pension or benefit payments from DSS between October 1990 and December 1991. The DSS applied a preclusion period on Wiseman. The AAT did not indicate any of the details of this period, including its length or the date from which it commenced. Wiseman appealed to the SSAT which fixed the preclusion period at 265 weeks and decided that there were no 'special circumstances' which would justify disregarding any of the compensation payments received by Wiseman. Both the Secretary and Wiseman applied to the AAT for review of the SSAT decision fixing the length of the preclusion period.

The legislation

Under s.1165(1) of the *Social Security Act* 1991, certain social security payments are not payable to a person for the 'lump sum preclusion period' calculated for that person. The length of that period is determined by dividing the 'compensation part' of the lump sum compensation payment by average weekly earnings.

The 'compensation part' of a lump sum payment is determined by applying s.17(3) and (4) of the *Social Security Act*. Where a claim is settled after 9 February 1988, the 'compensation part' is 50% of the lump sum compensation payment: s.17(3)(a). However, s.17(4) states that:

'Where a person —

(a) has received periodic compensation payments in respect of lost earnings or lost capacity to earn; and

(b) after receiving those payments, receives a lump sum compensation payment in respect of the lost earnings or lost capacity to earn (. . . the "LSP"); and

(c) because of receiving the LSP, becomes liable to repay an amount (. . . the Repaid Periodic Compensation Payment — "RPCP") equal to the periodic compensation payments received;

then, for the purposes of subsection (3), the amount of the lump sum compensation payment is —

LSP - RPCP'

The three approaches

The SSAT had concluded that the 'LSP' was \$162 500, 50% of the gross settlement amount of \$325 000. It reached that conclusion by deciding that the 'lump sum compensation payment in respect of the lost earnings or lost capacity to earn', referred to in

s.17(4)(b), was not the full amount of the compensation payment but the 'compensation part of the lump sum payment', as defined in s.17(3). Therefore the amount of worker's compensation payments paid to Wiseman was to be deducted from the \$162 500 which resulted in a preclusion period of 265 weeks.

The DSS submitted that the SSAT had applied s.17(3) and (4) in the wrong order. It submitted that s.17(4) must be applied first to calculate the amount of the lump sum payment to which s.17(3) applied in order to ascertain the 'compensation part'.

Counsel for Wiseman put a submission that appeared to combine the best of the other 2 approaches. It was submitted that the 'lump sum compensation payment in respect of the lost earnings or lost capacity to earn' referred to in s.17(4)(b) was the component of the gross lump sum that was for lost earnings or lost capacity to earn. The amount determined by applying s.17(4) in this way should then be halved by applying s.17(3)(a).

DSS approach adopted

The AAT preferred the DSS approach because it accorded with a straightforward reading of s. 17. The AAT accepted the DSS submission that the 50% rule in s. 17(3)(a) was intended to be applied at all levels of administration, so as to avoid a judgment having to be made as to what part of a lump sum actually represented non-income lost components.

The interpretations of s. 17(4)(b) advocated by the SSAT and Wiseman's counsel turned on the phrase, 'in respect of the lost earnings or lost capacity to earn', that was found in both paras (a) and (b) of s. 17(4). In relation to this the AAT said:

'The phrase may have been repeated because the draftsman considered that this would make the paragraph more easily understood by the non-lawyer. The whole Act is a brave and praiseworthy attempt to write legislation in "plain English". In my view, it has not sacrificed clarity in s.17 while achieving that end.'

(Reasons, para. 15)

Formal decision

The AAT affirmed the 'primary decision under review' (without setting out that decision and although, under s.1283 of the *Social Security Act* 1991, it is the SSAT decision that is to be reviewed by the AAT).

[D.M.]