Compensation award: 'special circumstances'?

COOK and SECRETARY TO DSS

(No. 8310)

Decided: 30 September 1992 by D.W. Muller.

Glenn Cook's application for invalid pension on 19 June 1990 was rejected on the basis that he was precluded from receiving a benefit or pension until 16 May 2001. On 3 June 1991 the SSAT reduced the preclusion period to 16 July 1997.

The facts

Cook was badly injured in a car accident on 28 March 1985, when he became a paraplegic. He was granted the invalid pension which was cancelled when he received lump sum damages of $800 000 in August 1988.

By mid-1990 Cook had spent all his money. A letter from Cook explained that the money had been spent on legal costs ($51 863), paraplegic association ($19 799), credit union ($6000), purchase and renovations to a Unit, Coffs Harbour ($406 660), wheelchairs etc. ($19 050), repayment of loans ($45 000), car and boat ($64 350), living expenses ($142 496), and failed investments ($90 000).

Cook was now living with his parents who were supporting him. Both the car and the boat were wrecked by Cook's friends. The businesses he invested in had been made bankrupt. The only asset of any value was the home unit, worth aproximately $250 000.

Evidence was given by a community corrections officer who was supervising Cook who had been convicted of several criminal offences in early 1991. Cook had become a heavy drinker and heroin addict before he was injured. He tried to maintain this lifestyle after he was injured and did so until his money ran out and his friends left.

Preclusion

The AAT set out the legislation dealing with preclusion from the receipt of pension in ss.152 and 153 of the *Social Security Act* 1947. The AAT said that social welfare legislation was intended to help the needy, but the intention of the *Social Security Act* was that a person was to use a compensation lump sum to live on.

The legislation took into account that part of the lump sum was to meet legal expenses etc. and so only considered that 50% of the sum was to be used to live on. The AAT noted that the preclusion period had been correctly calculated according to the Act.

Special circumstances

Section 156 of the 1947 Act gave the Secretary a discretion to treat the whole or part of any compensation payment as not having been made in the special circumstances of the case.

On behalf of Cook it was submitted that special circumstances existed because a preclusion period of 16 years was too long; Cook had a drug and alcohol problem which, with his serious injury, created an unusual psychological state; Cook had no knowledge of how to handle such a large sum of money; it would be difficult for Cook to find suitable accomodation if his Unit was sold; and Cook was suffering severe financial hardship.

The SSAT had treated the amounts invested in the failed business ventures, plus $100 000 spent whilst Cook was not in a fit state, as compensation payments which had not been made and thus reduced the preclusion period.

The AAT stated that Federal Court and AAT decisions had set out the following principles when assessing whether special circumstances exist:

(1) The plain intention of the Act was that a person should not receive social security payments and compensation payments for the same period.

(2) If a person received a lump sum of compensation then a pension or benefit ceased to be payable for a period.

(3) The discretion to apply special circumstances should not frustrate the objects of the Act.

(4) The Act should not be strictly enforced if it led to an unjust, unreasonable or otherwise inappropriate result.

(5) Hardship was relevant to the exercise of the discretion.

(6) The circumstances causing the hardship were also relevant.

(7) Financial hardship must be unusual or severe hardship.

This matter could be dealt with in at least 4 ways. These were:

(a) a strict adherence to the Act which had an element of punishment and deterrence;

(b) allowance could be made for an imprudent or unlucky investment and for money lost because of psychological imbalance;

(c) a calculation could be made of exactly how much money should have been left for Cook to live on. The AAT calculated that approximately $251 555 would have been left after the cost of the assets bought by Cook had been deducted from the lump sum. This would have enabled him to live comfortably until 1998.

(d) An assessment of Cook's present financial circumstances could be made. Cook's unit was valued at $250 000. If this was sold Cook could buy an adequate home for approximately $150 000 leaving him about $100 000 to live on.

As each of the above approaches except (a) would result in the same outcome, the AAT decided not to disturb the SSAT decision

Formal decision

The AAT affirmed the SSAT decision.

[C.H.]

SECRETARY TO DSS and LIEBELT

(No. 8196)

Decided: 25 August 1992 by J.A. Kiosoglous.

On 12 July 1991, the DSS decided that Gary Liebelt and his wife were precluded from receiving a pension or benefit from 20 July 1989 to 25 July 1990, and to recover the amount of $13 315.60 paid to Liebelt in benefits.

The SSAT varied this decision on 12 December 1991 by remitting the matter to the Secretary with directions that the amount to be recovered be recalculated on the basis that the total amount of additional benefit paid for Liebelt's children should be deducted from the recoverable amount. DSS requested review of that decision.

The facts

The facts were agreed upon by both parties before the hearing. Liebelt was injured in a car accident on 17 June 1989 but continued to work until 19 July 1989. He claimed sickness benefit which was paid from 8 August 1989 and rehabilitation allowance which was paid from 9 May 1990 to 31 January 1991. His wife was paid wife's pension from 10 May 1990 to 31 January 1991.

On 21 June 1991 an award of $62 358.70 was made in Liebelt's favour by consent. A delegate of the Secretary determined that Liebelt was precluded from receiving benefit or pension for 53 weeks from 20 July 1989 (the day after he finished work). During that period Liebelt was paid $13 315.60 in sickness benefit and rehabilitation allowance. This amount was refunded by the insurer to DSS.

The legislation

After considering the relevant legislation, namely ss.17, 1165(4) and 1179 of the *Social Security Act* 1991, the AAT found that the preclusion period had been correctly calculated and that the amount of $13 315.60 had been recovered from the insurer pursuant to the notice issued under s.1179.

Special circumstances

Section 1184 provides that the Secretary to DSS may treat the whole or part of any compensation payment as not having been made in the special circumstances of the case.

It was noted by the AAT that the Act had been amended from 1 January 1992, so that s.1166(5) and (6) provided that amounts to be recovered would be reduced by a notional entitlement to Family Allowance Supplement. Liebelt's claim was settled on 21 June 1991 and therefore the amendment did not apply to him.

Liebelt submitted that he was not suffering financial hardship or ill health but that payments for support of his children should not be recovered. Parliament had acknowledged this by amending the Act.

The AAT referred to *Krzywak* (1989) 45 *SSR* 580 and noted that, for special circumstances to exist, they must be unusual, uncommon or exceptional and result in an outcome which is unjust, unreasonable or otherwise inappropriate. The relevant factors referred to in *Krzywak* were:

(1) Incorrect legal advice — not relevant here.

(2) Ill health — not relevant here.

(3) Financial hardship — On its own this would not be enough to establish special circumstances: *Hajar* (1988) 47 *SSR* 614. Liebelt stated that he was not suffering financial hardship.

(4) Legislative change — The AAT noted that the Act had been amended but this amendment was not retrospective. It did not find that the non-retrospective operation was a special circumstance:

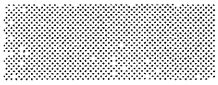
> 'The intention of Parliament is clear in this matter, and it would amount to the Tribunal entering the field of law-making if it were to exercise the discretion to get around the clear application of the law.'

(Reasons, para. 16)

Formal decision

The AAT set aside the SSAT decision and affirmed the decision of DSS dated 12 July 1991.

[C.H.]



PLATEL and SECRETARY TO DSS

(No. 8250)

Decided: 17 September 1992 by S.D. Hotop.

Platel requested review of an SSAT decision affirming a DSS decision to preclude Platel from receiving a social security benefit or pension from 4 November 1991 to 4 July 1993.

The facts

Platel was employed as a sheet metal worker until 1 November 1991, when he was retrenched and received a redundancy package of $27 000. His wife was injured in a car accident on 11 March 1989 and received weekly payments of compensation to 3 November 1991.

On 21 October 1991 Mrs Platel settled her common law claim for $133 254.54, $33 254.54 of which was repaid to the workers' compensation insurer for weekly payments received by Mrs Platel. The sum of $83 447 was paid to Mrs Platel after legal costs were deducted.

The 2 sums paid to the Platels were spent on renovations to their house ($27 000), discharging the mortgage ($24 838), a used car ($13 995), electrical appliances ($5000), air conditioning ($3250), security doors ($2000) and furniture ($5000). Debts of $6341 were repaid and gifts of several thousand dollars were given to their children. By February 1992 all the money had been spent and Platel owed $7000 to a finance company which was being repaid at the rate of $170 a month.

Three children were living at home paying board of $125 a week plus repayment of a loan by one child at the rate of $30-$40 a week. The other adult children helped their parents by giving them small sums of money.

The Platel's house is valued at $95 000, and they had debts of $7000 and no savings. The Platels claimed that they were not advised by their legal advisers when settling their claims that they would be precluded from receiving a social security benefit for a certain period.

After Platel and his wife were examined by the Commonwealth Medical Officer, the DSS decided that they were both eligible for disability support pensions.

Preclusion

According to s.1165 of the *Social Security Act* 1991, where a person receives a lump sum of compensation for loss of future earnings, that person is precluded from receiving a pension or benefit for a certain period.

The period is calculated by dividing 50% of the lump sum by average male weekly earnings at the date the lump sum was paid.

In this case the lump sum received by Mrs Platel was $100 000, 50% of which was $50 000. When this was divided by male average weekly earnings, a figure of 87 weeks was calculated. The preclusion period began on the 4 November 1991, the day after Mrs Platel last received weekly payments. The AAT found that the preclusion period had been correctly calculated and applied.

Special circumstances

The Secretary to the DSS may treat the whole or part of a compensation payment as not having been made in the special circumstances of the case (*Social Security Act* 1991, s.1184).

The AAT referred to a number of AAT and Federal Court decisions which had analysed the term 'special circumstances'. The intention of the legislature was that a certain proportion of the lump sum of compensation received should be used to support the person. When deciding the relevant factors, the AAT referred to those set out in *Krzywak* (1988) 45 *SSR* 580 and stated that these were not supposed to be exhaustive.

Financial circumstances: These must be unusual and exceptional. Platel was in receipt of $125 per week plus an extra $30 or $40. He admitted to the AAT that he and his wife were 'just scraping through'. They owned an unencumbered house which had just been upgraded. The AAT found that the Platels were not suffering unusual or exceptional hardship.

Health: Platel and his wife are both incapacitated for work, but this of itself was not sufficient to find special circumstances. There was no evidence before the AAT that the Platels had ongoing substantial health costs.

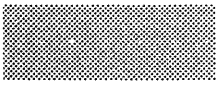
Incorrect legal advice: There are a number of AAT decisions which had found that incorrect legal advice was not a special circumstance.

The AAT concluded that the Platels were largly responsible for their straitened financial circumstances, and that it was not appropriate to exercise the discretion in this matter.

Formal decision

The AAT affirmed the decision under review.

[C.H.]



WILKS and SECRETARY TO DSS

(No. 8272)

Decided: 24 September 1992 by M.D. Allen.

Gregory Wilks requested review of a DSS decision (affirmed by the SSAT) to pay him the invalid pension at a rate which was less than he had been paid previously.

Wilks was granted invalid pension in 1986. He was also in receipt of miner's compensation which was assessed as income by the DSS. In 1989, Wilks was advised by his doctor to sell his house near Newcastle and move north. The proceeds from the sale of his house were placed in a bank account which raised his assets above the assets test limit. Payment of the invalid pension was cancelled.

In September 1990, Wilks purchased another house in Port Macquarie and re-applied for invalid pension which was granted at a reduced rate, i.e. at a rate less than it had been paid before it was cancelled.

The legislation

The *Social Security Act* 1947 was amended in 1987 so that, where a person commenced to receive a pension after 1 May 1987, any payment of compensation was deducted from the rate of invalid pension on a dollar for dollar basis. Where the pension was being paid before 1 May 1987, compensation was treated as income and the ordinary income test applied.

Because Wilks had re-applied for the pension after 1 May 1987, his compensation payments were directly deducted from the rate of payment of his pension. Thus he was paid at a lower rate than he had been before he sold his house in Newcastle.

Special circumstances

Although the 1947 Act applied when Wilks first sought review, the applicable legislation was now the *Social Security Act* 1991: see *Hodgson* (1992) 68 *SSR* 982.

Section 1184 of the 1991 Act states that the Secretary may treat the whole or part of any compensation payment as not having been made in the 'special circumstances' of the case.

The AAT found it appropriate to treat part of the compensation payments made to Wilks as not having been made for the following reason. Wilks had originally received his pension before 1 May 1987 and his compensation payments were treated as ordinary income. He lost his pension temporarily after he sold his house. The AAT said that Wilks did not lose his entitlement to the invalid pension, and — 'Strictly speaking I see no requirement for the applicant to have re-applied for the grant of invalid pension': Reasons, p. 3. Wilks simply had to satisfy DSS that that his assets and income were such that he was entitled to be paid the pension at a rate greater than nil.

Wilks was not told by the DSS that the legislation had changed when he attended their offices to provide information as required. Correspondence from the DSS to Wilks continued to refer to compensation payments as income which was misleading according to the AAT. Wilks had made his financial arrangements on the basis that his compensation payments would continue to be treated as income and so had suffered financial hardship. The AAT concluded that it could not direct the DSS to treat compensation payments to Wilks as income, but thought the same result would be achieved if half of each compensation payment was treated as not having been made.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary to DSS with directions that one half of every fortnightly payment of miner's compensation received by Wilks between 27 September 1990 and 12 October 1991 be regarded as not having been made.

[C.H.]

Cohabitation: job search allowance

GRAY and SECRETARY TO DSS

(No. 8216)

Decided: 1 September 1992 by B.J. McMahon, T.R. Russell and G.A.R. Johnston.

Robert Gray asked the DSS to pay him job search allowance after he was retrenched from his job. The DSS decided that he was living in a marriage-like relationship and assessed his claim accordingly. He asked for a review of the decision and, after it was affirmed by the SSAT, he appealed to the AAT.

The legislation

Section 4(2) of the *Social Security Act* 1991 sets out the circumstances under which a person will be treated as a member of a couple, including where the person is in a relationship which the Secretary considers to be a marriage-like relationship.

Section 4(3) lists the factors which must be taken into account in determining whether a marriage-like relationship exists. Broadly, the factors cover the financial relationship, the social relationship, arrangements concerning the household and any children, the existence of a sexual relationship and the parties' own perception and commitment.

The facts

Gray had moved in with Ms M in 1976, having first met her in 1975. They had continued to live together since then and three years ago, she had arranged for the house (which she owned, having bought out her ex-husband with assistance from Gray) to be transferred to him as a joint tenant. Although they originally had a sexual relationship, this ceased in 1979 and they had used separate bedrooms since that time.

In addition to the house they lived in, they also owned a time-share apartment as joint tenants and had holidays together there and at other places. Their social lives were considerably intermingled and they often socialised as a couple. They were both active Christians and 'a good deal of their life revolves around their Church and like-minded friends'.

Gray and Ms M had a joint bank account, from which shopping expenses were paid and they each had credit