force at the time when waiver was first considered (by the SSAT).

That direction authorised waiver of recovery in limited circumstances, including —

> '(g) Where in the opinion of the Secretary special circumstances apply such that the circumstances are extremely unusual, uncommon or exceptional (as discussed by the Federal Court of Australia in *Beadle v Director-General of Social Security* (1985) 7 ALD 670.'

'Special circumstances'

The overpayment came about because the DSS had calculated the rate of benefit payable to her without taking into account payments received by McKenzie from a fund administered by the Public Trustee.

The fund had been established by the Queensland Supreme Court in August 1987 (when McKenzie was 17), after she had recovered damages for injuries sustained in an accident when a child. The Supreme Court made a Protection Order with respect to McKenzie, directing the Public Trustee to manage all of her estate, including the damages awarded to her.

Shortly after the Public Trustee received the proceeds of the damages claim, it wrote to the DSS advising that it was handling McKenzie's affairs and asking if she was receiving a pension. The DSS replied that it had no record of McKenzie.

About 10 months later, McKenzie claimed sickness benefit. On the advice of a DSS officer, she did not complete the part of the claim form which asked if she was the beneficiary of a trust; and she wrote that she had not had a damages claim settled since 30 April 1987.

The DSS commenced to pay McKenzie benefit at the full rate and made no inquiry of the Public Trustee because by this stage the DSS had discarded the earlier letter from the Public Trustee.

In October 1989, McKenzie advised the DSS that she had money in trust, from which she derived no income and to which she did not have access.

The AAT made the following findings:

- McKenzie was still subject to the protection order made by the Supreme Court;
- McKenzie had no entitlement or access to any of the fund held by the Public Trustee, which had a discretion to apply the fund for her benefit;
- McKenzie had acted honestly in her dealings with the DSS , answering the questions on various claim forms to the best of her ability — her understanding of her financial and legal affairs being limited;
- the DSS had failed to act on the letter sent to it by the Public Trustee some 10 months before McKenzie's claim, or on the information provided by McKenzie in October 1989; and
- the Public Trustee had failed to intervene when it became aware that McKenzie was receiving social security payments.

The AAT criticised the DSS's failure to maintain a record of the letter from the Public Trustee:

> 'Given the nature of a Protection Order and the circumstances in which such an order is made, we find it difficult to understand why a file was not then opened. It would seem to us that the Department could well expect the subject of such an order would not only approach it in relation to a benefit but also to do so without having the ability to manage his or her own financial affairs. Despite having been given notice, the department effectively paid no regard to the Protection Order.'

(Reasons, para. 47)

Taking these factors into account, the AAT found that the circumstances of the case were 'special' within para (g) of the Minister's Direction of 8 July 1991: the DSS should have realised that it was dealing with a protected person, and had failed to show the care which was required when dealing with a person who lacked the capacity to manage her own affairs.

McKenzie's difficulties had been compounded, the AAT said, by the Public Trustee's inaction (and apparent failure to discharge the terms of the Protection Order, which made it responsible for the management of the respondent's estate).

Formal decision

The AAT affirmed the decision of the SSAT to waive recovery of the outstanding balance of the debt.

[P.H.]

Sickness allowance: relevant work

SECRETARY TO DSS and DICKER

(No. 8464)

Decided: 7 January 1993 by J.R. Dwyer.

The Secretary appealed against a decision of the SSAT, which set aside a decision of the DSS to reject David Dicker's claim for sickness benefit (correctly sickness allowance) and directed that Dicker fulfilled the requirements of section 666 of the *Social Security Act* 1991 as at the date of his claim.

The legislation

Section 666(1) of the *Social Security Act* 1991 provides, so far as it is relevant, that a person is qualified for sickness allowance if the person is incapacitated for work throughout the period because of sickness or an accident, the incapacity is caused wholly or virtually wholly by a medical condition arising from the sickness or accident, the incapacity is likely to be temporary and the person has suffered or are likely to suffer a loss of salary wages or other income because of that incapacity.

Section 666(2) defines what 'work' means in s.666(1): if the person had a contract of employment immediately before he or she became incapacitated and that contract continues after the incapacity, then work is the work the person has contracted to perform: s.666(2)(a); in any other case, 'work' is 'work of a kind that the person could, in the Secretary's opinion, be reasonably expected to do': s.666(2)(b). This is then further defined as work that is for at least 8 hours per week at award wages or above and may be full-time, part-time or casual.

Relevant work

Dicker applied for sickness allowance on 27 February 1992. On his form he had stated that his employer had not kept a job open for him. He also lodged 2 medical certificates: one was dated 26 February 1992, diagnosing tenosynivitis of the left wrist and indicating that, whilst Dicker could not do his usual type of work, he could do other types of work. The second certificate, from a Dr Harris, dated 27 February 1992, gave the same diagnosis and said that Dicker was not fit to

undertake picking for the rest of the season.

The DSS told him he was able to do work other than picking and Dicker then said he would get another certificate explaining that he was unfit for all types of work. He was told to lodge a claim for Job Search Allowance. Dicker told the DSS that he had a 12-week suspension imposed by CES.

Dicker lodged a second certificate from Dr Davis which indicated that, not only was Dicker unable to do his usual work, but that he could not do any other type of work. The DSS then rejected his claim without explaining the reason for the rejection. The Departmental advocate told the AAT that the reason for rejection was that Dicker was not unfit for all types of work.

The AAT also noted that, after the decision had been made to reject Dicker's claim for sickness allowance, the DSS had phoned Dr Harris who apparently stated that even though Dicker had a brace on his left arm, he could do light duties.

Although it was not entirely clear what the nature of Dicker's employment had been before he claimed sickness allowance (Dicker did not take part in the hearing), it was accepted that he did not have a contract of employment that continued after he got tenosynivitis. Hence s.666(2)(a) did not apply to him. The AAT said that s.666(2)(b) applied and this required the Secretary to form an opinion as to the sort of work Dicker could reasonably be expected to do, and then whether he was incapacitated for that work:

> 'In forming an opinion as to the kind of work which Mr Dicker could reasonably be expected to do it is necessary to consider his employment qualifications and experience. There is no evidence that the primary decision-maker or the officer who reviewed that decision gave any consideration to these matters before Mr Dicker's claim was rejected or the rejection was affirmed.'

(Reasons, para. 18)

The AAT noted that the only evidence before the original Departmental decision-makers was that on Dicker's claim form which said that he worked as a labourer, left school at 17, reached Year 11 and had the 'SC' (presumably school certificate) qualification.

The only evidence as to Dicker's prior work history before the AAT was contained in the SSAT's reasons for decision which stated that he had previously worked as an infantry soldier, as a concreter, plasterer and labourer. The DSS advocate said that, as Dicker was right-handed, he was capable of doing clerical work, or could work as a car park or gate attendant, as a kitchen hand or night watchman.

The AAT concluded that the work Dicker could reasonably be expected to do, was work similar to that he had done in the past, that is, semi-skilled or unskilled labouring work. It was not reasonable to expect him to do clerical work, because it appeared he had no experience or qualifications for it. In relation to other work as a car-park attendant, kitchen hand or night watchman, the AAT stated that these required the full use of two arms, unless an employer made special arrangements:

> 'Even if there are some jobs available for car park attendants who do not have to drive and for gate keepers who do not have to manually open gates, it is my understanding that those positions are not readily available as they are usually kept by employers for their own employees who require light duties work. A kitchen hand would be required to use both arms in the course of his duties and a person employing a night watchman for security reasons would no doubt require one with two strong arms.'

(Reasons, para. 24)

The AAT concluded that, in relation to those without a continuing contract of employment to whom s.666(2)(b) applied, 'it is not reasonable to expect them to be able to attract employers who will offer them special conditions of employment to take account of incapacity due to sickness or accident': Reasons, para. 25.

The Tribunal concluded that Dicker was incapacitated for work in that he was incapacitated for work of a kind that he could reasonably be expected to do, that this incapacity was wholly caused by a medical condition and that it was likely to be temporary.

The DSS's relationship with Dicker

After making its decision, the Tribunal went on to comment on a statement made by Dicker on his appeal form to the SSAT: he had said that he thought staff at the Mildura DSS office did not like him. The Tribunal said '[t]here are matters in the documents which support that assertion': Reasons, para. 27.

For example 'the way in which the claim was rejected, without reference to the terms of the Act or to any manual, and without obtaining necessary information from Mr Dicker or giving weight to the fact that his arm was in a brace, are matters that give rise to some concern'.

There was also on the file evidence of a threat made by Dicker to an officer of the DSS. Whilst the Tribunal said this was to be deplored, it was 'understandable that Mr Dicker may have felt considerable frustration at that point'. The AAT concluded:

> 'It seems likely that Mr Dicker's relationship with the Department at Mildura will continue. It is to be hoped that efforts will be made by officers of the Department to achieve a more positive interaction.'

(Reasons, para. 28)

Formal decision

The decision under review was varied by substituting 'sickness allowance' for 'sickness benefit', but was otherwise affirmed.

[J.M.]

Special benefit: claimant for refugee status

BEIGMAN and SECRETARY TO DSS

(No. 8429)

Decided: 16 December 1992 by O'Connor J, D.P. Breen and T.R. Gibson.

Yuri Beigman entered Australia illegally in August 1991, claimed refugee status in September 1991 and was granted an unrestricted work permit pending the determination of his claim.

In November 1991, Beigman claimed special benefit. The DSS rejected his claim and the SSAT affirmed that decision. Beigman appealed to the AAT.

The legislation

Section 729(1) of the *Social Security Act* 1991 prescribes the qualifications for special benefit. The residence requirements are expressed in complex terms: the person must be an Australian resident, or the holder of a refugee (temporary) entry permit under the Migration Regulations, or an applicant for such a permit who has been advised by the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) that he or she has a 'substantial claim' for the permit; and the person must not be an illegal entrant