

## Periodical payments of compensation: special circumstances

**NAPOLITANO and SECRETARY TO DSS**

(No. 8461)

**Decided:** 23 December 1992 by I.R. Thompson, G. Brewer and L.S. Rodopoulos.

Napolitano's claim for disability support pension was rejected by the DSS because he was receiving periodical payments of compensation.

The SSAT affirmed that decision on review concluding that special circumstances did not exist. Napolitano then requested review by the AAT.

### The facts

Napolitano was injured at work in 1975 and received periodic payments of compensation until approximately 3 months before the AAT hearing. In 1979 he was granted the invalid pension at a reduced rate because his compensation payments were treated as income according to the provisions of the *Social Security Act 1947* at that time.

The 1947 Act was amended in 1987 so that the rate of payment of an invalid pension was reduced by the full amount of the periodic payments of compensation. Napolitano was not affected by this amendment.

In June 1991 Napolitano remarried. His wife had \$240 000 in the bank following a family law property settlement. The interest on that deposit was considered income, and the rate of payment of disability support pension (formerly the invalid pension) payable to Napolitano was reduced to nil.

He sought advice from the DSS, and was told by an officer to use the money to buy things and then the pension would be restored. The officer did not check Napolitano's file, and ignored a letter from the DSS Napolitano brought with him which explained his situation. The AAT found that:

'the information which she (the DSS officer) gave him was incorrect and was given without the exercise of due care and competence'.

(Reasons para.6)

Napolitano's wife spent the money buying a house in Italy in her home

town, paying off the mortgage on the matrimonial home in Australia, and taking the family on a holiday to Italy.

On 5 March 1992 Napolitano lodged a claim for disability support pension, which was rejected because he was receiving periodical payments of compensation and the rate of payment he would be entitled to was nil.

### Special circumstances

Section 1184 of *Social Security Act 1991* states:

'For the purposes of this Part, the Secretary may treat the whole or part of a compensation payment as:

- (a) not having been made; or
- (b) not liable to be made;

if the Secretary thinks it is appropriate to do so in the special circumstances of the case.'

The AAT referred to the analysis of s.1184 in the AAT decision of *Platel* (1992) 70 SSR 1008 where previous AAT and Federal court decisions were discussed. In particular the situation in *Wilks* (1992) 70 SSR 1009 was discussed as it was similar to the situation in this case.

The AAT then set out the circumstances which might be considered special in this case. These were:

1. The reason why invalid pension ceased to be payable. The money (\$240 000) was held temporarily by Napolitano's wife as she had always intended buying another house.
3. Napolitano had been given incorrect advice by DSS.
3. The money has been spent and can not be recovered.
4. It would not be easy to sell the house in Italy because it is a holiday house in a small country town.
5. When the claim for disability support pension was lodged, Napolitano had only \$7000 in the bank which was reduced to \$4700 at the time of the SSAT hearing.
6. The family was experiencing financial hardship. Napolitano's wife had also been in receipt of the invalid pension before she received her settlement, and so the family incurred considerable expense for medicines.

To decide the extent of financial hardship Napolitano was suffering, the AAT compared the circumstances of Napolitano to that of a person receiving disability support pension at the maximum rate including fringe benefits. The amount received by Napolitano from payment of periodical payments exceeded the amount which would be

received by such a pensioner by \$106.74.

The incorrect advice given to Napolitano by DSS did not result in him ceasing to be paid invalid pension.

The AAT decided that the circumstances specified in points 1-4: 'are unusual and distinguish the applicant's [Napolitano's] situation from that of the normal claimant for disability support pension': Reasons para.15.

However the other matters do not constitute special circumstances, and the circumstances set out in 1-4 are not enough on their own to amount to special circumstances. Otherwise Napolitano would be placed in a situation of advantage compared to other pensioners.

### The decision

Although this matter had not been raised at the hearing by the parties, the AAT noted that the calculations which were the basis for the rejection of Napolitano's claim for disability support pension, were incorrect. The notional rate of pension Napolitano would be entitled to should be reduced by half the rate of periodical payments, and not the full amount as had been calculated by the DSS (see s.1168(3)). Napolitano would have been entitled to payment of disability pension at a greatly reduced rate.

### Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with directions that Napolitano's claim for disability support pension be reconsidered according to the provisions of the *Social Security Act 1991* as explained in the AAT's reasons.

[C.H.]

## Compensation award: special circumstances?

**ALVER and SECRETARY TO DSS**  
(No. 8351)

**Decided:** 30 October 1992 by P.W. Johnston.

On 25 January 1991 the DSS refused to reduce the preclusion period applying to Alver as a result of Alver receiving a

lump sum of compensation. This decision was affirmed by the SSAT and Alver requested review by the AAT. Before the AAT hearing, the DSS amended its decision to reduce the preclusion period by 3 weeks.

#### The facts

Alver injured his back on 27 June 1988. He returned to work part-time in about October 1988 on reduced hours until surgery was performed on his back. He once again returned to work on light duties gradually increasing the hours worked to full-time. Initially Alver received no payments of compensation for 4 to 6 weeks. Whilst working part-time Alver continued to receive part payments of compensation.

On 12 December 1990, Alver gave up his job and, on 17 December 1990, Alver accepted a lump sum compensation payment of \$30 000 plus \$2000 legal costs, representing damages and a workers' compensation settlement. Alver used the money to buy household items including a car (\$16 310) and to pay debts (\$11 630) and legal costs (\$2500).

Alver was precluded from receiving social security benefits from 17 December 1990 to 17 June 1991. An officer of DSS decided that no special circumstances existed to warrant reducing the preclusion period.

Alver was 30 years old, married with 1 child aged 5 years. When he signed the settlement documents, he also signed an acknowledgement prepared by his solicitor that he was aware that he might be precluded from receiving social security benefits for a period. Alver told the AAT that he understood that the preclusion period would run from the date of his accident for approximately 30 weeks. Therefore, at the time of settlement the period would be at an end. He also stated that he did not read the first page of the document prepared by his solicitor and so was not aware of the acknowledgement.

When his claim had settled Alver had thought he could return to work with his former employer. When he was not offered another job he made enquiries of the DSS and was advised of the preclusion period and that it would run from the date Alver last received a periodic payment of compensation. By this time Alver had spent all the money. Alver's solicitor gave evidence that he always advised his clients carefully on the possible social security implications of a settlement. He could not remember the particular advice he gave Alver.

The AAT found that Alver had large debts because the compensation insurance company had initially not paid him for several weeks. However some of the money had been used to repay Alver's brother-in-law for baby-sitting. Alver had explained that he needed a car to drive his wife who was working casually at that time, to work. Alver complained of feeling depressed because of money problems and because at times his back was very painful. He had had to sell the new car for far less than what he had paid for it, and to pawn some of his wife's jewellery.

Alver was now receiving the disability support pension from which he paid rent of \$110 per week. Homeswest would soon provide the family with a house which they would repay at the rate of \$213 per fortnight. Alver had borrowed a further \$1000 from Custom Credit for rent and food and owed \$400 to a dentist. He conceded under cross-examination that he had received more than \$2000 in holiday, sick and termination pay shortly after settlement of his claim. Although the AAT found Alver vague and unimpressive whilst giving evidence, it was noted that the documentary evidence and the evidence of his wife supported Alver's claim that his financial situation was serious.

The medical evidence before the AAT indicated that Alver suffered from a chronic lumbar back disability which rendered him totally unfit for work at this time. He was emotionally stressed and in pain.

#### The legislation

The AAT decided that the DSS had correctly calculated the preclusion period according to ss.152 and 153 of the *Social Security Act 1947*. The only issue was whether special circumstances existed so that the preclusion period should be reduced pursuant to s.156. The AAT considered whether it should apply s.156 or s.1184 of *Social Security Act 1991*. It decided that there is no material difference between the two sections and applied s.156.

#### Special circumstances

Two circumstances were relied upon by Alver as being special. These were financial hardship and misleading or inadequate legal advice. As no definition of special circumstances is contained in the Act, the AAT referred to past decisions of the AAT and the Federal Court and stated:

'The Tribunal is required to proceed, as I understand it, by way of a two-stage

evaluative process. It first must determine whether there are "special circumstances" and, if so, then consider whether it is "appropriate" in the light of those circumstances, to treat the whole or a part (of) the compensation payment as not having been made'.

(Reasons para.19)

In deciding whether special circumstances existed the AAT first dealt with financial hardship. It decided that it could look at the circumstances prevailing during the preclusion period and Alver's present circumstances as these reflected the past hardship.

The AAT concluded the financial hardship suffered by Alver and his family in association with personal and family stress caused by the injury warranted a finding of special circumstances. This was so even though this hardship was in part a product of Alver's own mismanagement. Alver's medical condition and the late payment of periodical payments contributed to the situation. The cause of Alver's financial hardship was relevant and the AAT found that Alver had not gone on a 'spending spree'. Most of the settlement, which was not large, was used to repay debts. However some of the payments were not necessary. The purchase of a car for \$8500 and payment of \$500 for baby-sitting could be considered extravagant.

The AAT found Alver's solicitor to be a careful and truthful witness but concluded that Alver and his wife would not have understood the advice they had received at settlement and would probably have ignored that advice because they believed Alver would return to work. The AAT was not prepared to find that the legal advice had been misleading, but noted that Alver had been left with an inadequate understanding of the social security system which was not entirely his fault.

The AAT decided that the appropriate decision would be that some of the lump sum compensation should be treated as not having been made but not all. Alver need not have spent \$4000 on the car and baby-sitting fees. Also he received more than \$2000 after settlement from his employer which should have been used for ordinary living expenses. Alver should have had approximately \$5500 available to support his family resulting in a preclusion period of 10 weeks. Furthermore the public purse should not have to be responsible for all Alver's debts. A fair preclusion period would be 16 weeks.

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#### The facts

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On 12 December 1990, Alver gave up his job and, on 17 December 1990, Alver accepted a lump sum compensation payment of \$30 000 plus \$2000 legal costs, representing damages and a workers' compensation settlement. Alver used the money to buy household items including a car (\$16 310) and to pay debts (\$11 630) and legal costs (\$2500).

Alver was precluded from receiving social security benefits from 17 December 1990 to 17 June 1991. An officer of DSS decided that no special circumstances existed to warrant reducing the preclusion period.

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The medical evidence before the AAT indicated that Alver suffered from a chronic lumbar back disability which rendered him totally unfit for work at this time. He was emotionally stressed and in pain.

#### The legislation

The AAT decided that the DSS had correctly calculated the preclusion period according to ss.152 and 153 of the *Social Security Act 1947*. The only issue was whether special circumstances existed so that the preclusion period should be reduced pursuant to s.156. The AAT considered whether it should apply s.156 or s.1184 of *Social Security Act 1991*. It decided that there is no material difference between the two sections and applied s.156.

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Two circumstances were relied upon by Alver as being special. These were financial hardship and misleading or inadequate legal advice. As no definition of special circumstances is contained in the Act, the AAT referred to past decisions of the AAT and the Federal Court and stated:

'The Tribunal is required to proceed, as I understand it, by way of a two-stage

evaluative process. It first must determine whether there are "special circumstances" and, if so, then consider whether it is "appropriate" in the light of those circumstances, to treat the whole or a part (of) the compensation payment as not having been made'.

(Reasons para.19)

In deciding whether special circumstances existed the AAT first dealt with financial hardship. It decided that it could look at the circumstances prevailing during the preclusion period and Alver's present circumstances as these reflected the past hardship.

The AAT concluded the financial hardship suffered by Alver and his family in association with personal and family stress caused by the injury warranted a finding of special circumstances. This was so even though this hardship was in part a product of Alver's own mismanagement. Alver's medical condition and the late payment of periodical payments contributed to the situation. The cause of Alver's financial hardship was relevant and the AAT found that Alver had not gone on a 'spending spree'. Most of the settlement, which was not large, was used to repay debts. However some of the payments were not necessary. The purchase of a car for \$8500 and payment of \$500 for baby-sitting could be considered extravagant.

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**Formal decision**

The AAT set aside the decision under review and substituted a decision that:

- there were special circumstances which justified the application of s.156; and
- so much of the \$30 000 be treated as not having been made as will reduce the preclusion period to applying between 18 December 1990 and 17 June 1991, 16 weeks.

[C.H.]

**SECRETARY TO DSS and BRAY**

(No. 8440)

**Decided:** 18 December 1992 by J. Handley.

Bray's application for job search allowance was rejected on the basis that he was precluded from receiving a social security benefit because he had received a lump sum compensation settlement.

On review by the SSAT, it was decided that special circumstances existed, and the whole of the lump sum should be disregarded and job search allowance paid. The DSS requested review of that decision.

Bray did not appear at the hearing but written submissions on his behalf were lodged by his solicitors.

**Stay order**

The DSS applied for a stay order to stop implementation of the SSAT decision, and this was heard before the substantive hearing. The DSS conceded that there were special circumstances in Bray's case, and the appropriate preclusion period would be from the date of the application for job search allowance to the date of the SSAT decision.

An order was made to this effect and Bray was paid job search allowance from the date of the SSAT decision, 15 October 1992.

**The facts**

Bray was in receipt of weekly payments of compensation until 10 December 1990. His common law claim against his employer, the Commonwealth, was settled on 18 April 1991 for \$220 000 including legal costs. The DSS imposed a preclusion period from 11 December 1990 to 1 August 1994, which was calculated

by halving the lump sum, and dividing \$110 000 by average male weekly earnings at the time of settlement. This resulted in a preclusion period of 190 weeks.

Prior to receiving job search allowance at the maximum rate, Bray received the family allowance supplement. When Bray settled his common law claim he was employed, and this continued until September 1991. He then remained unemployed, although his wife was employed for six months in early 1992.

From his settlement moneys Bray paid his solicitors \$65 000 in legal costs. It was submitted by Bray's solicitors, that their costs were high because of the behaviour of the Commonwealth during litigation. They had requested that the Commonwealth make an Act of Grace payment to Bray to cover those costs.

The rest of the money was used to pay for an overseas holiday for Bray's family (\$40 000), to buy antique furniture (\$40 000), to pay loans (\$25 000), to pay a deposit on a block of land (\$10 000) and the remainder was spent on living expenses.

**Special circumstances**

The AAT decided that the DSS had correctly calculated the preclusion period, and that the date of commencement was 11 December 1990, the day after Bray had last received periodical payments (see s.1165(6)).

According to s.1184 of the *Social Security Act* 1991, the whole or part of a compensation lump sum payment can be considered as not having been made in the special circumstances of the case. The AAT referred to a number of earlier decisions of the AAT including *Alver* (reported in this issue) and *Ivovic* (1981) 3 SSR 25, and concluded that it first must decide whether special circumstances exist and if so, whether it is appropriate to treat the lump sum as not having been made.

Bray's solicitors submitted that what Bray did with his compensation moneys was not a matter for the AAT and nor was it a matter intended to be dealt with by the legislation. The AAT confessed: 'to some difficulty in comprehending what this part of the Respondents [Bray's] submission is intended to mean': Reasons p.7.

By the time of the SSAT hearing Bray's financial situation was serious. He had sold most of the antique furniture at a loss, and incurred debts to banks and financial institutions. His family had been evicted from the fami-

ly home because the rent had not been paid, and he was barely able to provide food for the children. He could not complete construction of his home, and this would have to be sold at a loss.

Given Bray's perilous financial circumstances, it was appropriate to find special circumstances in this case. Bray had rashly spent his settlement moneys and must accept responsibility for the subsequent loss of assets. Nonetheless special circumstances applied and the preclusion period should be reduced to that period between 14 June 1992 and 15 October 1992, that is, from the date of claim for job search allowance to the date of the SSAT hearing.

**Formal decision**

The AAT set aside the SSAT decision and substituted a decision that special circumstances existed. So much of the settlement moneys should be regarded as not having been made to allow a preclusion period between 14 June 1992 and 15 October 1992.

[C.H.]

## Waiver of overpayment: special circumstances

**SECRETARY TO DSS and TURNER**

(No. 8245)

**Decided:** 15 September 1992 by J.R. Dwyer.

The SSAT had affirmed a decision of the Secretary to raise a debt in respect of unemployment benefit and job search allowance paid during Turner's absence overseas from 14 June to 5 August 1991. The SSAT had varied the decision by waiving an amount equivalent to the amount to which Turner's wife and children would have been notionally entitled had they applied for benefits during that period. The balance was to be 'written off' for 12 months or until Turner gained employment. Turner sought review of this decision.

**The facts**

Turner, aged 45 years, had held several senior executive positions in Australia and other countries with international