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 family 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

automotive companies. He had been continuously unemployed and in receipt of benefits since September 1990.

After unsuccessfully seeking work in Australia, he travelled to England in June 1990 to pursue his work-seeking activities overseas. He did not notify the DSS of his absence. While in England he continued to lodge benefit continuation forms each fortnight. His wife and child remained in Australia and he continued to support them. His wife did not claim benefits in her own right.

The legislation

Turner did not dispute the existence of the debt but sought that it be waived in full. Section 1237 of the *Social Security Act* 1991 empowers the Secretary to waive the Commonwealth's right to recover the whole or part of a debt. That power must be exercised in accordance with any directions issued by the Minister under s.1237(3) and in force from time to time (s.1237(2)).

The AAT was bound to exercise its discretion in accordance with the ministerial directions of 5 May 1992 which revoked those of July 1991. The directions limit the circumstances in which a debt may be waived. Clause (d) authorises waiver where, in the opinion of the Secretary, special circumstances apply such that the circumstances are 'extremely unusual, uncommon or exceptional'.

Clause 3 requires waiver of an amount equivalent to the amount that a debtor would have been entitled to receive by way of family allowance during the overpayment period had the person lodged a claim for family allowance.

Section 1236 empowers the Secretary to write off a debt.

Special circumstances

The AAT found that Turner was actively seeking work during his absence. In view of his specialised experience the AAT found that it was appropriate for him, after unsuccessfully seeking work in Australia for nearly 2 years, to travel to England in search of employment. That was an extremely unusual and uncommon circumstance for a recipient of job search allowance, but the whole of the circumstances had to be weighed to determine whether the conditions in clause (d) of the ministerial directions were satisfied.

The AAT then directed itself to the 7 matters set out in *Ward* (1985) 24 *SSR* 289 as being relevant to the existence of special circumstances indicating waiver of a debt. The first and paramount consideration was that Turner had received public money to which he was not entitled. In determining what weight should be placed on that consideration, it would be unbalanced to ignore the notional entitlement of Turner's wife and child to some form of social security payment, since this represented a saving to the public purse.

Although Turner's wife had not been registered with the CES and was therefore not qualified for unemployment benefit or job search allowance in her own right during Turner's absence, the AAT was satisfied that she would have claimed benefits and complied with the requirements had Turner not continued to receive payments for the family.

The Secretary submitted that the requirement in cl.3 of the directions for waiver of an amount equivalent to notional entitlement to family allowance impliedly excluded power to consider notional entitlement to another benefit. The AAT rejected this submission:

> ' . . . Clause 3 does not exclude the power to consider another notional entitlement as part of the relevant circumstances which may be special and give rise to a decision to waive in a particular case.'

(Reasons, para. 44)

One of the relevant matters listed in *Ward* was the way that the overpayment arose. The AAT found that Turner had knowingly deceived the DSS about his absence from Australia, but that he did not know that he was disqualified for unemployment benefit and job search allowance while absent. He saw the deception as a necessary means of allowing him to engage in his search for employment. The AAT was troubled by the deception practised on the DSS by Turner in concealing his absence from Australia, but concluded that this matter did not in all the circumstances preclude waiver.

Formal decision

The AAT varied the decision under review. Like the SSAT, it waived an amount equivalent to the notional entitlement of Mrs Turner and her son to unemployment benefit during the period 14 June to 5 August 1991. Instead of writing off the balance, as the SSAT had done, the AAT determined that the balance should be recovered 'by such instalments as appear appropriate, commencing on the day 12 months from the date of this decision'.

[P.O'C.]

Child disability allowance: review of cancellation

SECRETARY TO DSS and FORBES

(No. 8407)

Decided: 4 December 1992 by R.C. Jennings.

The DSS asked the AAT to review an SSAT decision which had set aside a DSS decision to cancel the child disability allowance paid to the applicant.

The facts

Megan Forbes was born in March 1979. In November 1983 she began to receive treatment for acute lymphatic leukemia involving induction therapy, cranial irradiation and maintenance chemotherapy. This latter treatment continued for over three years. In November 1988 she was considered to be cured, although it was advised that as a result of her treatment she might have significant learning disabilities.

In 1991 Megan was assessed by a special education consultant, who observed that Megan was having difficulty in the classroom as a result of a border-line intellectual disability, and a poor short term memory. It was noted that Megan required special programs and support. She was given special homework which was supervised by her mother for an average of one to two hours each day. This compared with 5 to 20 minutes per week by other parents.

The legislation

Section 952 of the *Social Security Act* 1991 provides that a young person is a disabled child if:

> '(a) the young person has a physical, intellectual or psychiatric disability; and
>
> (b) because of that disability, the young person:
>
> (i) needs care and attention from another person on a daily basis; and
>
> (ii) the care and attention needed by the young person is substantially more than that needed by a young person of the same age who does not have a physical, intellectual or psychiatric disability; and
>
> (c) the young person is likely to need that care and attention permanently or for an extended period.'

Section 954 provides that a person is qualified to receive child disability allowance in respect of a child if the