

the compensation part of the settlement, under s.17(3)(b) of the *Social Security Act* 1991 and had calculated a preclusion period pursuant to s.1165 of the Act from 3 November 1988 to 7 October 1992. However, the SSAT had set aside that decision and remitted the matter to the Secretary for recalculation on the basis that the compensation part of the lump sum was 50% of \$137,565.

The Department argued in the AAT that the SSAT had been incorrect in using the 50% rule as there had been a verdict after a hearing and not a consent order. On that basis, the correct provision to apply was s.17(3)(b). Moreover, the Department contended that there were no circumstances sufficiently special to warrant the use by the Secretary of the Secretary's power under s.1184 to treat the compensation payments as not having been made.

The AAT did not agree with the SSAT that Messenger's claim was determined by way of a 'consent verdict . . . i.e. the matter was settled'. The disposition by judgment had been confirmed by Messenger's solicitor in a discussion with the Tribunal.

The AAT explained that Messenger and his wife were both somewhat confused by the events that had occurred: for example, Mrs Messenger had stated at the SSAT hearing that the matter had been determined by consent verdict but she explained that she had understood this to mean a decision of the court.

As the Tribunal found that the matter was determined by a verdict, it was held that s.17(3)(b) applied so as to make the part of the payment that, in the opinion of the Secretary, in respect of lost earnings, the compensation part of the lump sum payment. The AAT agreed with the Department that the figure of \$116,930.25 was the appropriate sum for past and future economic loss. On that basis the AAT agreed with the calculation of the preclusion period and found that there was no evidence of special circumstances to justify the exercise of the discretion under s.1184.

Formal decision

The AAT set aside the SSAT decision and affirmed the decision of the delegate to calculate the preclusion period on the basis that \$116,930.25 was the compensation part of the lump sum.

[R.G.]

Compensation: special circumstances

SECRETARY TO DSS and VXY
(No. 8559)

Decided: 3 March 1993 by J.R. Dwyer, L.S. Rodopoulos and C. Barker.

In December 1991, VXY settled a claim for compensation, and lodged a claim for disability support pension (DSP). The DSS conceded that VXY was 'manifestly eligible DSP' on 23 December, but then decided on 17 February 1992 that because VXY had received a lump sum of \$140,000, he would be precluded from receiving DSP for 121 weeks from 20 December 1991. When VXY requested review of that decision by the SSAT, it was found that special circumstances existed and that DSP should be paid to VXY from the date of the SSAT decision. The DSS requested review of that decision by the AAT.

At the AAT hearing VXY applied for a suppression order preventing disclosure of his name and all evidence before the AAT which could assist in identifying him. An order to that effect was made, and the AAT identified the respondent by the initials 'VXY'.

Stay proceedings

The DSS lodged an application requesting that the AAT stay the operation of the SSAT decision. This application was refused by the AAT, which meant that VXY continued to receive payments of DSP until the further hearing by the AAT. VXY was warned that if the AAT were to decide that no special circumstances existed, he might have to repay all DSP payments made to him.

The facts

VXY ceased work in January 1990 and received weekly payments of workers' compensation. In June 1990 VXY developed a psychotic condition, which it was alleged, was related to his work caused condition. VXY was hospitalised on two occasions for psychiatric treatment. He requested review of his employer's decision to discontinue weekly payments of compensation, and this was heard on 2 December 1991. VXY was represented by a barrister and, after negotiations, a settlement offer was made. A lump sum of \$140,000 was offered on the basis that VXY waived any further right to weekly payments and medical expenses.

Because of his illness, VXY's son and wife had to decide whether to accept the offer. The strain of fighting the case would affect VXY's health badly according to his psychiatrist.

VXY's son wished to ensure that his father would continue to have an income if he accepted the offer, so approached the DSS for advice. Neither his barrister nor his solicitor advised VXY or his son that the lump sum would affect VXY's entitlement to social security payments. The son attended the DSS on 4 and 9 December 1991. He then agreed to accept the offer of settlement and an order to that effect was made on 19 December 1991.

VXY's son purchased the current family home in his parents' names in late March 1992 for \$267,000. VXY and his wife owned an unencumbered block of land valued at \$70,000, which was for sale, and have \$5000 in the bank. Before DSP was paid to VXY, the family lived on the son's unemployment benefit which was paid at the single rate. The money in the bank was saved whilst VXY was receiving DSP.

The law

VXY did not dispute that the DSS had correctly calculated the preclusion period at 121 weeks, and that this period should run from 20 December 1991 according to s.1165 of the *Social Security Act* 1991. However, VXY submitted that pursuant to s.1184 of the Act, the Secretary to the DSS should consider the whole or part of the compensation payment as not having been made in the special circumstances of the case.

The AAT referred to Federal Court and AAT decisions which had considered the concept of special circumstances (*Secretary, DSS v Smith*, (1991) 62 SSR 876, *Re Krzywak and Secretary, DSS* (1988) 45 SSR 580). To decide whether special circumstances existed in this case, the AAT considered the following matters:

Incorrect advice

VXY's son told the AAT that he was incorrectly advised by the DSS on two occasions. On 3 December 1991 the son went to his local DSS office for information. He told an officer that his father was considering accepting a lump sum of \$140,000, and asked if this would affect payment of the DSP. He was told that it would not. At the AAT hearing, the DSS presented a memorandum from the relevant office manager stating that no-one could remember speaking to VXY's son, but

that no-one would have said that a lump sum of compensation would not affect payment of DSP. A letter from VXY's solicitors to the employer's solicitors appeared to state that VXY's claim had settled on 2 December 1991.

The AAT found that VXY agreed to the settlement on 2 December but that it was on the understanding that he could withdraw before 19 December when a final order would be made.

On 9 December VXY's son lodged a claim for DSP on behalf of his father and again made enquiries of two officers about his father's eligibility. One officer checked the forms and agreed with the earlier advice. She gave him a brochure on the rate of DSP payable, marking the appropriate section. He did not ask the second officer for advice. Neither officer could remember speaking to VXY's son, but said they would have given him general advice on the effect of a compensation settlement.

The AAT chose to believe VXY's son's version of events, and thus found that VXY had been incorrectly advised by DSS and this was a special circumstance.

Ill health

VXY suffered from a major depressive disorder with psychotic features, and was a protected person under the relevant mental health legislation. His treating psychiatrist had recommended that he be institutionalised as had the hospital. The family preferred to keep VXY at home for as long as possible. VXY and his wife had lived in another State, moving to Victoria when he became sick to be close to his son. In Victoria, the family rented accommodation, but were twice evicted because of VXY's violent outbursts.

The AAT found that VXY's ill health was a special circumstance.

Financial hardship

VXY and his wife owned the family home and a block of land, and had \$5000 in the bank. The AAT accepted that it would not be reasonable, because of VXY's ill health, to expect him to sell the family home. However because of the block of land, the AAT did not think that VXY was in severe financial hardship.

The discretion

'Under s.1184 if there are special circumstances the Secretary still has to consider whether it is appropriate to treat either the whole or part of the compensation payment as not having been made.'

(Reasons, para.42)

The principles by which the discretion is to be exercised have been referred to in a number of AAT and Federal Court decisions and summarised in *Re Cook and Secretary, DSS* (1992) 70 SSR 1007.

'It is the entirety of the circumstances which must be considered before the Tribunal can decide this matter.'

(Reasons, para.45)

The AAT found, on the evidence presented, that VXY had received incorrect advice from DSS after he had decided to accept the offer of 2 December 1991. The family home was bought after VXY had received two letters from DSS (including one from an Authorised Review Officer) advising that he was precluded from receiving DSP because of the settlement money. VXY's son explained that he continued with the purchase of the house because his father needed a stable home, and he had not given a great deal of weight to the written decisions. He had spoken to an officer of the DSS after the first letter, and had been told that the preclusion period would probably be a few weeks.

The AAT found that VXY's son would not have acted differently if he had been given correct advice by the DSS. He needed the settlement moneys to buy his father a home, his father's condition was likely to deteriorate if the hearing in December 1991 continued, and the sum offered was the maximum under the legislation. There was no evidence that the employer would have continued to pay weekly payments if the offer had not been accepted.

The AAT concluded that it was appropriate in the circumstances to reduce the preclusion period from 121 weeks to 78 weeks. VXY had received DSP for 44 weeks between the SSAT decision and the AAT hearing. The AAT did not think it was appropriate that VXY should have to repay the amount paid in this period because of the confusion caused by conflicting advice from DSS, and VXY's ill health.

The AAT suggested that inadequate advice from lawyers might be treated as a special circumstance. It was not feasible to suggest that persons like VXY sue their lawyer for negligence given the shortage of legal aid funds.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that it was appropriate in the special circumstances of the case that so much of the compensation payment received be dis-

regarded so that the preclusion period be reduced from 121 weeks to 78 weeks, and that the period should run from 20 December 1991 to 20 May 1991, and from 14 March 1993 to 14 April 1994.

The AAT recommended that the DSS display eye-catching but brief notices around DSS offices detailing the effect of a lump sum compensation settlement on social security payments.

[C.H.]

Job search allowance: liquid assets test

SECRETARY TO DSS and GELDERS

(No. 8645)

Decided: 8 April 1993 by D.P. Breen, J.D. Horrigan and E.K. Christie.

Robert Gelders sold his principal home on 7 February 1992. On 5 March 1992, he used the bulk of the sale moneys to purchase a block of land and placed the balance, more than \$20 000, in a bank account. On 24 April 1992, Gelders signed a contract with a builder for the construction of a new home on the land.

Meanwhile, on 7 April 1992, Gelders claimed job search allowance. The DSS rejected his claim on the ground that Gelders had more than the 'maximum reserve' in liquid assets. The SSAT set aside the DSS decision and the DSS appealed to the AAT.

The legislation

Section 519(1) of the *Social Security Act* 1991 provides that a person is not qualified for job search allowance if the value of the person's liquid assets exceeds the person's maximum reserve, unless the person has served 'the liquid assets test waiting period'.

The maximum reserve in Gelders' case was \$10,000.

Section 1118(1) is contained in Part 3.12 of the Act, headed 'General provisions relating to the assets test'. That section provides that, if a person sells the person's principal home, the proceeds of sale which are likely to be applied within 12 months to acquiring another principal home are 'to be disregarded during that period for the purposes of this Act'.