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 disregarded 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'.

**Funds committed to home building to be excluded**

The AAT rejected the DSS argument that s.519(1) was a new provision which had no equivalent in the 1947 Act; and that, because s.1118(2) did have an equivalent in the 1947 Act (s.4(2)), s.519(1) should prevail over s.1118(2).

The AAT said that the reference in s.1118(2) to 'assets test' encompassed the 'liquid assets test' in s.519(1).

The AAT noted that s.13 of the *Acts Interpretation Act* 1901 deems the headings of Parts of an Act to be part of the Act. The heading to Part 3.12 described it as containing 'general provisions'. Section 1118(2) was declared to operate 'for the purposes of this Act':

> 'No exclusion of s.519 is attempted. The application of s.1118(2) to s.519 is likely given that both provisions expressly or by necessary implication only refer to assets in the nature of liquid assets.'

(Reasons, para. 13)

The AAT also said that it was 'persuaded that s.519 must be subject to s.1118(2) by reason of the absurd and unjust results which would otherwise be reached': Reasons, para. 18.

After noting that the assets test limit was lower for homeowners than it was for non-homeowners, the AAT said:

> 'If the value of a person's home was not excluded from the calculation of assets in relation to a lesser assets limit then an injustice would be inflicted on homeowners which could not have been intended by the legislature. In addition, it would be artificial and absurd if an unemployed home owner could qualify for job search allowance but an unemployed home builder would be ineligible notwithstanding that the liquid funds responsible for the ineligibility were committed to the building of the principal home.'

(Reasons, para. 19)

After noting that some exclusions from the rule in s.1118(2) were expressly mentioned in that provision, the AAT said that it could not infer an exclusion of s.519 from the ambit of s.1118(2): Reasons, para. 20.

The AAT decided that the funds which Gelders was using for the construction of a new home should be excluded from the liquid assets test. This had the effect of reducing his liquid assets to some $7000, below the maximum reserve.

**Formal decision**

The AAT affirmed the decision of the SSAT.

**[P.H.]**

# Newstart allowance: student

**MURFET and SECRETARY TO DSS**

**(No. 8529)**

**Decided:** 11 February 1993 by M.T. Lewis, I.R. Way and D.D. Coffey.

Murfet applied for review of a DSS decision to cancel payment of newstart allowance. The decision was affirmed by the SSAT.

**The facts**

Murfet was a full-time student studying for a PhD at the University of New South Wales. He attended the university 20 to 24 hours each week. The university advised that the course could be undertaken on a full or part-time basis, and that Murfet had elected for full-time study. Murfet advised the DSS that he was available for work on a full-time basis while enrolled as a PhD student. He also indicated some medical limitations to his capacity to work because of a rare eye disease, asthma and rheumatoid arthritis. He said he needed to work to pay for his studies, and the studies did not interfere with his job-seeking. He had been unsuccessful in gaining a graduate award from the university but would try again.

Murfet told the AAT that he was not required to attend classes or seminars and his personal research could be undertaken during evenings and weekends totalling 30 hours study a week. This constituted a part-time study program despite his continuing enrolment as a full-time student. He had previously been granted newstart under the same circumstances and queried why payments had now been cancelled.

While in receipt of the allowance he had applied for some 90 jobs, but since cancellation he had not had money to search for work or to attend regularly at the university. The cancellation had reduced his study activities on both financial and psychological grounds. He acknowledged that if he changed his status to part-time he could still complete his thesis on time. He was not prepared to do this because it would hamper his application for a graduate research award.

A letter from a professor at the university indicated that full-time enrolment would not be tolerated if it ran concurrently with full-time employment.

**The legislation**

Section 613(1) of the *Social Security Act* 1991 provides that subject to subsection (2) a newstart allowance is not payable to a person who is enrolled in a full-time course of education. Prior to the enactment of the *Social Security Act* 1991 sub-section 136(1) of the *Social Security Act* 1947 referred to 'a person who is engaged .... in a course of education on a full-time basis'. Section 613(1) had not previously been interpreted by the courts.

**The cases**

In *Harradine* (1988) 47 *SSR* 615 the issue was whether a person who is enrolled as a full-time student in a course which is regarded by the educational institution as full-time, and who is pursuing the course at the planned rate of progress, is 'engaged in a course of education on a full-time basis'. The court decided that Harradine, who was enrolled as a full-time law student and worked half-time as a teacher, was engaged in a course of employment on a full-time basis. Davies J said the words 'on a full-time basis' should be construed as qualifying the words 'is engaged in a course of education'.

The AAT distinguished two prior decisions of the Tribunal:

(a) In *Thomson* (1981) 2 *SSR 12;* 53 *FLR* 356 the court decided that Thomson was continuing to seek employment and continued to be unemployed notwithstanding that she was undertaking a full-time course until she found work. The AAT in this case said that such a decision would not be open to it under s.163(1) without invoking s.601(2). That provision enables the Secretary to require a person to undertake a course to improve the person's work prospects.

(b) In *Cheary* (unreported, I.R. Thompson No. 8490, 22 January 1993) the respondent was undertaking a TAFE course requiring 20 to 25 hours a week. TAFE colleges do not use the phrase 'full-time course of education' and the AAT was not assisted by any definition in the Act. In the present case, the university formally required that PhD candidates enrol full-time.

**The decision**

The AAT followed *Harradine* in interpreting the words 'enrolled in a full-time course of education' as referring to the formal enrolment record rather than to any informal practice adopted by Murfet. The AAT made no distinction between coursework and research work and used the Macquarie