

the small town of Karratha. He said that he applied to Homewest as a married man because as a single man he had no hope of obtaining a house.

**Issues of credit**

In assessing Wieland's credibility as a witness it was relevant to take into account that she had made false representations in the past. The AAT accepted her reasons for the false representations and her claim that she believed she was entitled to the benefits. The evidence of Dickson was also accepted as truthful despite the fact that he had made false statements about the relationship in the past, including falsely claiming Wieland as his dependent spouse for taxation purposes in 1985-86.

**Assessing the relationship**

The AAT found that there was a degree of mutual society, protection and support, but no sexual or sentimental aspect to their relationship. They pursued their respective interests in ways more normally associated with friends sharing accommodation. The AAT laid emphasis on the strict accounting for money spent and the fact that they kept their finances separate, until Dickson's illness in 1991.

The association had benefits for each. Wieland's presence was used in part as a 'front' by Dickson to conceal his homosexuality from the town, while the shared living costs enabled Wieland to remain with her circle of friends in Karratha enjoying an independent lifestyle.

The AAT concluded that Wieland had not been living with Dickson on a bona fide domestic basis *as his wife*.

[P.O'C.]

**Compensation preclusion: commencement of preclusion period: special circumstances**

MARTIN and SECRETARY, DSS (No. 8888)

**Decided:** 4 August 1993 by S.D. Hotop.

Martin requested review of the SSAT decision to preclude her from receiving a social security benefit from 29 August 1990 to 5 February 1991. The SSAT also decide that no special circumstances existed for the purposes of s.1184.

**The facts**

Martin was injured in a car accident on her way to work on 10 February 1989. She continued in casual employment until 23 June 1989 when her employment was terminated because of her injury. She received periodic payments to 28 August 1990 and social security benefits from 7 December 1989 to 22 February 1991. Martin's claim for damages was settled for \$39,675 which included \$11,175 to be repaid to the worker's compensation insurer. The net amount of \$28,000 comprised \$23,500 for pain and suffering and \$5000 for economic loss.

**The preclusion period**

At the hearing Martin did not challenge the length of the preclusion period, which the AAT found had been correctly calculated at 23 weeks. Martin did challenge the date of commencement of the preclusion period on 29 August 1990. Martin submitted that she received periodic payment until 31 March 1990 and therefore the preclusion period should commence on 1 April 1990, the day after periodic payments ceased (see s.1165(3)). The AAT accepted the documentary evidence supplied by DSS and found that periodic payments were made until 28 August 1990.

Therefore any social security payments made to Martin in the 23 weeks from 29 August 1990 were recoverable pursuant to s.1166(1). An amount of \$3053 of sickness benefit had been paid during that period.

**Special circumstances**

Pursuant to s.1184 the whole or part of a lump sum of compensation can be treated as not having been made in the special circumstances of the case. Martin sub-

mitted that special circumstances applied in her case because most of the settlement money paid to her was for pain and suffering and not for economic loss. She also submitted that she was in financial hardship, suffered from a permanent spinal injury and that she had been disadvantaged by poor legal representation.

The AAT agreed that the '50% rule' worked to the disadvantage of Martin because only 17.5% of her compensation settlement was for lost earnings. However as the Federal Court noted in *Smith v Secretary, DSS 1991 62 SSR 876* 'the "50% rule" was not the only arbitrary feature of this particular legislative scheme': Reasons para.17. The formula presumes a weekly rate of earnings which may bear no resemblance to the person's actual earnings. Martin was employed on a casual basis, earning on average less than \$200 per week. The rate of earnings used to calculate her preclusion period presumed a rate of earnings of \$598.90 per week. This was to the advantage of Martin. Nonetheless the harshness of the '50% rule' was a factor to be taken into account when considering special circumstances.

Martin's financial circumstances were not considered to be unusual or exceptional by the AAT. She was receiving Austudy and owned a car worth \$11,000. She had a number of small liabilities in connection with her rented accommodation, and her settlement moneys had been spent on legal costs, her car and other debts.

According to Martin she had been advised by her solicitor that the amount she would have to repay DSS would be 'minimal'. She only accepted the settlement because she was under stress at the time. The AAT referred to *Venables and Secretary to DSS (1988) 43 SSR 548; Secretary to DSS and Bolton (1989) 50 SSR 650* and stated that incorrect legal advice was not a special circumstance.

The AAT accepted that Martin was suffering from a permanent spinal injury and that this caused her pain and restricted the jobs she could do. However Martin was studying to be an art teacher and would not be prevented from undertaking this occupation because of her injury. The AAT found that Martin's physical injury was not sufficiently serious to constitute a special circumstance. The AAT concluded by finding no special circumstances existed in this case and stating:

'The Tribunal would point out, however, that it is not the purpose or function of the Commonwealth's social security legislation to restore innocent accident victims, who have thereby suffered financial detriment, to the financial position they enjoyed immediately before the relevant accident.'

(Reasons, para.27)

### Formal decision

The AAT affirmed the decision under review.

[C.H.]

### SECRETARY TO DSS and LANE (No. 8894)

**Decided:** 5 August 1993 by S.A. Forgie, I.R.W. Brumfield and J.D. Horrigan.

Lane requested review of an SSAT decision which had set aside a DSS decision to raise and recover an overpayment of sickness benefit. The SSAT also decided that Lane was precluded from receiving a social security benefit from 8 March 1986 to 11 October 1990. Sickness benefit was paid to Lane from January 1991.

#### The issues

The AAT set out 3 issues to be addressed. The first was to establish the date upon which Lane last received periodic payments of compensation. The second issue was whether special circumstances existed as outlined in s.1184, and the third was whether the discretion pursuant to s.1237 should be exercised.

#### The facts

Lane was a registered nurse who hurt her back on 24 April 1984. She worked until 13 May 1985 and received her salary until 4 October 1985. She then received workers' compensation payments until 7 March 1986. Lane returned to work on 17 January 1986 but was unable to continue, and ceased work on 24 September 1986.

Lane claimed damages for her back injury and this claim settled on 15 November 1989 for \$250,000, \$110,000 being paid for medical and legal expenses. On receipt of the settlement money Lane paid \$20,000 off her mortgage, and \$12,000 to discharge other debts. She separated from her husband in 1990 and moved to Queensland to be with her parents. In 1991 Lane bought a house for \$127,500 with her parents, contributing \$100,000 to the purchase.

Sickness benefit was paid to Lane from January 1991 until it was cancelled in November 1991 because Lane was precluded from receiving a social security benefit until 25 December 1991. DSS advised Lane that she had been overpaid sickness benefit of \$2526 because she had failed to advise DSS of the lump sum settlement she had received.

#### When did periodic payments cease?

Lane continued to receive periodic payments after she returned to work because

of confusion about who was to notify the insurer of her return to work. On 8 April 1987 a payment was made to Lane from the insurer, which purported to be a payment of compensation for the period 30 March 1987 to 20 May 1987. The accompanying letter advised Lane that this was a final payment and liability had been 'discontinued'. Lane could not recall receiving this payment, but the AAT was satisfied on the evidence presented by the insurer that the payment had been made.

Section 1165(3) provides that a lump sum preclusion period runs from the day after the last day of periodic payments. To establish the preclusion period applying to Lane, the AAT had to determine whether the periodic payments made to her finished on 20 May 1987 or 7 March 1986.

On behalf of Lane it was submitted that the payment in April 1987 was for medical expenses only. The AAT rejected that argument noting that the letter from the insurer and the evidence from a representative of the insurer had clearly stated that the money was paid in respect of Lane's incapacity for work. The AAT then considered whether a series of periodic payments paid as a lump sum should be considered periodic payments or a lump sum. After referring to the Federal Court decision of *Secretary to DSS v a'Beckett* (1990) 55 SSR 774 and the definition of 'periodic payments' in s.17(1), the AAT concluded:

'The emphasis of this definition is not upon the frequency or regularity with which the person receives the payments but upon the period or periods which those cheques are intended to cover.'

(Reasons, para.30)

The person need only receive the payments in respect of a period and not during the period (s.17(7)). The AAT concluded that Lane had received periodic payments until 20 May 1987 even though there was a substantial gap between receipt of one set of payments (7 March 1986) and the next payment (20 May 1987).

#### Special circumstances

Section 1184 provides that the whole or part of a lump sum of compensation can be regarded as not having been made in the special circumstances of the case. The AAT referred to a number of Federal Court and AAT cases which had considered the meaning of 'special circumstances'. The AAT stated that the meaning of special circumstances must be considered in the context of Part 3.14. A person is deemed to receive payment for loss of earning capacity at a rate equal to average male weekly earnings for a certain period, and during that period the person cannot receive a social security

benefit. So the purpose of this Part is to ensure that a person is not paid from two sources for the same period. Special circumstances will apply where it is unreasonable or unjust for Part 3.14 to apply.

From the lump sum of \$250,000, Lane paid \$110,000 for medical and legal costs. She paid mortgage and credit card debts totalling approximately \$30,000. The evidence shows that between 17 January 1986 and 20 May 1987 Lane did not receive income from any source for 144 days. Although the settlement figure probably covered this period, the AAT found that the compensation paid during this period should be treated as not having been made in the special circumstances of the case. It was unreasonable or unjust that no allowance is made for a situation where the lump sum compensates a person for a period before the last periodic payment was made. The lump sum preclusion period cannot include the period before the last periodic payment was made.

#### The overpayment

Lane applied for sickness benefit on 7 February 1990, and advised DSS that she had received a lump sum of compensation. DSS advised her by telephone that she was not eligible for a social security benefit. She lodged a further claim on 21 January 1991, although she knew a preclusion period applied to her. Lane had become depressed because of the break up of her marriage. She completed most of the claim form and took it to the counter at a DSS office. According to Lane, she was asked about compensation, but was told that if her application for sickness benefit related to a different incapacity than the incapacity for which she received compensation, she would not be precluded from receiving sickness benefits. Lane did not complete all the financial details correctly, failing to mention the balance of her settlement moneys which had been invested. Sickness benefits were paid until November 1991.

The AAT found that Lane had been overpaid sickness benefit of \$2526, and then considered whether recovery of this amount should be waived. In accordance with the Federal Court's decision in *Riddell* (1993) 73 SSR 1067, the AAT was not bound to follow the ministerial directions when exercising the discretion in s.1237. The AAT rejected the submission that the same circumstances should be taken into account as for s.1184. The discretion was not limited to considerations of injustice, unreasonableness or unfairness arising out of the operation of the Act. After taking into account Lane's financial position and the circumstances of the overpayment, it was decided that

it was not appropriate to exercise the discretion in this case.

However, the AAT noted, that as it had reduced the preclusion period it was unlikely any sickness benefit would have been paid to Lane during the preclusion period. Therefore there would be no overpayment.

**Formal decision**

The AAT decided to:

1. set aside the decision under review and substitute a decision that the lump sum be reduced in the special circumstances of the case according to the following formula —  $2 \times (144 \text{ days divided by } 7) \times \text{average weekly earnings}$ ;

2. the lump sum preclusion period begins on 21 May 1987.

[C.H.]

[Editor's note: The AAT did not state the basis for the overpayment of sickness benefit, but presumably it was as a result of Lane's incorrect statement to DSS concerning her investments. If so, reducing the preclusion period would not affect the overpayment.]

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