

AAT. The second Tribunal's error was, said Beazley J, that it failed to consider the submission made as to Kalwy's financial position after the conspiracy, which evidence might have corroborated Kalwy's explanation of the increase in his bank accounts during the period of the conspiracy (*Kalwy* (FC) (No. 2) (1993) 77 SSR 1128).

#### The issues before the AAT

The AAT rejected a submission by the DSS that it was bound by findings previously made by the AAT and not set aside by the Federal Court. The matter was remitted because the error of not considering Kalwy's financial position after the conspiracy might have influenced the AAT's findings as to whether Kalwy was involved in the conspiracy. That evidence was also relevant to the question of whether Kalwy received proceeds from the fraud. It would be inconsistent with the Court's direction for the AAT to treat itself as bound by those findings. The AAT considered that all matters that affect the decision under review were open.

The issue before the AAT was whether the DSS properly issued notices under s.162 of the 1947 Act to institutions at which Kalwy held bank accounts. This in turn depended on whether a debt was due and owing to the Commonwealth under s.246(1) of the 1947 Act. For the DSS to succeed, it would be necessary to show first, the Kalwy was a co-conspirator in the fraud; secondly, that payments of benefits were made; thirdly, that those payments were made as a result of the fraud and would not have otherwise been made; fourthly, that Kalwy received the payments made.

#### Was Kalwy a co-conspirator in the fraud?

In considering the degree of proof required to establish that Kalwy was a party to the fraud, the AAT adopted the approach of *Davies J* in *Letts* (1984) 7 ALD 1; the AAT would have to be satisfied of the matter on the balance of probabilities, but since the allegation was of criminal behaviour it would need to be well proved.

The AAT found it was unsafe to rely on the testimony of two alleged co-conspirators whose evidence tended to implicate Kalwy. There were also taped telephone conversations between other co-conspirators which tended to incriminate Kalwy, but these were equivocal and without corroboration could not support a finding against him.

The AAT examined Kalwy's savings

patterns before, during and after the period of the fraud. The bank records indicated a surprisingly high savings rate during the period of the fraud for one on Kalwy's salary, but there was no evidence to contradict his explanations of low expenses, good and regular winnings from betting, and car loan repayments from his brother. The financial evidence was equivocal, and was insufficient to allow for the drawing of an inference that Kalwy was involved in the fraud.

Given the serious nature of the allegations, the AAT could not on the material before it find, on the balance of probabilities, that Kalwy was a party to the conspiracy. The AAT was therefore unable to find that he owed a debt to the Commonwealth under s.246. It followed that the notice under s.162 should not have been issued, and Kalwy was entitled to a refund of the \$20,711 recovered from him.

#### Formal decision

The AAT therefore affirmed the decision under review.

[P.O'C.]

## Compensation payments: lump sum or periodic?

SECRETARY TO DSS and KAESE (No. 9499)

Decided: 27 May 1994 by D.J.Grimes, M.E.C.Thorpe and J.Kalowski.

The DSS asked the AAT to review a SSAT decision that the sum of \$11,392 received by Ms Kaese as a compensation payment was a lump sum for the purposes of the Act.

#### The facts

In December 1987 Kaese suffered a work-related injury. From August 1989 to April 1992 she received disability support pension (DSP). In March 1992 she was awarded compensation for her injury. This award included a weekly payment of \$80 from 26 July 1989 and continuing. On 1 May 1992 the DSS issued a recovery notice for a debt of \$11,392. The debt was stated to have been incurred from 2 August 1989 to 20 April 1992 for which period Kaese

received DSP and workers compensation payments. This amount was recovered directly from the insurer in May 1992.

Kaese appealed to the SSAT against the decision to recover this amount. In July 1992 the SSAT determined that the amount paid as workers compensation was a lump sum payment and not periodic payments. The SSAT returned the matter to the DSS for recalculation of the debt.

Was the payment a lump sum payment or periodic payments?

The DSS argued that the payment could only be characterised as periodic payments as it was stated in the settlement order that compensation was to be at the weekly rate of \$80 and that weekly payments were to continue. Although some of the payment was received in a lump sum, it represented weekly arrears. Reference was made to *Chahoud* (1993) 28 ALD 927 and *Blunn and Cleaver* (1994) 77 SSR 1131 in submitting that the nature of the payment must be considered and not the method of payment.

The SSAT relied on the decision of the Tribunal in *Smallacombe* (1991) 63 SSR 880. The AAT had there decided that a single payment received as compensation for loss of earning over a 6-month period was a lump sum payment. But that decision had not been followed by the Federal Court in *Chahoud*. The Court had decided that such a payment was arrears in periodic payments. A similar view was expressed in *Cleaver*. It was the nature of the payment rather than the manner in which it was paid that must be considered.

The Tribunal noted:

"The terms of the compensation award in the present case clearly state that compensation was awarded on the basis of weekly compensation payments of \$80 per week from 26 July 1992. The only express provision for a lump sum payment is made in clause 3 of the order which awarded the respondent an additional \$5433 plus interest for permanent impairment of her back. It is accepted that the respondent actually received an amount of compensation in the form of a single payment. However, it is clear from the terms of the settlement order that such payment was based on the calculation of an award of \$80 per week from an earlier date, namely 26 July 1989".

(Reasons, paras 10-11)

Thus the AAT concluded that the payment was a series of periodic payments and not a lump sum payment. According to s.1170 the amount of the debt is the lesser of the sum of the periodic payments or the sum of the

pension paid. Kaese received \$11,392 in compensation payments and \$19,494.40 in pension. The AAT found that she was therefore liable to repay the former amount.

#### Were there special circumstances?

Kaese submitted that there were special circumstances in her case which might warrant the exercise of the discretion in section 1184 of the *Social Security Act 1991*. She said that she agreed to the settlement on the understanding that she would continue to receive her pension in addition to the \$80 per week. She now received only half the pension. She was suffering ill health and her health was deteriorating. She lived with her invalid brother who suffered from epilepsy and he was difficult to live with. He had little income and contributed little to household expenses. Her home situation was described as stressful. She owned her own home, a \$52,000 mortgage over the property being paid out by her brother after he received a compensation settlement. The brother received \$100 per week rental income from another sister.

Section 1184 provides that the Secretary may treat the whole or part of a compensation payment as not having been made if there are 'special circumstances'. The Tribunal considered the meaning of this term and noted that amongst other things the entirety of the claimant's circumstances must be examined - 'individual factors must not be looked at in isolation' (see *Bolton* (1989) 50 SSR 650).

Kaese contended that special circumstances existed because she suffered ill health and financial hardship. The AAT commented that receipt of DSP alone could not support a finding of special circumstances. It was also noted that financial hardship must be 'exceptional' to constitute special circumstances. No evidence of this was given to the Tribunal.

#### Formal decision

The AAT set aside the decision under review and substituted a decision that the payment of \$11,392 consisted of periodic payments and that pursuant to s.1170(3) of the Act the DSS was entitled to recover the lesser of either the sum of the periodic payments received or the sum of the pension paid during the period 2 August 1989 to 20 April 1992.

[B.S.]

## Compensation payments: which law applies?

SECRETARY TO DSS and HAUGHEY  
(No. 9656)

**Decided:** 5 August 1994 by B.H. Burns, D.J. Trowse and J.Y. Hancock.

On 26 March 1993 Haughey lodged a claim for disability support pension (DSP), which was granted and, in consequence, his wife was granted a wife's pension from 8 April 1993. On 27 April 1993 the DSS determined that weekly payments of compensation made to Mrs Haughey were to be treated as a direct deduction from the Haugheys' social security entitlements, reducing the pension of each of them by an amount of \$122 per week.

On 19 August 1993 the SSAT set aside the decision of the DSS and substituted a decision that in the special circumstances of the case the DSS should treat the weekly payments of compensation as ordinary income. The DSS sought review of the decision.

#### Legislation

At the time of the delegate's decision, s.1168 of the *Social Security Act 1991* provided that the rate of pension payable to a person was to be reduced 'dollar for dollar' for any periodic compensation payment received by his partner if s.1168(1) applied to the person. The subsection applied if a person's partner receives a series of periodical compensation payments and the person is qualified for DSP for the periodic payments period, and the person was not, at the time of the event that gave rise to the partner's entitlement to compensation, qualified for DSP. In that event the periodic compensation payments were not to be treated as ordinary income (to which a different, and more generous, income test applied): s.1171. If the person's partner qualified for wife pension, that pension was also reduced under s.1168(2). The AAT found that these provisions applied to Mr and Mrs Haughey.

At the time of the delegate's decision and at the time of the lodging of the application for review, s.1184 empowered the Secretary to treat the whole or part of a compensation payment as not having been made, or not liable to be made, if the Secretary thinks it appropriate to do so in the

special circumstances of the case.

However between the date of lodgement of the application for review and the date of hearing before the AAT, s.1184 was amended by the *Social Security (Budget and Other Measures) Legislation Amendment Act 1994*. The effect of the amendment is that where the set of circumstances which give rise to the compensation of the person's partner are unrelated to the circumstances that give rise to the person's qualification for a compensation affected payment, that fact in itself does not constitute special circumstances for the purposes of the section. A note in the Act indicated that the amendment was inserted to overcome the reasoning of the AAT in *Lee* (1993) 75 SSR 1090.

#### Which law applies?

The first issue was whether the AAT was required to apply s.1184 as it stood prior to the commencement of the amending Act, or as it stood at the date of the hearing by the AAT.

The AAT said that the amendment to s.1184 was not retrospective because there was no indication of an intention that it was to be retrospective. Accordingly, s.8 of the *Acts Interpretation Act 1901* protects any rights accrued under the Act prior to the amendment. The DSS submitted that Haughey had accrued no rights, because accrued rights cannot exist where the rights are contingent upon the exercise of a discretionary power such as that in s.1184. In support of its submission it referred to: *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934; *Director of Public Works v Ho Po Sang* [1961] AC 901; *Reilly* (1987) 37 SSR 494; *Phillips* (1987) 40 SSR 508; *Bradley* (1992) 70 SSR 1003. The DSS submitted that therefore the AAT had to apply s.1184 as amended.

The AAT preferred a different line of analysis, namely that Haughey had accrued a substantive right prior to the commencement of the amending Act, which right was preserved by s.8 of the Acts Interpretation Act. The nature of the right was a right to have the decision under review reconsidered in accordance with the law as it stood before the amendment. The AAT referred to the decision of the High Court in *Esber v Commonwealth of Australia* (1992) 106 ALR 577 as applied in *Queensland Medical Laboratory and Department of Health Housing and Community Services* (Decision No. 9290; 27 January 1994 and *Kratochvil* (AAT) (1994) 79 SSR 1146.