

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.

Although the right was accrued as at the date of lodgement of the application for review, it did not necessarily follow that the law to be applied to the accrued right was the law in force at the date of the lodgment. Since the AAT was in the shoes of the delegate when making its decision, the applicable law was that which existed at the date of the original decision. The AAT said that this proposition was consistent with the High Court's views in *Esber*, where the majority had left open the question of whether the relevant law to apply was the law in force at the date of lodgement of the application for review.

In the present case it would make no practical difference whether the law to be applied was the law as it stood at the time of the original decision or the law as at the date of the lodgement of the application for review, because both of those dates preceded the amendment.

The AAT proceeded to apply the law as it stood at the date of the original decision.

Special circumstances

The SSAT had referred to *Lee* in support of its decision that there were special circumstances to disregard part of the weekly compensation payments. In *Lee* the AAT found special circumstances in the absence of any connection between Mrs Lee's eligibility for pension and the fact that her husband was receiving compensation payments. The facts in the present case were similar to those in *Lee*, but the AAT declined to follow the prior case. It said that the facts in the present case and those in *Lee* fell squarely within the terms of s.1168. While it might seem unfair that a dollar for dollar deduction be applied where the pensioner's spouse was receiving periodic compensation but not when the spouse was receiving wages, that was the clear intention of the legislation. There was nothing special about that circumstance.

Haughey further argued that it was unfair that the reduction in pension was calculated on the gross and not the after tax amount of compensation payments. The AAT applied the reasoning in *Gutierrez* (Decision No. 9213; 24 December 1993) to find that the compensation payments referred to in s.1168 are the gross amounts of the compensation received rather than the after tax amount that is actually received. That fact is not of itself unfair so as to go towards an exercise of the discretion in s.1184.

The AAT found that there were no special circumstances under s.1184.

Formal decision

The AAT set aside the decision under

review and substituted a decision that the rate of Mr Haughey's DSP and Mrs Haughey's wife pension was to be reduced under s.1168(3) in accordance with the reasons of the AAT.

[P.O'C.]

Rate of special benefit: whether married person

GORDON and SECRETARY, DSS (No.9470)

Decided: 12 May 1994 by B.A. Barbour, J.Campbell and A.Cripps.

Background

This application related to a DSS decision to reject Mr Gordon's claim for special benefit on the ground that his spouse's income precluded payment for the period 22 March 1989 to 31 December 1989. An extension of time to lodge the application was granted. The facts of the matter were not in dispute. 'The applicant and his wife, who are legally married, have lived together, after a period of separation of some 5 years, since 1982': Reasons para 4. In 1985, the AAT found that Mr and Mrs Gordon were not living separately and apart for the purposes of social security entitlement (*Gordon* (1985) 27 SSR 339). In March 1989, the Department conceded that they were living separately under one roof and had done so for a period of at least 26 weeks.

The legislation

Prior to 1 January 1990, s.3 of the *Social Security Act 1947* provided that:

- (8) Where:
 - (a) a person who would, apart from this subsection, be an unmarried person was formerly a married person;
 - (b) the person is living in his or her former matrimonial home; and
 - (c) the person's former spouse is also living in the same home; the person shall, if the conditions referred to in paragraphs (b) and (c) continue to apply to the person, be treated as a married person for the purposes of this Act after the end of the period commencing on the day (in this sub-section called 'commencing day') on which those conditions were first satisfied or 14 May 1987, whichever is the later, and ending ...
 - (e) in any other case 26 weeks after the commencing day ...'

Mr Gordon declined to give oral evidence on certain matters or make oral submissions at the hearing. He had prepared two written submissions and

the AAT considered these arguments in its written decision.

Mr Gordon submitted that the DSS had not assessed his claim for special benefit in accordance with ss.129 and 130 of the 1947 Act. The AAT found that Mr Gordon was qualified for special benefit under s.129 at all material times. There was no argument on this point.

Mr Gordon accepted the DSS's submission that he should be considered a married person and as there was no other evidence before the AAT, it found that he was a 'married person' for the relevant period.

The issue was the rate of payment. The DSS submitted that the rate of payment, calculated according to ss.130, 122(1) and (4) was nil. This was based on Mrs Gordon's income. Mr Gordon did not dispute that this would be the case if Mrs Gordon's income was taken into account. He did not raise any argument in relation to his status as a married person nor the assessment of the rate of payment. Consequently, the AAT rejected his submission that the rate of payment was incorrect. The AAT found that if Mrs Gordon's income was ascribed to Mr Gordon, then his entitlement would be nil.

Mr Gordon's second argument was that the DSS was negligent in assessing his claim because they did not investigate evidence supporting his claim as a separated person. The AAT noted that the material did not go to the issue of whether Mr Gordon and his wife were properly treated as married persons.

The third argument alleged DSS negligence and non-compliance with the *Fol Act 1982*. The AAT noted this was not relevant to determining eligibility for special benefit and rate of payment.

The fourth argument was that the DSS was harsh, unreasonable and unjust in the assessment of Mr Gordon's claim and that the DSS Manual of Instructions was not followed. The AAT commented that the DSS guidelines were not binding on the AAT and that the AAT must determine Mr Gordon's entitlements according to the law despite the fact that he might consider the result harsh and unreasonable.

The AAT noted that the amendment to the Act which came into force on 1 January 1991 was a recognition that the definition of 'married person' in s.3 had operated harshly, but that that did not entitle Mr Gordon to payment of special benefit prior to the date of the amendment.

Formal decision

The AAT affirmed the decision under review.

[M.A.N.]