# Overpayment: failure to notify of departure from Australia, NESB

**SOMSAK and SECRETARY TO DSS**
**(No. 10480)**

**Decided:** 10 October 1995 by G.L. McDonald.

The DSS sought to recover an overpayment of JSA totalling $4356. This decision was affirmed by the SSAT and Somsak sought review by the AAT.

**The facts**

Somsak and his wife migrated to Australia from Slovakia on 17 December 1991. Somsak told the AAT through an interpreter that he neither spoke nor understood English on arrival in Australia. He completed a claim form for JSA with assistance and subsequently received benefits. This claim form was misplaced by the DSS. A second claim form, completed by Somsak after returning from overseas in August 1993, requested a Czechoslovakian interpreter. The AAT thought it reasonable to conclude that he would have had as great or greater need for an interpreter in 1991. A letter dated 23 January 1992 advised that Somsak would receive JSA from 18 December 1991 and enclosed a notice pursuant to s.574 of the *Social Security Act.* The notice advised that he was required to notify the DSS should he or his partner leave or decide to leave Australia. Both the letter and the notice were in English. Somsak did not recall receiving this letter.

An officer from the DSS interviewed Somsak in March 1992 with an interpreter present. Somsak told the AAT that the discussion concerned his attempts to find work. This discussion did not cover the notification requirements under the *Social Security Act.*

Somsak's wife and son returned to Bratislavia in May 1992 to obtain medical treatment for their son who suffered from a blood disease. Somsak did not notify the DSS of his wife's departure as required by question 10 of the JSA application form. He continued to receive JSA at the married rate. On 6 November 1992, Somsak left Australia to join his wife and son in Bratislavia. He did not notify the DSS of his departure. Somsak told the AAT that he left suddenly because all flights were fully booked and he had to wait for a cancellation.

Somsak denied lodging the JSA application form for the fortnight ending 17 November 1992 and the three subsequent fortnights. He claimed that his signature had been forged and that he had not authorised anyone to lodge the forms with the DSS. He also said that he had not received any of the money paid subsequent to 6 November 1992. There is a suggestion in the facts that the forms may have been completed and the money retained by the people Somsak was living with prior to returning to Bratislavia. Somsak told the AAT that he had not known that JSA had been paid after 6 November 1992 until February 1994, when he was interviewed by a DSS officer. Somsak said that he had reported the matter to the State and Federal police who had both since closed their investigations.

**The issues**

It was not in dispute that Somsak had been paid the married rate when he was not entitled to receive it. It was also clear that the DSS had continued to make payments into Somsak's former bank account after 6 November 1992, and that he had failed to notify the DSS of his wife's or his departure from Australia.

It was submitted for Somsak that the notice of 23 January 1992 (requiring notification of any changes in circumstances) was of no effect. It was argued that the notice was not in a form that Somsak could understand and that it should have been translated into Slovanian. Somsak's representative referred to the DSS guidelines about providing the services of an interpreter for non-English speaking clients. It was submitted that there was a failure to abide by the guidelines which amounted to an administrative error under s.1237(2) (the waiver provisions). This administrative error should result in the debt being waived by the DSS. Because the notice was not in a language Somsak could understand, he had a reasonable excuse for not complying with the requirements of the notice and the provisions of s.574(5) of the *Act.*

The DSS argued that there was no binding requirement that a notice under s.574 be translated, and that a failure to comply with the guidelines did not amount to an administrative error. There was a debt due to the Commonwealth which the Secretary was entitled to recover.

**Findings**

The AAT was satisfied that the notice was posted to Somsak and must be deemed to have been received by him.

The DSS guidelines did not have the force of delegated legislation. There was no requirement that every letter or notice be translated into the recipient's preferred language. The AAT said:

> 'Not every letter or notice sent by the Department can be translated into the recipient's preferred language. That such a course is desirable is undeniable. However, it is equally understandable that, given the constraints of funding, such a course is currently unrealistic and indeed the guide does not provide for its occurrence.'

(Reasons, para. 16)

The AAT indicated that some responsibility must lie with social security recipients to make their own inquiries about notices they receive and do not understand. The guidelines contemplate that the assistance of an interpreter will be available on request. The AAT noted that Somsak could have asked about the notice at the interview in March 1992, where an interpreter was present. It found no administrative error and that Somsak had not complied with the notification requirements.

**Formal decision**

The AAT affirmed the decision that Samsak owed a debt to the Commonwealth.

**[H.B.]**

# Compensation: preclusion period; lost earnings or lost earning capacity

**CUNNEEN and SECRETARY TO DSS**
**(No. 10533)**

**Decided:** 16 November 1995 by K.L. Beddoe.

The DSS decided to apply a lump sum preclusion period because Cunneen had recieved a payment of compensation. Payment of a pension or benefit was to be precluded from 25 March 1994 to 15 June 1995. An authorised review officer (ARO) reduced the preclusion period to 52 weeks. The decision of the ARO was affirmed by the SSAT and Cunneen appealed to the AAT.

**The facts**

Cunneen was employed at the Canterbury District Hospital as a rehabilitation counsellor. She was injured on 16 August 1988 and had not worked since 18 August 1988. She was paid sickness benefits from 13 September 1988. Her claim for compensation pursuant to the *Workers' Compensation Act (NSW)* was settled on 24 March 1994. Prior to that, she had not received weekly payments of compensation under the NSW scheme. She received the following amounts:

- $2500 for weekly payments from 18 August 1988 to 24 March 1994
- $12,510 for a permanent impairment to the back
- $9,382.50 for a permanent impairment to the right leg
- $9,382.50 for a permanent impairment to the left leg
- $15,000 for pain and suffering
- $2275 interest on the lump sum for pain and suffering
- $10,000 for expenses, and
- payment of her legal costs.

**The law**

The definition of compensation in s.17(2)(e) of the *Social Security Act* provided that it was a payment made 'wholly or partly in respect of lost earnings or lost capacity to earn'. Section 17(3) determines the compensation component of a lump sum compensation payment, and s.17(4A) provides that arrears of periodic payments is not a lump sum compensation payment. Section 1165 precludes the payment of a pension or benefit to a person who receives a lump sum payment of compensation for a period to be calculated according to s.1165(4). Sections 1165(3), 1165(3A), 1165(3B) and 1165(3C) provide for the commencement of the lump sum preclusion period.

**The issue**

The AAT had to determine whether Cuneen had received compensation as defined by s.17(2) of the *Social Security Act.* If so, s.1165 operated to fix a lump sum preclusion period.

The AAT considered whether elements of the settlement amount were to be deemed compensation and included in the calculation of a lump sum preclusion period.

The DSS sought to resile from their previous arguments about the lump sum preclusion period. The DSS argued that it was entitled to recover sickness benefits paid between 16 August 1988 and mid-November 1989 as this was the correct lump sum preclusion period. The DSS sought to have the matter remitted to it on the basis that Cunneen was entitled to DSP for 52 weeks from March 1994.

**Findings**

The AAT did not accept the arguments of the DSS about the entitlement to recover sickness benefits. The DSS had not made any determination pursuant to s.1166 about the payment of sickness benefits.

The AAT was satisfied that the payment of $2500 of weekly compensation was not compensation as defined by s.17(3) of the Act. The effect of s.17(4) was to treat arrears of weekly payments as being received during the relevant period rather than as a lump sum compensation payment. As there was no relevant lump sum compensation payment for the period to 24 March 1994, the lump sum preclusion period could only commence on 25 March 1994. Accordingly, there was no lump sum preclusion period between August 1988 and November 1989.

Was the balance of compensation paid, $56,275 made wholly or partly in respect of lost earnings or lost capacity to earn as provided in the definition of compensation? The balance was paid for permanent impairments to the back and legs, pain and suffering and medical expenses. The AAT found that the lump sum payment did not include any amount for lost earnings or lost earning capacity.

**Formal decision**

The AAT made an interim decision that the amount received was not compensation under the *Social Security Act 1991.*

**[H.B.]**

# Compensation: preclusion and special circumstances

**SECRETARY TO DSS and HILL**

**(No. 10566)**

Decided: 4 December 1995 by W. Eyre.

On 3 November of 1994, Hill received compensation of $18,223, including an amount of $5000 for future loss of earning capacity, by way of settlement, from the State Government Insurance Office for injuries resulting from a motor vehicle accident on 15 May 1992. At the time of the accident Hill was in receipt of job search allowance and remained so until 10 July 1992.

As a result of Hill's receipt of compensation, the DSS decided to apply a lump sum preclusion period of 17 weeks from 15 May 1992 to 10 September 1992 based on 50% of the settlement figure of $18,223, and that job search allowance paid to Hill during that period, in the sum of $1588.02, was a recoverable debt. The SSAT set aside that decision and substituted a decision that the compensation component of the settlement amount should be disregarded and no preclusion period should be applied. The DSS appealed to the AAT.

**The issue**

The issue in this case was whether, in Hill's case, there were special circumstances, enabling the Secretary to treat the whole or part of the compensation payment as not having been made, in accordance with s.1184(1) of the *Social Security Act 1991.*

**Special circumstances**

Hill argued that in a situation where social security payments are received for only a short period, and the compensation for future economic loss does not overlap that period either by nature or time, it is harsh and unreasonable to try and reclaim the amounts of social security payment.

The AAT noted the decision of *Commonwealth of Australia v Daniels* (1994) 33 ALD 111, in which the AAT found special circumstances to exist where there was a complete lack of causative connection between the compensation payment for incapacity to work and the applicant's unemployment status arising from retrenchment, and there was an undue delay between the accidents in 1980 and 1982 and the payment of the lump sum in 1989, emphasised by the fact that the applicant became unemployed in 1990. The DSS argued that *Daniels* was distinguishable because of amendments effected by the *Social Security (Budget and Other Measures) Legislation Amendment Act 1993*, which inserted a new subsection 1184(2). That subsection provides that, where a person is qualified for a compensation-affected payment and their partner receives compensation, the fact that there is no connection between eligibility for benefit and the circumstances giving rise to the compensation payment, does not of itself constitute special circumstances.The AAT, however, confirmed that the discretion given by s.1184(1) is not affected by s.1184(2) which only applies where compensation is received by the partner of a social security recipient.

The AAT agreed that Hill had not been compensated for loss of earnings or lost