

lowance because he was fit for light work.

In May 1994 the AAT had affirmed an earlier decision of the DSS to cancel payment of disability support pension to Boskovic ((1994) 80 SSR 1171). This decision had been affirmed by the Federal Court ((1995) 83 SSR 1222).

#### Newstart allowance: the facts

In the earlier decision of the AAT, it had been found that Boskovic had been engaged in a roadside flower selling business. Evidence was provided at the hearing that Boskovic had worked approximately 300 days in the last 10 years selling flowers. According to Boskovic his son had taken over the business in June 1994. The son had closed the business down after 3 months because he did not make enough money. The DSS was satisfied that Boskovic ceased the business in June 1995, and he had been paid job search allowance from then. Therefore, the period under review was from June 1994 to June 1995.

#### The law

Section 593 of the *Social Security Act 1991* sets out the qualifications for newstart allowance. One of the requirements is that the person be unemployed throughout the period. The AAT decided: 'That the onus is on the applicant [Boskovic] to demonstrate that he was unemployed for the period 7 June 1994 to 14 June 1995': Reasons, para. 6.

The AAT found that Boskovic's evidence contradicted earlier evidence which had been provided to the AAT. It cited numerous examples of contradictory evidence and, in particular, evidence that Boskovic had held a Hawker's licence in 1994, and in 1995 until May. Boskovic was unable to give a precise estimate of his weekly earnings, and became evasive when answering questions about where the earnings had been held. The AAT concluded that:

'The applicant has been self employed as a flower seller over a number of years, and he has not provided corroborative evidence that during the period 7 June 1994 to 14 June 1995, the period under review, he had ceased being employed in that business.'

(Reasons, para. 24)

According to the AAT, Boskovic had been underemployed in the flower selling business, and had been fit for light work throughout the period. There was no evidence that Boskovic had been looking for work during the period, despite his evidence to the contrary. Boskovic had been pursuing a claim for sickness allowance for most of the relevant period. Therefore, he was not qualified to receive newstart allowance.

#### Sickness allowance — the facts

Boskovic told the AAT that during the winter months he was affected by arthritis, having pain in every joint. A DSS officer had observed in a file note, that Boskovic had limped into his office but had left walking normally. He also recorded that he did not accept the medical certificate dated 6 July 1994 provided by Boskovic's doctor because the doctor: 'is not to be believed, as I am personally aware of his practices': Reasons, para. 9. Boskovic was referred to a Commonwealth Medical Officer who found that he was fit for light work. No reference was made in that medical report to Boskovic suffering from a temporary condition such as sinusitis or bronchitis.

Boskovic obtained another medical certificate on 16 August 1994 in which his doctor stated that he was unfit for work because of bronchitis and influenza. At the hearing, Boskovic told the AAT that he had difficulty walking because of his arthritis, he had headaches as a result of a fractured skull, and he had lost an eye.

#### The law

Section 666 of the Act sets out the qualifications for sickness allowance, which include that a person must be incapacitated for work throughout the period because of a sickness or accident, and that incapacity must be of a temporary nature. The AAT stated that it must decide: 'whether the applicant has suffered a temporary incapacity to work, and whether except for that incapacity he would be either working or receiving JSA': Reasons, para. 7.

The AAT found that there was evidence before it, namely the medical certificate of 16 August 1994, which showed that Boskovic was temporarily incapacitated for work because of influenza and bronchitis from 16 August 1994 to 15 September 1994. This evidence had not been challenged. A later medical certificate from the same doctor did not refer to influenza or bronchitis. The AAT concluded that Boskovic was temporarily incapacitated for work from 16 August 1994 to 15 September 1994.

#### Formal decision

The AAT decided:

- to affirm the decision to cancel newstart allowance; and
- to set aside the decision not pay sickness allowance in relation to the claim lodged on 17 August 1994.

[C. H.]

[Editor's Note: The onus of proof placed on Boskovic by the AAT to show that he was unemployed during the relevant period would

seem to be contrary to the pronouncements of the Federal Court in *McDonald v Director General of Social Security* (1984) 6 ALD 6. In *McDonald* the court had decided that there is no onus of proof in these administrative proceedings. However, where the DSS has cancelled a pension, the circumstances might indicate that the DSS should show that the person is no longer qualified to receive that pension. A similar argument might be mounted in this case.]

## Special circumstances, waiver and write-off

SECRETARY TO DSS and  
DUZEVICH  
(No. 10752)

Decided: 19 February 1996 by S.D. Hotop.

The SSAT had decided to treat the whole of periodic compensation received by Duzevich as not having been made, and therefore decided that social security payments made during the same period as compensation were not recoverable. The DSS appealed this decision to the AAT.

#### The facts

Duzevich had sustained an injury in the course of her employment whilst living in New Zealand. She had received periodic compensation from the New Zealand Accident Compensation Corporation for the period 24 July 1985 to 19 September 1989.

Duzevich arrived in Australia in 1988, whereupon in July 1989, the Accident Compensation Corporation decided that she was no longer entitled to payments. In May 1992, Duzevich sought review of the Corporation's decision, and in March 1994, the Corporation agreed to restore payment with arrears from September 1989.

The DSS advised Duzevich by letter in early September 1994 that receipt of compensation would cause social security payments to be recoverable. In late September 1994 the corporation advised that the amount of \$NZ 41,625, after tax, was credited to her bank account, being arrears for the period September 1989 to June 1992.

The DSS then gave Duzevich notice that \$14,633.26 was to be repaid to the DSS.

### Special circumstances

Duzevich had moved to Australia with her husband to be nearer to her children. Only a few days after her arrival, her 23-year old son was killed in a motor vehicle accident. She returned to New Zealand to bury her son, returning to Australia in September 1988 to be with her daughter.

In 1989 Duzevich and her husband bought a house. In 1991, her husband suffered a slight stroke and had to leave employment, going onto sickness benefit. To meet their mortgage commitments they had to access emergency financial assistance through welfare agencies from 1992 to 1993.

Duzevich had lodged a claim on their mortgage insurance policy after her husband's stroke, but the insurer refused to honour the policy on the ground that Duzevich's husband had inaccurately completed the form. Duzevich's husband was eventually diagnosed with cancer and he died in March 1993, after having been looked after by Duzevich at home, with assistance from nursing services.

Duzevich gave evidence that she had received the arrears payment from the Corporation, and had used part of it to catch up with mortgage payments. At the date of hearing, Duzevich still had \$21,000 remaining in her bank account. A statement of financial circumstances was submitted which indicated that Duzevich's expenditure each year clearly outweighed her income.

Duzevich gave evidence, supported by written medical reports that she suffered from chronic Chrones disease, hypertension, depression, anxiety and anaemia and had recently undergone an operation to remove a large section of her bowel and an ovary. Essentially the evidence indicated that Duzevich's health would continue to decline, and would be exacerbated by her present financial cir-

cumstances and anxiety. Duzevich's physiotherapist, by written report, confirmed that Duzevich's condition sometimes rendered her unable to cope with daily living activities.

Evidence was also given by a specialist grief counsellor, that Duzevich was suffering from emotional distress caused by the death of her husband and her son, and the possibility that she would have to sell the family home.

### The law

The AAT considered the law relating to the 'disregarding' of compensation payments (s.1184 of the *Social Security Act 1991*). The AAT considered previous decisions of both the AAT and the Federal Court in which 'special circumstances' had been defined.

The AAT also considered previous decisions which had highlighted the issue that social security legislation was intended to be beneficial or welfare legislation.

After considering Duzevich's circumstances in the light of these decisions, the AAT decided that her circumstances were not so unusual or exceptional that they could be considered special in the context of s.1184 of the Act. In reaching this decision, the AAT noted that financial hardship alone does not constitute special circumstances. The AAT also noted that a person's state of health is not enough to constitute special circumstances. The AAT observed that Duzevich had relatively substantial assets and no liabilities beyond the mortgage.

The AAT then considered whether the debt should be waived or written off.

### Waiver

The AAT decided that the 'new' waiver provisions which allow for waiver in 'special circumstances' should be inter-

preted and applied in the same way as special circumstances under s.1184 of the Act. Thus, it was not appropriate to waive the debt.

### Write-off

Finally, the AAT considered s.1236(1) of the Act, which is a discretionary power to write off a debt. The AAT referred to the decision in *Re L and Secretary, Department of Social Security* (1995) 21 AAR 412.

Although Duzevich's circumstances could not be described as desperate or even difficult, they were unfortunate. Even though Duzevich's circumstances were not special, they were such as to warrant exercise of the broader discretion to write off a debt.

The AAT commented:

'the series of unfortunate circumstances adversely affecting the respondent's physical and mental health (including the tragic loss of her husband and her only son) and her financial situation, compassionate considerations and the beneficial nature of the Act loom large as factors relevant to the exercise of the discretionary power to write-off the compensation debt in the present case — all the more so because the respondent is in no way responsible for the unfortunate position in which she presently finds herself.'

(Reasons, para. 37)

Furthermore, the AAT noted the decision of *Secretary, Department of Social Security v Hodgson* (1992) 37 FCR 32 which stated that write-off should not be for a specified period. Accordingly the AAT made no specific orders as to the period of write-off, recognising that the debt would exist in law, and may later be pursued by the applicant.

### Formal decision

The AAT set aside the decision and substituted its decision that there was a debt, but that this debt should be written off.

[B.M.]