

Federal Court

Compensation payments: special circumstances

SECRETARY TO THE DSS v ELLIS

(Federal Court of Australia)

Decided: 8 April 1997 by Carr J.

Background

Ellis was injured in November 1994 in the course of her employment, as a result of which she received workers compensation payments of \$729 a fortnight. On 1 May 1995 she lodged a claim for sole parent pension. This was rejected on the basis that the workers compensation payments were to be treated as a direct deduction in accordance with s.1168 of the *Social Security Act 1991* (the Act), and that this resulted in a nil pension entitlement. The SSAT substituted a decision that 'special circumstances' existed within the meaning of s.1184 of the Act and that part of the weekly payments should be disregarded for the purposes of calculating whether Ellis was entitled to sole parent pension. This had the effect of treating Ellis' weekly compensation payments as if she had received them by way of paid employment, resulting in an entitlement to pension amounting to \$61 a fortnight. The AAT affirmed the decision of the SSAT.

The findings of fact relating to 'special circumstances'

The 'special circumstances' which the AAT found to exist included:

- extreme financial hardship. In this respect the AAT adopted the findings of the SSAT;
- responsibility for 4 children under the age of 10, with no maintenance or other financial support from Ellis' husband, or from any other source;
- the marriage breakdown had been contributed to by the hardship caused by the injury;
- following separation Ellis was left with the combined debts of herself and her husband;
- Ellis was required to attend her former workplace under a rehabilitation scheme to undertake those administrative tasks she could manage. She was not paid but still incurred travel and child care costs;

- because of her family's needs she had to undertake tasks which caused lasting damage to the knee injury during the recuperation period;
- payments of sole parent pension were not related to the payments for workers compensation or the injury;
- Ellis had virtually no assets;
- Ellis had been forced to use her credit card to buy the necessities of life such as food;
- the knee injury continued to cause significant difficulties in undertaking housework and other daily activities, and precluded her from pursuing her occupation as a nurse.

The AAT regarded Ellis' financial situation as desperate, was satisfied that she used the amounts available to her from compensation in a practical and careful manner, and that she and her children were suffering unacceptable hardship.

Submissions made by the DSS

The DSS argued that the AAT had erred in law in finding that Ellis' circumstances were special within the meaning of s.1184. It was submitted that:

- Ellis' circumstances were not sufficiently unique or unusual as to constitute special circumstances. Even if they were 'special', they were not sufficiently distinctive, extreme, unique or unfair, when considered in the context of other persons with children who receive periodic compensation payments, to have made it appropriate to exercise the discretion to treat the whole or part of the workers compensation payments as not having been made;
- the AAT had failed to take into account the legislative policy behind s.1168, which was to conserve public moneys. It had effectively treated the fact that the compensation payments received by Ellis were insufficient for her needs as the basis for concluding that the strict operation of s.1168 should be negated. The Tribunal had ignored the fact that s.1168 was intended to leave Ellis dependent on workers compensation payments;
- the AAT took into account irrelevant considerations, namely the fact that there was no relationship between the sole parent pension and the workers compensation payments;
- the AAT failed to take into account relevant evidence, in that it did not take into account Ellis' receipt of fam-

ily payments when assessing her financial circumstances. It had made a finding that she received no support, financial or otherwise from her husband 'or any other source'.

The view of the Court

The Court rejected the DSS submissions. It was accepted that the AAT was aware that it had to give effect to s.1168 and the policy behind that section, unless it found there were special circumstances. The AAT recognised that special circumstances meant, on the authorities, circumstances which were out of the ordinary. Once it got to that point the Tribunal was engaged in a purely factual exercise, and it was open to the Tribunal, on the findings made, to conclude that the circumstances were sufficiently out of the ordinary as to amount to 'special circumstances'. It was also not appropriate to fetter the statutory discretion conferred by s.1184. To accept that the discretion should only be exercised where the circumstances were sufficiently distinctive, extreme, unique, unusual or unfair, would be to add an unwarranted gloss to the words of the section. Once special circumstances are found it is up to the decision maker to decide whether it is appropriate to exercise the discretion conferred by the section.

The Court did not regard the fact that there was no relationship between the payment of sole parent pension and the deriving of income by reason of a work-related injury, as an irrelevant consideration. The discretion under s.1184 is wide and entitled the Tribunal to take into account a whole host of factors. The Court also rejected the contention that the AAT had failed to take into account the receipt by Ellis of family payment. In making a finding that Ellis was suffering extreme financial hardship the AAT had adopted the findings of the SSAT, which had in its reasons, clearly taken into account the family payments received. Ellis' evidence to the AAT regarding her financial circumstances also clearly set out the receipt by her of such payments. The AAT did not therefore err in law by failing to specifically refer to the payments in its findings.

Formal decision

The appeal was dismissed with costs.

[A.T.]