

## Including Student Assistance Decisions

## Opinion

**Employment National — the saviour of job searchers?**

From 30 April 1998 the CES will no longer be available to help job-seekers. It will be replaced by Employment National and a network of private agencies who have tendered for the role previously played by the CES, the Skillshares and other community and private employment and case management agencies.

There had been considerable disquiet expressed about these changes by a range of community organisations e.g. ACOSS, Welfare Rights, the Brotherhood of St Laurence and representatives of groups facing extra disadvantage, such as the Head Injury Council of Australia. At the same time, Dr Kemp (the Minister for DEETYA) has emphasised that the unemployed will have access to a wider choice of providers, in a wide range of locations. It is probably too early to comment on this.

Under the new arrangements, providers will be paid on the basis of outcomes, that is, a certain amount for each job-seeker placed in employment for more than 15 hours spread over 5 days.

The providers will only be paid for those job seekers who are receiving benefits. A person currently registered with the CES but not in receipt of social security benefits may be charged by an agency in those States in which that is not illegal. Such people will still be able to use the touch screens provided

currently by CES, which will in the future be available at Centrelink Offices. They may also be given some additional help. However, the private contractors will not be paid by the Commonwealth for job-matching for them. A number of the providers have told the Minister that they will provide job-matching services for such people. There is no contractual obligation for any service to be provided free to those not on benefits.

There do not appear to be any safeguards currently in place to stop a person being placed with the same employer for a series of 'casual' or short-term positions, and the contractor being paid for job-matching over a number of occasions. What is undeniable is that many current case management providers will no longer be providing the services they have in the past.

Employment Services Regulatory Authority (ESRA) estimated that it took up to 10 months for a case management provider to provide sustained quality outcomes. It is perhaps unfortunate that a large percentage of those providers on specific sites identified by ESRA as among the best performers were not offered FLEX 3 contracts. It appears inevitable that there will be a loss of experience and

*Continued on page 18*

## In this Issue

## AAT decisions

- Carer's pension: 'severely handicapped person'; 'the home of the handicapped person'  
*Dunstall . . . 14*
- Disability support pension: inability to work and unrated symptoms; Meniere's disease  
*Busstra . . . 14*
- Assets test: transfer of farm; disposal of asset  
*May . . . 15*
- Age pension: value of assets  
*Miller . . . 16*
- Compensation: special circumstances  
*Dean . . . 16*  
*Haidar . . . 17*
- Disability support pension: overseas pension and compensation; special circumstances  
*Martin . . . 18*
- Sole parent pension: marriage-like relationship  
*Lilley . . . 19*  
*O'Neill . . . 19*
- Member of a couple: same sex relationship  
*Harman . . . 19*
- Newstart allowance: whether 'unemployed'  
*James . . . 20*
- Application for review: limitation on date of effect  
*Azzopardi . . . 20*
- Age pension: hardship provisions; false statement; debt and write off  
*White . . . 21*
- Practice and procedure: stay order; newly arrived migrant  
*Prikhodko . . . 22*
- Newstart allowance: activity test and advertised positions  
*Tyrkos . . . 22*

## Student assistance decisions

- AUSTUDY: financial supplement; application by required date  
*Nguyen . . . 23*
- AUSTUDY: minimum time of course; illness, circumstances beyond control  
*Rodolico . . . 24*

The **Social Security Reporter** is published six times a year by the Legal Service Bulletin Co-operative Ltd. Tel. (03) 9544 0974

ISSN 0817 3524

**Editor:** Christine Heazlewood

**Contributors:** Agnes Borsody, Helen Brown, Margaret Carstairs, Kees de Hoog, Christine Heazlewood, Susanne Liden, Mary Anne Noone, Phillip Swain, Andrea Treble and Peter Wilmshurst.

**Typesetting:** Marilyn Gillespie **Printing:** Thajo Printing, 4 Yeovil Court, Mulgrave.

**Subscriptions** are available at \$40 a year, \$30 for Alternative Law Journal subscribers.

Please address all correspondence to Legal Service Bulletin Co-op, C/- Law Faculty, Monash University, Clayton 3168

Copyright © Legal Service Bulletin Co-operative Ltd 1998

the remaining funds to buy essential items of furniture.

The AAT stated that:

'it is essential not to look at each circumstance in isolation, but rather consideration should be given to a person's circumstances as a whole. In this instance, the applicant's circumstances both past and present are particularly relevant, as the preclusion period has already been served. Such consideration should encompass more than just the applicant's financial circumstances, but should extend to matters such as health and social issues.'

(Reasons, para. 65)

The AAT found that the combined effects of Haidar's ill health, the ill health of his family, the breakdown of his marriage and the resulting emotional strain constituted a special circumstance which the Tribunal should have regard to in considering whether to exercise the discretion. Haidar spent money to provide necessities, not luxuries. Cultural issues may have played a role in his decision to repay his creditors, and this does not mean that the discretion should not be exercised. The alleged misleading advice Haidar received, does not of itself create special circumstances, however it contributes to the overall finding that those circumstances exist.

#### Formal decision

The AAT set aside the decision under review, and exercised the discretion in accordance with s.1184(1) by treating part of Haidar's compensation payment as not having been made. The preclusion period was to be reduced from 63 to 47 weeks. The appropriate sum was to be repaid to Haidar.

[A.B.]

[Contributor's Note: It is not clear from the AAT's reasons why this reduction in the preclusion period was appropriate.]

#### Opinion continued

expertise in the provision of such services to the most disadvantaged job seekers. This would appear to mean that some people currently being case managed will be removed from case management, and certainly a number will be moved to different providers, although they might feel they were getting a good service from their current case manager.

Letters from CES to case management providers indicated that anyone who has been on case management for more than 39 weeks will have their case management terminated after 30 April 1998. This may cause great confusion among those who are long-term unemployed, and who may not be clear about their rights and obligations after this date.

[A.B.]

## Disability support pension: overseas pension and compensation; special circumstances

MARTIN and SECRETARY TO THE DSS  
(No. 12409)

Decided: 21 November 1997 by J. Shead.

#### The background

Martin arrived in Australia from Spain in 1990, and was injured at work in the same year. He suffered leg, ankle, arm and internal injuries. He later suffered a heart attack and had a bypass operation. He also had a hernia, and (recently) had been diagnosed with diabetes.

Martin applied for and was granted invalid pension (now disability support pension — DSP), and in February 1994 received a lump sum compensation payment in respect of arrears of workers compensation payments which were continuing at the rate of \$150 a week. In September 1995 a Spanish pension was also taken into account as income and this, together with the compensation payments and bank interest, meant that his DSP was cancelled. Martin sought review of this decision, but in January 1996 the Authorised Review Officer affirmed the decision, as did the SSAT when it considered that matter on 8 August 1996.

#### The issue

Martin argued that the Spanish pension he received ought not to be taken into account in determining his eligibility for DSP, and that the treatment of workers compensation payments differentially from other income amounted to 'special circumstances' sufficient to allow the discretion contained in s.1184 of the *Social Security Act 1991* (the Act) to be exercised.

#### The law

The relevant International Agreement is set out in Schedule 6 of the Act, whilst s.1168 sets out the manner in which compensation payments are to be treated in determining the rate of DSP. Section 1184 of the Act allows all or part of a compensation payment to be treated as not having been made '... if the Secretary thinks it is appropriate to do so in the special circumstances of the case'.

#### Overseas pension and compensation

As to whether Martin's Spanish pension should be considered in determining eligibility for DSP, the AAT noted the provisions of the International Agreement, and concluded that Martin was qualified for DSP by virtue of s.94 of the Act rather than through the operation of any provision of the Agreement. The Tribunal further concluded that there were no particular provisions of the Agreement that affected Martin's DSP, the rate of which should be determined by reference to the usual provisions of the Act.

Noting the provisions of s.17 and s.1168 of the Act, the Tribunal concluded that the DSP was a compensation affected payment (that is, a social security payment the rate of which must be determined with reference to any payments under a scheme of compensation). In Martin's case, the application of the income test taking account of compensation payments, the Spanish pension and other interest, meant that Martin's DSP rate was reduced to nil.

#### Special circumstances

The AAT next considered whether 'special circumstances' could be said to exist in Martin's case, sufficient to justify the exercise of the s.1184 discretion. The Tribunal noted with approval the test of 'special circumstances' in *Beadle and Director-General of Social Security* (1984) 1 ALD 1 — that the circumstances be 'unusual, uncommon or exceptional'. In *Krzywak and Secretary, Department of Social Security* (1988) 15 ALD 690 it was suggested financial hardship, legislative changes, incorrect legal advice and ill-health were factors relevant to the existence of 'special circumstances'. The AAT concluded that these factors were not exhaustive but rather useful guides for the exercise of the discretion, which decision must be made bearing in mind the context of the Act, and the recognition that all DSS applicants will ordinarily be 'impecunious and in straitened circumstances' (*Director-General of Social Security v Hales* (1982) 47 ALR 281).

Having regard to Martin's current income and expenditures, and noting his reliance on family and friends for some financial assistance, the AAT nevertheless concluded that he was not suffering financial hardship compared to other social security recipients. The AAT similarly concluded that his ill-health was not so severe as to constitute special circumstances. As to legislative treatment of compensation payments differentially to other forms of income, the AAT concluded that the Act made clear that such differential treatment was intended. However, given fluctuations in currency exchange rates, the AAT found that it