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 re 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

would be appropriate for Martin to, from time to time, request the DSS to review the rate of DSP to be paid to him.

Formal decision

The AAT affirmed the decision under review.

[P.A.S.]

Sole parent pension: marriage-like relationship

LILLEY and SECRETARY TO THE DSS

O'NEILL and SECRETARY TO THE DSS (No. 12517)

Decided: 22 December 1997 by K.L. Beddoe, H.M. Pavlin and E.K. Christie.

Lilley and O'Neill shared premises since 1992. The DSS decided on separate dates to cancel the sole parent pensions (SPP) of both Lilley and O'Neill. Both decisions were affirmed by an Authorised Review Officer and the SSAT. The issue for the AAT was whether they shared a 'marriage-like relationship'.

The law

Section 249(1) of the *Social Security Act 1991* provides that a person is qualified for SPP if not a member of a couple. Section 4(2) provides that a person is a member of a couple if he or she has a relationship with a person of the opposite sex, is not legally married to that person, but in the Secretary's view has a 'marriage-like relationship'. Section 4(3) sets out the criteria to be considered by the Secretary in determining whether there is a marriage-like relationship, including the financial and social aspects of the relationship, any joint responsibility for caring for children, the household arrangements, any sexual relationship and the length of the relationship.

The facts

The AAT commented that neither Lilley or O'Neill 'seems able to cope with details as to what happened in the past': Reasons, para. 9. It appeared they began living in the same premises at Wynnum in 1992. O'Neill and her daughter moved into the premises where Lilley and his children lived, as her mother's flat was too small to accommodate 3 people. The DSS investigated their circumstances in 1993, and did not cancel either party's SPP. The evidence showed that the DSS had considered their eligibility for SPP 'on more than one occasion': Reasons, para. 11.

Lilley and O'Neill moved to Griffin in April 1993. There was evidence of O'Neill leaving the premises and residing separately for several months in 1994. There was clear and consistent evidence that both parties had separate bedrooms and did not share a common bed. In 1996 O'Neill gave birth to a daughter, Leilani, with Lilley as the acknowledged father. The evidence was that O'Neill agreed to conceive a child because Lilley wanted a child to replace his daughter who now resided with her mother. O'Neill gave evidence that Lilley had the prime responsibility for the care of Leilani and, in the event that they no longer shared premises, Leilani would stay with her father.

O'Neill did not live in shared premises at the time of the AAT hearing, and said that she had moved away 4 or 5 times. However, her 2 daughters stayed with Lilley during the week because of their schooling.

Marriage-like relationship

The AAT found this to be evidence of joint responsibility for the care of her children together with their joint responsibility for the care of their daughter. The AAT was not satisfied that there were two distinct households operating in the shared premises. There did not appear to be joint social activities. The only evidence of a sexual relationship was the conception and birth of their daughter. Lilley was 21 years older than O'Neill and the AAT was of the view that he had very strong views about raising children and household matters. The AAT thought that O'Neill was more submissive and prepared to rely on others to help in the care of her children.

The AAT found that their relationship was a marriage-like relationship. It had particular regard to the length of the relationship, the dominant personality of Lilley, his desire to have another child, the arrangements for the care of the children and O'Neill's apparent dependence on Lilley for support.

Formal decision

The decision to cancel both pensions was affirmed.

[H.B.]

Member of a couple: same sex relationship

HARMAN and SECRETARY TO THE DSS (No. 12503)

Decided: 19 December 1997 by M.T.E. Shotter.

The background

Harman's application for an age pension had been rejected due to the level of his income. He resided in Holland but would otherwise have been entitled to a pension under the International Agreement between Australia and the Netherlands. Harman objected to the decision of the DSS and the SSAT, arguing that he should be considered as a member of a couple, which would allow for the application of a higher income limit. He argued that the refusal to consider himself and his same sex partner as a couple was contrary to the way in which assessment of pension occurred in the Netherlands, and also contravened international agreements signed by Australia.

The law

The AAT noted that s.4(2) of the *Social Security Act 1991* defines a person as 'a member of a couple' if:

> '(a) the person is legally married to another person and is not, in the Secretary's opinion . . . living separately and apart; or
>
> (b) all of the following conditions are met:
>
> (i) the person has a relationship with a person of the opposite sex (in this paragraph called the "partner");
>
> (ii) the person is not legally married to the partner;
>
> (iii) the relationship between the person and the partner is, in the Secretary's opinion . . . a marriage-like relationship . . .'

Member of a couple

Australian government policy was clearly expressed in s.4(2)(b)(i), requiring the relationship to be with a person of the opposite sex, and the AAT was bound by the legislation. The policy of the Dutch government could have no bearing on the decision. Harman's pension rate therefore had to be worked out as if he were a single person. According to the International Agreement Portability Rate Calculator, s.1210 and Article 10 of the Agreement itself, this depended upon Harman's Australian working life residence. The DSS had calculated Harman to have a working life residence of 288 months, and this was not contested by Harman. Based on this the AAT applied the relevant formula set out in Article 10