

Write off

The AAT emphasised that if 'special circumstances' waiver had not been available, there would be strong reasons favouring write-off of a substantial part of the total debt, given the length of time it would take to recover the debt at the present rate of deductions. Apart from considerations of financial hardship, the burden of imposing such a long period of recovery would defeat the beneficial nature of the legislation. The AAT took the view that the psychological condition of Bitunjac could be taken into account in determining that a portion of the debt should be written off, noting that this approach was approved as acceptable by a full bench of the Federal Court in *Lee v Secretary to the DSS* (1996) 139 ALR 57.

Formal decision

The AAT affirmed the decision that the sole parent pension debt for the period 25 July 1991 to 20 June 1992 was not recoverable. The AAT varied the decision relating to the family allowance debt. The portion of the debt still outstanding at 1 January 1996 was not recoverable. The AAT remitted for determination by the DSS the calculation of what portion, if any, of the debt was recovered prior to 1 January 1996, this amount being a debt.

[S.L.]

Disability support pension: lump sum compensation payment to spouse; special circumstances

CZIRANKO and SECRETARY TO THE DSS
(No. 12915)

Decided: 21 May 1998 by T.E. Barnett.

The background

Cziranko married her husband in January 1997, having known him since the early 1980s. They had lived in a de facto relationship from 1989 until November 1991, (when they continued to live at the one address but not as a couple from November 1993 until April 1996). Cziranko's husband-to-be was injured in work-related accident in November

1993, in respect of which he received \$95,000 in compensation in October 1996. At that time Cziranko was in receipt of disability support pension (DSP). Cziranko and her husband-to-be signed a prenuptial agreement in January 1997 shortly before their marriage.

In February 1997 the DSS determined that Cziranko was ineligible to receive DSP from the date of her marriage and imposed a preclusion period from January 1997 to June 1998, decisions affirmed by the SSAT in May 1997.

The issue

There was no dispute that the DSS had correctly applied the relevant legislation in cancelling Cziranko's DSP, and imposing a preclusion period. Cziranko contended, however, that special circumstances existed so that the whole of her husband's compensation payment should be considered not to have been paid.

The law

Section 1184 of the Act provides that:

- (1) . . . the Secretary may treat the whole or part of a compensation payment as
- (a) not having been made; or
 - (b) not liable to be made;

if the Secretary thinks it is appropriate to do so in the special circumstances of the case.'

The AAT noted the comments in *Beadle and Director-General of Social Security* (1984) 6 ALD 1 that to be 'special', circumstances need to be 'unusual, uncommon or exceptional' and although they need not necessarily be unique, they 'must have a particular quality of unusualness that permits them to be described as special'. In exercising the s.1184 discretion the AAT was entitled to take a global view of all the circumstances of an applicant's case, including financial hardship, legislative changes, incorrect advice and ill-health (*Krzywak and Secretary to the DSS* (1989) 15 ALD 690).

Special circumstances

Cziranko argued the following constituted special circumstances:

- her lack of knowledge of the compensation payment and of its dispersal, which occurred prior to her marriage. The AAT noted that prior to their marriage Cziranko and her husband lived together, and had arranged their finances consistent with this. The AAT concluded that until March 1996 they 'lived together in a close relationship, both personally and financially' and that Cziranko was aware at the time of the marriage that her husband had received a compensation payment which could affect her pension, and that she

'probably knew' of the lump sum payment: Reasons, para. 33;

- her lack of control over the dispersal of the compensation payment by her husband-to-be. The AAT noted that the account into which the compensation payment was made, was solely in the name of Mr Cziranko, that bank statements showed some \$30,000 was dispersed by him within 3 days of the receipt of the compensation, and that with the exception of a mortgage payment the debts met from the compensation amount were Mr Cziranko's alone. The AAT concluded that the 'pattern of spending is consistent with Mr Cziranko's statement that the applicant had no control over how the funds were spent', and that in the period leading up to their decision to marry in December 1996, 'the applicant was not in a relationship where she could influence the manner in which this money was spent': Reasons, paras 40-41;
- her lack of knowledge about the effect of the compensation payment upon her pension entitlement, and of the preclusion period, prior to her marriage. Noting the periods when Cziranko and her husband had lived in a *marriage-like* relationship, a status affirmed in a previous SSAT application, and that Cziranko was aware of her husband's periodic payments, the AAT concluded that her lack of knowledge was not a special circumstance within s.1184;
- the health implications arising from financial difficulties resulting from the preclusion period. Cziranko and her husband both suffered various health conditions, including anxiety and panic disorders, arthritis, a heart murmur and duodenal ulcer. In August 1997 they were involved in a car accident which exacerbated their health difficulties. The AAT concluded that the imposition of a preclusion period was likely to aggravate Cziranko's anxiety and stress conditions, as her financial position was 'extraordinarily strained, even in the absence of a preclusion period': Reasons, para. 63;
- the impact of financial stress on the continuation of her marriage, which Cziranko contended was likely to end if the preclusion period was applied. The AAT concluded that the fact that a preclusion period would place a strain on Cziranko's marriage was not of itself a special circumstance, but that 'the circumstances of the applicant's relationship with her now husband are sufficiently unusual that the operation of the legislation would have an unfair and unjust application on her': Reasons, para. 60;
- financial hardship because the compensation payment had been virtually

exhausted. The AAT found that the bulk of the compensation moneys was spent before the marriage, and that to impose a preclusion period now would leave Cziranko and her husband with no funds on which to live. The AAT noted that Cziranko's financial circumstances had worsened since her marriage as a result of the health and treatment costs consequent upon the car accident. The imposition of a preclusion period would mean that 'the applicant's financial hardship will be extreme through no fault or mismanagement of funds of her own': Reasons, para. 64.

The AAT was satisfied that the bulk of the compensation was not expended for Cziranko's benefit. She did not have access to the funds nor control over how they were dispersed. The preclusion period was not imposed until after the compensation funds were spent. The AAT concluded that Cziranko's circumstances were sufficiently unusual for the s.1184 discretion to be exercised in respect of the whole of the compensation payment.

Formal decision

The AAT set aside the decision and determined that there were special circumstances sufficient to treat the whole of the compensation payment as not having been made, and, in consequence, that no preclusion period arose.

[P.A.S.]

Compensation: special circumstance

EVERY and SECRETARY TO THE
DSS
(No. 12752)

Decided: 27 March 1998 by D.P. Breen.

The background

Every received an out of court settlement of \$50,000 in 1996 for injuries received in an accident in 1990. During 1992 and 1993 Every had been paid disability support pension (DSP), and when Every received settlement moneys, the DSS held them to be 'compensation.' Applying provisions of the *Social Security Act 1991* (the Act), the DSS recovered the amount of DSP paid to Every during the compensation preclusion period. Every sought review of that decision on the basis that the amount of \$50,000 was not 'compensation' within the meaning of the Act. His argument in this regard rested on the

early settlement of the action after the trial commenced, for a sum much less than that sued for. It was argued that the settlement was arrived at on a purely commercial basis without reference to heads of damage once it was realised that his case was at risk if the trial continued. Letters from Every's solicitors in the common law action, and from the solicitors for the defendant, supported that basis of settlement.

The issues

The issues before the AAT were:

- whether the amount of \$50,000 was 'compensation' within the meaning of the Act, and
- if it was, whether the special circumstances provisions of the Act applied so as to allow the compensation, or part of it, to be disregarded.

The legislation

The Act provides the following definition of 'compensation' in s.17(2) of the Act.

'For the purposes of this Act, compensation means:

- (a) a payment of damages; or
 - (b) a payment under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme; or
 - (c) a payment (with or without admission of liability) in settlement of a claim for damages or a claim under such an insurance scheme; or
 - (d) any other compensation or damages payment;
- (whether the payment is in the form of a lump sum or in the form of a series of periodic payments) that is:
- (e) made wholly or partly in respect of lost earnings or lost capacity to earn; and
 - (f) made either within or outside Australia.'

Every argued that the settlement agreed on was not one that fell under s.17(2)(e) in that it was not a sum paid wholly or partly in respect of lost earnings or lost capacity to earn. In the alternative he argued, if the amount was held to be 'compensation', the discretion under s.1184 should be exercised so that the Secretary treats the whole or part of a lump sum compensation as not having been made in cases of special circumstances.

Lump sum

In regard to the question of whether the settlement moneys were compensation the AAT considered the issues and relevant Federal Court authorities including *Secretary to the DSS v a'Beckett* (57 SSR 779) and *Secretary to the DSS v Hulls* (60 SSR 834). The AAT noted that whilst the Federal Court in *a'Beckett* acknowledged that for a lump sum to be 'com-

ensation' it must be paid in respect of an incapacity to earn, the Court warned against giving primacy to declarations by solicitors that settlements were made on a basis other than in respect of loss of earning capacity.

The AAT said that they could not give primacy to the statements of the parties 'without reference to the circumstantial matrix of the settlement': Reasons, para. 12. In that regard, the AAT referred to the fact that as a result of the injury Every had taken time off work and had lost income. Furthermore, Every's claim in the common law action included a claim for loss of earnings, and whilst this on its own was not conclusive it contributed to the overall picture of whether an amount was paid in respect of lost earnings or earning capacity.

Special circumstances

On the question of whether there were special circumstances that would justify disregarding the compensation in whole or in part, the AAT stated that to exercise the discretion available under s.1184(1) the circumstances 'must be "unusual, uncommon or exceptional" enough to render the strict application of the Act "unjust, unreasonable or inappropriate"': Reasons, para. 16.

In *Krzywak and Secretary, Department of Social Security 45 SSR 580* it was said that financial hardship, legislative changes, incorrect legal advice and ill-health were all factors relevant to the existence of special circumstances. The AAT acknowledged that it was not enough to consider each of the items in isolation.

The circumstances relied on by Every were financial hardship, incorrect legal advice, advice by a disability support panel that Every re-train in computers which Every alleged led him to spend \$20,000 on computer education and equipment, and the high proportion of legal fees arising from the damages action.

Whilst acknowledging that Every's life was plagued by financial hardships and ill health, his circumstances, including the large amount spent on legal fees, were contemplated by the legislature and reflected in the provision in the Act for only 50% of the lump sum being identified as 'compensation.'

Formal decision

The AAT affirmed the decision under review.

[M.C.]