

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.]