



Including Student Assistance Decisions

Opinion

Special circumstances and compensation payments: a narrowing of discretion

In the recent Federal Court decision of *Haidar v Secretary to the DSS* (reported in this issue), Hill J considered the scope of the discretion available to a decision maker under s.1184 of the *Social Security Act 1991* to disregard the making of a compensation payment. That section enables the Secretary to treat the whole or part of a compensation payment as not having been made when assessing a person's entitlement to a social security payment, if the Secretary thinks it appropriate to do so in the special circumstances of the case.

In Haidar's case the AAT had determined that special circumstances existed such that it was appropriate to disregard all or part of the compensation payment received by him. The AAT then went on to determine how the discretion should be exercised, that is the extent to which the preclusion period, a period during which he was not entitled to receive benefits due to the receipt of compensation, should be reduced. This period had already been served by Haidar, during which he suffered extreme financial hardship.

The AAT took into account Haidar's circumstances 'before, during and after the preclusion period', in particular Haidar's 'present circumstances which, while they re-

main straitened, have improved considerably since the end of the preclusion period'. On that basis the AAT decided not to reduce the preclusion period in its entirety, but to reduce it for a number of weeks only.

The Federal Court held that it was an irrelevant consideration for the AAT to have taken into account the improvement in Haidar's circumstances following the preclusion period, because that improvement had nothing to do with events occurring during the preclusion period. Hill J took the view that, in exercising the discretion to disregard a compensation payment, factors occurring after the expiration of a preclusion period will only be relevant to the decision where there is a nexus between those factors and the circumstances relating to the compensation payment and preclusion period. Haidar's circumstances had improved because he was granted child disability allowance, a matter which had nothing to do with the application of a preclusion period to his entitlement for sole parent pension.

In Haidar's case, the likely outcome would be the further reduction of the preclusion period once the matter was again considered by the AAT, a positive outcome for the social security beneficiary. However, it seems likely that, in many cases, such beneficiaries will suffer a deterioration in their financial situation following a preclusion period. Often there will be a relevant nexus between this deterioration and the circumstances arising out of the preclusion period,

Continued on back page

In this Issue

AAT Decisions

- Age pension: farm assets and trusts
Agnew . . . 58
- Disability support pension: residing overseas, 'severely disabled'
Blundell . . . 59
- Newstart allowance: misconduct as a worker
O'Keeffe . . . 61
- Family allowance: arrears; residency requirements
Mosca . . . 61
- Family payment: proper notice of previous decision
McAllan . . . 62
- Family payment: proper notice of decision
McCaughan . . . 63
- Family payment debt: request to be paid on an estimate; form approved by the Secretary; waiver and good faith
Abeyratne . . . 64
- Waiver: special circumstances
Tuncer . . . 65
- Joint debtor: conviction and waiver
Edwards . . . 67
- Member of a couple and waiver of debt: 'special circumstances'
SRL . . . 67
- Sole parent pension: marriage-like relationship
Stephenson . . . 69

Student Assistance Decisions

- Student assistance; meaning of 'a year' in regulation 35
Moore . . . 70
- AUSTUDY: actual means test; general living expenses
Maher . . . 70

Federal Court Decisions

- Debt: language barrier
Zafiratos . . . 71
- Compensation preclusion: special circumstances; irrelevant matters
Haidar . . . 72
- FOI: 'Dob in'—reasonable expectation of confidentiality
Bartlett . . . 73
- ABSTUDY debt: jurisdiction of AAT and SSAT
Allen . . . 74

SSAT Decisions

. . . 75

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: Andrea Treble

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

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

Print Post approved PP381667/00178

ued by reference to the net assets backing them.

The SSAT obtained a valuation of the rental property from the Australian Valuer's Office. According to this valuation, the property value varied from \$950,000 to \$1,035,000 in the period in question. The SSAT accepted this valuation as more reliable than either the estate agent's opinion provided by GA or the value written in the unit trust's accounts. It adjusted the net asset value of the unit trust (and therefore of its units) accordingly.

The SSAT did not accept that the net asset value of the unit trust should be reduced on the basis that debts owed to it could not be repaid. It noted that the debts had not been written down in the period in question, and were legally enforceable. The SSAT commented that the GA family entities had received the benefit of legitimate taxation advantages from maintaining the debts through the period in question, and it was inappropriate to

accept a different view of their existence retrospectively, for social security purposes.

The adjusted value of the units held by GA, combined with other less significant assets, were well above the amount at which jobsearch and sickness allowance would reduce to nil. The SSAT could not consider whether the value of the units should be disregarded for the period of the debt as GA had never requested this at the time. In respect of his new claim, the SSAT considered whether the value of the assets should be disregarded. Given that GA was living with his mother who had demonstrated a preparedness to support him, and was also in a position to call on money owed to him by the family trust, he would not suffer severe financial hardship.

The SSAT was also satisfied that GA had made false statements, which caused the debt. His financial circumstances were such that recovery was appropriate. The presence of chronic fatigue syn-

drome was not in itself enough to justify waiving recovery.

[C.H.]

Opinion continued from front page

but not always. The approach adopted by Hill J means that a decision maker will not be able to have regard to unforeseen and unrelated events which affect a person's circumstances following the preclusion period. The totality of the person's circumstances cannot necessarily be taken into account in determining whether a person should be required to repay compensation-affected payments received by them during a preclusion period, or whether entitlements withheld by the Department during such a period should be paid at a later date.

In adopting this approach Hill J took into account the policy considerations behind s.1184(1). Although that section is expressed in terms which give the decision maker a wholly unfettered discretion, the approach of Hill J clearly narrows that discretion, with potentially adverse consequences for some social security recipients.

Retiring Editor

The SSR would like to take this opportunity to acknowledge the generosity and skill of Christine Heazlewood, who has given a great deal of her time and effort, as contributor and editor of the SSR over the past five years. Her input and expertise has been invaluable.

Thankyou Christine!

TO SUBSCRIBE!

Social Security Reporter

\$40 (6 issues) per annum

Cheque enclosed \$.....

OR

Charge my Bankcard / Mastercard / Visa / Amex

Card No.....

Card name

Expiry date.....

Signature

Name

Address

..... Postcode

Send to:

Legal Service Bulletin Co-operative Ltd,
C/- Law Faculty, Monash University,
Clayton, Victoria 3168
tel. (03) 9544 0974
fax (03) 9905 5305
e-mail: l.boulton@law.monash.edu.au