

- Zafiratos and his wife travelled together to Greece in 1994.

The AAT concluded that Zafiratos and his wife were living as a married couple, and it was not until Zafiratos realised the seriousness of his situation he asserted that they were separated. The AAT found that Zafiratos had made a false statement to the DSS and as a result had been paid a benefit.

A proper interpreter

The Court found that Zafiratos had been provided with a professional interpreter for 2.5 days of the 3-day hearing. For the first half day he had agreed that one of the witnesses would interpret for him. No complaint was made of the interpreter's performance during or after the hearing at the AAT. Zafiratos had been represented at the hearing. The Court viewed the transcript and was satisfied that Zafiratos had been supplied with an appropriate interpreter for the hearing at the AAT. Kiefel J. noted 'Determining whether language is a barrier to another person is difficult and caution is necessary': Reasons, p.3. The Court was satisfied that there was compelling evidence open to the AAT to find that Zafiratos was able to understand spoken English.

The fairness of the hearing

The Court rejected Zafiratos' arguments that the DSS had been given unlimited time to present its case and that the AAT had cut off his representative. A perusal of the transcript showed that this was not so. A claim that the AAT was biased had no substance at all according to Kiefel J. The AAT had shown appropriate interest in Zafiratos' case and had given him an opportunity to comment where it was necessary.

The Court noted that Zafiratos seemed to be under the misapprehension that because he was acquitted of fraud charges there could be no debt. It also rejected Zafiratos' claim that the record of interview with the Federal Police should not have been admitted into evidence. The Court found it was clearly admissible evidence.

Formal decision

The appeal by Zafiratos to the Court was dismissed with costs.

[C.H.]

Compensation preclusion: special circumstances; irrelevant matters

HAIDAR v SECRETARY TO THE DSS
(Federal Court of Australia)

Decided: 20 August 1998 by Hill J.

Haidar had been precluded from receiving a social security payment for a period of 63 weeks because he had received a compensation lump sum. This decision was affirmed by the SSAT, but set aside by the AAT which decided that the preclusion period should be reduced to 47 weeks.

The facts

During the relevant period Haidar was entitled to be paid the sole parent pension because he had the custody of his two children in Australia. Haidar was injured in December 1991 at work and was eventually paid a lump sum payment of compensation of \$67,000. The DSS applied s.1165 of the *Social Security Act* (the Act), and decided that a preclusion period of 63 weeks applied to the payment of benefits to Haidar. It considered whether s.1184 of the Act should apply and decided that it should not.

The law

Section 1184(1) is an ameliorating provision of the Act, and it provides:

'For the purposes of this Part, 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 decision

The AAT found that there were special circumstances justifying the exercise of the discretion in s.1184. The DSS subsequently accepted that there were special circumstances in this case. The special circumstances found by the AAT were the ill health of Haidar, the ill health of his family and the breakdown of his marriage. Haidar's daughter had spent 3 years of her life in hospital. Her medical condition was caused by her mother's alcoholism. Haidar's son had also required 2 operations and follow-up medical treatment. Haidar was responsible for

the financial welfare of 2 other children living in Lebanon. Haidar had a limited understanding of English, and it was not clear whether he understood his rights in relation to the payment of compensation and social security benefits, or whether he would have understood any legal advice given to him. Haidar had survived on income which was far less than he received when he was employed. It was difficult for him to pay for the family's basic needs.

Following the separation from his wife, there were no furnishings or household goods left in the family home. The children had limited clothing, and Haidar had to borrow money to set up a new home. Even though Haidar lived in government housing, his circumstances were described as 'dire'. The AAT found that advice given to Haidar following the settlement of his claim and his lack of understanding of that advice, although not special circumstances, contributed to his situation.

By the time of the AAT hearing, Haidar had served the preclusion period and was once again receiving benefits. The effect of the AAT decision would be that the DSS would have to repay a sum of money to Haidar. The AAT found that the preclusion period should be reduced from 63 to 47 weeks as this reflected the hardship and difficulties Haidar and his family had experienced during the preclusion period. According to the AAT it took into account Haidar's present circumstances, which remained straitened, even though improved. Haidar was currently meeting his living expenses and had reduced his debt significantly.

The discretion

The first matter to be addressed was whether it was appropriate to treat the whole or part of the compensation payment as not having been made. Section 1184 required the AAT to determine the relevant part of the lump sum which was to be treated as not having been made. It then followed that the period of the preclusion would be reduced according to the statutory formula.

It was argued that the AAT had failed to provide adequate reasons for the exercise of its discretion, had placed too much weight on Haidar's financial circumstances at the time of the AAT hearing (after the end of the preclusion period), and had failed to give weight to the significant findings of fact made by the Tribunal when deciding there were special circumstances. It was also argued that the AAT's decision was unreasonable because it was so manifestly unfair that no reasonable decision maker would conclude this, and that the AAT had taken

into account irrelevant factors and had failed to take into account relevant factors such as the legal costs of Haidar at the hearing.

The adequacy of the reasons

The Court noted that the AAT was required to give adequate reasons and a failure to do so would constitute an error of law. However it noted:

'The reasons of the Tribunal should not be looked at pedantically nor should an attempt be made to find some lacuna in the reasons when overall the Tribunal has dealt with the substantial issue in the case'.

(Reasons, p.8)

The Court preferred to consider whether the AAT took into account irrelevant considerations, or came to an unreasonable decision rather than examining the reasoning process to see whether there was an error of law. Where the decision maker is exercising a discretion, it is difficult to argue that there is a question of law because the decision maker has placed undue weight on a relevant matter. There would be an error if the decision maker had failed to give weight to a relevant factor.

Irrelevant matters

Hill J noted that the AAT took into account 3 matters when exercising its discretion. The first of these was that the preclusion period had been served by Haidar and, if he was successful, the DSS would have to pay him a sum of money. The Court found that the requirement that the DSS might have to pay Haidar a sum of money was not a relevant matter. It accepted that it would have been relevant if Haidar had had to pay money to the DSS, but that was not the case here.

The second matter was the hardship and difficulties experienced by Haidar and his family before, during and after the preclusion period. According to Hill J these matters were relevant, although there may be some difficulty accepting that the period after the preclusion period was relevant.

The third matter the AAT had considered was Haidar's present circumstances, that is, his circumstances at the time of the AAT hearing. Haidar's circumstances had improved considerably and this seemed to be an important factor for the AAT.

Hill J noted that:

'The question whether the matter is indeed irrelevant must likewise be determined by reference to the subject matter, scope and purpose of the legislation, pursuant to which the discretion is conferred.'

(Reasons, p.12)

The Court referred to the legislative history of s.1184(1) and noted that there was an attempt to balance budgetary considerations

against the interests of the social security recipient. The purpose of the legislation was to prevent a person receiving both social security benefits and compensation benefits at the same time. The legislature had been conscious of the possible harshness of the operation of the rules, and had provided for that harshness to be ameliorated by s.1184. The Court concluded that even where the preclusion period had finished, it could not be said that events at the time of the AAT hearing would necessarily be irrelevant. The AAT must take into account the facts as they exist at the time the matter is heard, to the extent they are relevant to the decision. The AAT is not limited to taking into account events which occurred at the time of the original decision. Even where a person's financial circumstances had improved because of the receipt of the lump sum, the decision maker could take into account the financial circumstances existing at the time of the decision. This was because those circumstances were relevant to whether or not a social security benefit should be paid. However, an event which occurred after the preclusion period which was wholly unrelated to the lump sum would not have significance.

'Events after the expiration of the ordained preclusion period could only have relevance as factors to be considered in the exercise of discretion if those facts in some way related to the events occurring during the preclusion period.'

(Reasons, p.14)

Haidar's financial situation had improved because following the preclusion period he was paid the sole parent pension and CDA. According to Hill J this was irrelevant given the legislative policy behind this part of the Act.

The hardship and difficulties suffered by Haidar and his family in the preclusion period were undoubtedly relevant.

Unreasonableness

Hill J noted that Haidar's circumstances were indeed special. The AAT recognised this and reduced the preclusion period. According to the Court, 'in the circumstances of the case that was a small reduction indeed': Reasons, p. 15. This did not suggest that the preclusion period should be reduced to nil, but rather that the preclusion period could be reduced to a range of weeks. The Court concluded that the AAT's decision was unreasonable.

Formal decision

The Federal Court allowed the appeal, set aside the AAT decision and remitted the matter back to a differently constituted Tribunal to be determined.

[C.H.]

FOI : 'Dob in' – reasonable expectation of confidentiality

BARTLETT v SECRETARY TO THE DSS (Federal Court of Australia)

Decided: 25 June 1997 by Heerey J.

Bartlett appealed to the Federal Court about a decision of the AAT concerned with release of documents under the *Freedom of Information Act* (the FOI Act). The document in question was a referral by the DSS to the Federal Police. It had been released to Bartlett with a number of deletions.

The law

Section 37(1)(b) of the FOI Act states that a document is to be exempt if its disclosure would or could reasonably be expected to enable a person to ascertain the existence or identity of a confidential source of information in relation to the enforcement or administration of the law.

The AAT decision

During the hearing, the document was presented to the AAT, and the contents of the document were discussed with the representative of the DSS whilst the applicant was absent from the hearing. The AAT later summarised in general terms the effect of the discussion.

The AAT decided that the document in question contained information which, if disclosed, could reasonably be expected to reveal to Bartlett the identity of the person who denounced him. The AAT found that even when confidentiality was not expressly agreed to by the person who gave the information, it could be implied by the type of information given (possible breaches of the law), that it was given under a pledge of confidentiality.

'A reasonable expectation'

Bartlett argued that the AAT had misconstrued s.37(1)(b) of the FOI Act. The section required a reasonable expectation that the information, if disclosed, would enable a person to identify a confidential source. The AAT equated a reasonable expectation with a reasonable possibility. Heerey J found that it was not in dispute that the requirement that disclosure 'would or could reasonably be expected to', is a higher standard than possibility. It requires more than a possibility or risk of an event occurring. The AAT had referred to it being reasonably possible and this amounted to an error of law.