however, could only be recovered if Witchard and Gray failed to comply with the notices sent to them, requiring them to inform the DSS when their income exceeded $90 a fortnight.

Was there a failure to comply with recipient notification notices? Meaning of 'requiring' to notify

The AAT referred to the judgment of Forster CJ in *Shervill v Shearer* (1979) 26 ALR 454 in the context of the *Traffic Act 1949* (NT), as to the meaning of 'required'. The AAT stated:

> If notices are sent by DSS or Centrelink in the honest and reasonable belief that they will be understood, then they can be said to be notices '*requiring*' certain things even if the recipients of those notices do not understand the notices. Conversely, if they are not sent with that honest and reasonable belief and the person does not understand them, they cannot be said to be notices '*requiring*' certain action and cannot be notices under those sections.
>
> It is not an answer to our interpretation to say that administrative expediency requires that a standard notice be sent to all of those who have dealings with Centrelink or its predecessor, DSS. Administrative expediency requires that course of action when Centrelink has no knowledge that a recipient of its notices is likely to have difficulty understanding them. Centrelink is not, however, simply a conduit for the payment of money in circumstances stipulated by Parliament. As the Tribunal said in *Re Van Brummelen and Secretary, Department of Social Security* (1995) 37 ALD 729 (Deputy President McDonald, Senior Member Barnett and Dr Billings, Member):
>
> *'That ... is altogether too bland a statement, because it ignores the administrative reality of how the function determined by parliament is to be achieved: bearing in mind the reason for having such legislation in the first place is to make provision for those who cannot, for a variety of reasons, make provisions for themselves. ...'* (page 734)
>
> When it does have knowledge of a person's intellectual impairment and that he or she is likely to have a limited understanding of notices sent by Centrelink, good administration may require that particular arrangements be made for him or her. It may be, as recommended by the Tribunal in Re Van Brummelen, that some provision should be made in the claim form for notification of a third person to whom information may be sent on those persons' behalf.

(Reasons, paras 94–96)

The AAT held that Centrelink's knowledge includes information in reports on clients and information known to social workers, whether that information is known to particular client service officers or not. Therefore, neither Gray nor Witchard were sent notices under s.132 or 172. Therefore, there were no recoverable debts against them for the period 25 September 1995 to 7 March 1997.

The AAT also accepted that Gray and Witchard had attempted to inform the DSS that their income was above the $90 a fortnight limit in the letters sent to them, albeit that their efforts were not understood or acted on by DSS staff in Ballina.

Waiver

The AAT considered the issue of waiver for the entire period of 6 October 1994 to 7 March 1997. It held that the whole of the debts were attributable solely to administrative error and should be waived under s.1237A of the Act. The DSS knew of the ongoing compensation payments to Witchard. The errors were then compounded by the failure to issue proper notices to Witchard or Gray. Neither Witchard or Gray contributed to the errors, indeed they drew the attention of the DSS to them. The AAT referred to *Secretary to the DEETYA v Prince* 3(3) *SSR* 37, and held that after their visit to Ballina, that is after the first payment, both Witchard and Gray received the payments in 'good faith', as that is defined in *Prince*.

The AAT also held that any overpayment should be waived under s.1237 AAD. The debts did not arise as a result of any failure or omission in complying with any obligation under the Act. The circumstances were 'special' as that term has been explained in *Groth v Secretary to the DSS* 2(1) *SSR* 10. The intellectual impairment of both Gray and Witchard, and their attempts to deal with Centrelink were 'special circumstances'.

Formal decision

The SSAT's decision was affirmed.

[A.B.]

Compensation: date of commencement of lump sum preclusion period

ROBINSON and SECRETARY TO THE DFaCS
(No. 19990398)

Decided: 9 June 1999 by P. Burton.

Background

The applicant was injured as a result of a chemical spill on 31 March 1980. The applicant continued to work despite various symptoms associated with the accident. He changed to other duties with his employer and last worked in March 1994. He remained on sick leave until his retirement on 24 August 1994.

As the symptoms worsened, he sought legal advice and damages were claimed against his employer. The link between his illness and the chemical spill was an issue, however the potential damages were substantial. On 2 March 1998 Robinson received a lump sum settlement for damages.

Prior to accepting the settlement moneys Robinson's solicitor received from Centrelink conflicting advice concerning the commencement date of any preclusion period. The first advice was that the date would run from when Robinson stopped work, the second advice, which, on the date of the hearing, was that ' ... it was likely that the preclusion period in Mr Robinson's case, commenced on the date of the chemical spill incident'. This was consistent with the solicitor's view and meant that Robinson could expect to receive the settlement moneys without any deductions.

After the settlement was finalised, a preclusion period was imposed from 26 August 1994 to 15 May 1997 and a debt raised of $20,039 in respect of disability support pension paid from September 1994.

Robinson said that he would not have accepted the settlement if he had been aware of the amount of the payback, but would have 'hung out' for more.

The applicant appealed to the SSAT which affirmed the Department's decision.

The argument put to the AAT was that:

- the preclusion period should commence at the time that Robinson suffered his illness (31 March 1980), not

the date that he left his job (26 August 1994); or

- if the preclusion period commenced on 26 August 1994, then there were special circumstances that warrant the exercise of the discretion under s.1184(1).

The issue

The main issue was:

> whether, for the purposes of s.1165(7), Mr Robinson had a loss of earnings or a loss of earning capacity in the periods when he was off work for the condition on sick pay between 1980 and August 1994.

(Reasons, para. 28)

The law

Section 1165(7) states as follows:

> **1165(7)** If neither subsection (5) nor (6) applies, the new lump sum preclusion period is the period that:
>
> (a) begins on the day on which the loss of earnings or loss of earning capacity began; and
>
> (b) ends after the number of weeks worked out under subsections (8) and (9).

The applicant argued that during the time that he was incapacitated for work '... he suffered both a loss of earnings and a loss of capacity to work, notwithstanding that he received income by way of sick pay': Reasons, para. 28.

The DFaCS argued that Robinson did not suffer any loss of earnings or earning capacity when he was receiving sick pay.

The AAT considered whether sick pay was earnings and '... if so, whether the utilising of earned sick leave credits is to be regarded as a loss of earnings': Reasons, para. 29.

The AAT looked at the definition of earnings and income and concluded that where a person is incapacitated for work and cannot earn their normal income, then they have suffered a loss of earning capacity. Consequently Robinson first suffered a loss of earnings and earning capacity on 31 March 1980.

Although not necessary given this conclusion, the AAT also addressed the issue of special circumstances, deciding that since it was reasonable for Robinson's legal advisers to act on the information provided by the Department, together with the fact that there had been conflicting advice provided at an earlier stage, this was sufficient to warrant the exercise of the discretion under s.1184(1).

Conclusion

The AAT concluded that the preclusion period commenced on 31 March 1980. Consequently there was no debt to the Commonwealth for payments received during the preclusion period.

The AAT also found that special circumstances arose such that the whole of the compensation payments paid should be treated as not having been made.

Formal decision

The AAT set aside the decision of the SSAT with directions that:

- The preclusion period commenced on 31 March 1980.
- The debt of $20,039 was incorrectly deducted from the lump sum settlement.

[R.P.]

Income test: carries on a business

EKIS and SECRETARY TO THE DFaCS (No. 19990422)

Decided: 17 June 1999 by K.L. Beddoe.

Background

The Federal Court (see summary reported in this issue) had remitted this matter back to the AAT, as originally constituted, to decide whether Ekis, who worked as a commission-only real estate saleswoman, was a person who 'carries on a business' within the meaning of s.1075 of the *Social Security Act 1991* (the Act). If she was, then her ordinary income must be reduced by the expenses she incurred in generating those earnings in assessing the rate of her age pension. (See legislation set out at p.171)

The Federal Court had held that the AAT had to decide whether Ekis was an employee of Wavecourt Pty Ltd, a franchisee of LJ Hooker, where she worked. If she was an employee, then because the meaning of the word 'business' in s.1075 of the Act had the same meaning as in the *Income Tax Assessment Act 1936*, Ekis could not be a person who 'carries on a business'.

Relevant matters

The AAT noted that the Court had stated that the question of whether a person is an employee rather than an independent contractor must be determined by the circumstances of the particular case. Taking into account the facts it had found previously (see 3 *SSR* 51) and the materials before it, the AAT considered the following matters to be relevant:

Control. Ekis was subject to control in matters affecting the franchise but not in obtaining listings and how she went about selling properties. She was required to attend the office for rostered days in the office and weekly sales meetings, but not the rest of the time.

Remuneration. This was by commission only on sales. Ekis was not paid a wage or holiday pay. Superannuation and worker's compensation were paid by the franchise.

Hours of Work. Other than to attend the office for rostered days and weekly sales meetings, Ekis chose her own hours of work and was available seven days a week.

Provision of Equipment. Wavecourt provided office space, a desk, a telephone, a fax machine, and a photocopier in the office plus standard form stationery. Ekis provided all other stationery, pens, business cards, mobile telephone and a motor vehicle including business rate insurance and other running costs.

Deductions for Income Tax. Wavecourt made deductions of income tax and remitted them to the Australian Taxation Office.

The Tribunal also took into account the fact that Ekis was a licensed real estate agent entitled to trade as such on her own account. It noted a marked similarity between this case and the engagement of couriers in *Vabu Pty Ltd v Federal Commissioner of Taxation* 96 ATC 4898. It was satisfied that Ekis was not subject to the same degree of control as in *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 and was to be properly characterised as an independent contractor conducting her own business. For these reasons she was not an employee of Wavecourt.

Formal decision

The AAT set aside the decision and decided Ekis' losses and outgoings were to be deducted from her ordinary income derived from her real estate business in accordance with s.1075(1) of the Act.

[K.deH.]