which the insured person receives as compensation for the loss which he or she has incurred as a result of the happening of the event prescribed in the schedule to the policy. They cannot be extended to any statutory benefits regardless of the reason for their being paid to the insured person.

(Reasons, paras 71, 72)

From a review of the relevant qualification and payability provisions in the Act, the Tribunal noted that whilst to receive SA it is essential that a person's incapacity be wholly caused by a medical condition arising from sickness or accident, there is no requirement that the sickness or accident arose out of, or in the course of a person's employment. Furthermore, NSA is predicated upon a person's being unemployed and not upon any incapacity. It follows that both NSA and SA fall outside para. 5(i) of the policy, and sub-para. (a) in particular. This meant that both the periodic payments and the lump sum payments of compensation were made under a policy coming within s.17(2A) of the Act, and thus excluded from the operation of s.17(2)(d), and hence were not compensation for the purposes of s.17(2).

In view of this conclusion, the Tribunal was of the view that it was not relevant to consider whether s.1184 could apply. As the decision under review was limited to the imposition of a preclusion period because of the lump sum payment, it did not have the power to review the earlier decisions to recover SA and NSA paid during periods for which Gentley received periodic compensation payments under the policy.

Formal decision

The AAT decided to set aside the decision, and substituted a new decision that the lump sum payment under the AFA policy was not a payment of compensation and not subject to the compensation provisions in Part 3.14 of the Act.

[K.deH.]

[**Contributor's note**: The Secretary to the DFaCS has appealed this decision to the Federal Court.]

Compensation recovery: notice given to insurer; drafting error in legislation

VENESS and SECRETARY TO THE DFaCS (No. 20000006)

Decided: 12 January 2000 by S.D. Hotop.

Veness was involved in a motor vehicle accident. His claim for damages was settled by consent judgment in the District Court. After the accident Veness had received social security payments for a time. When the action was settled, a notice was sent to the third party insurer, the Insurance Commission of Western Australia, setting out that the Department intended to recover from the Commission the sum of social security payments received by Veness in the period after the accident. It was this notice that became a crucial issue in the case before the AAT. Indeed it appears that the question of validity of the notice was one raised by the AAT and written submissions were invited upon it.

The notice to the insurer was one issued under s.1179 *Social Security Act 1991* (the Act) to ensure that funds that are about to be paid out are not paid without notice of the Secretary's interest in the matter.

Veness was not disputing that the sum settled was 'compensation' within the meaning of the legislation and did not dispute that the period calculated under the legislation as the period during which Veness was precluded from receiving social security payments had been correctly calculated as 199 weeks. Veness asked that the discretion available under the legislation to disregard a part or whole of the settlement moneys — discretion available if there are 'special circumstances' — be exercised in his case so that the length of the period would be reduced.

The issues

The issues in the case were twofold. Firstly, there was the issue raised by Veness, namely whether 'special circumstances' were present in his case. Secondly, there was the issue raised by the Tribunal namely whether the recovery notice issued to the Insurance Commission was valid.

The legislation

On the first issue the Act provides for a discretion in s.1184 of the Act in the following terms:

> 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.

On the second issue, the question of validity of the notice issued to the Insurance Commission under s.1179 of the Act, the AAT was required to interpret a legislative provision which contained clear drafting errors. These had been the source of comment in two earlier cases decided by the AAT. Sub-section 1179(4) provides:

> If the person claiming compensation is not a member of a couple, the recoverable amount is equal to the smallest of the following amounts:
>
> (a) the sum of the payments of the compensation affected payments payable to the person for:
>
> (i) the periodic payments period; or
>
> (ii) if a lump sum compensation payment is received before 20 March 1997 — the old lump sum preclusion period; or
>
> (iii) if a lump sum compensation affected payment is received before 20 March 1997 — the new lump sum preclusion period;
>
> (b) the compensation part of the lump sum payment or the sum of the amounts of the periodic compensation payments;
>
> (c) the maximum amount for which the insurer is liable to indemnify the compensation payer in relation to the matter at any time after receiving:
>
> (i) a preliminary notice under section 1177 in relation to the matter; or
>
> (ii) if the insurer has not received a preliminary notice — the recovery notice under this section in relation to the matter.

The drafting errors were the two phrases 'lump sum compensation affected payment' and 'received before 20 March 1997' in ss.1179(4)(a)(iii).

Special circumstances

The AAT dealt with this issue quite briefly. Veness' evidence about his circumstances was that he had used part of the settlement moneys in the purchase of a house and a four-wheel drive vehicle which he still retained, along with other assets and had some $19,000 in the bank at the time of the hearing. Other circumstances which he raised were wrong advice from Centrelink about which payments he would have to repay from

any settlement. He said that Centrelink informed him that he would have to repay sickness allowance but not newstart allowance. Without the wrong advice, he asserted that he would not have purchased the four-wheel drive and the house. He suffered ongoing medical problems and depression occasioning high weekly payments for medication. He was unable to work but was renting out his house and living in a caravan he owned to provide some income.

The AAT noted that the question of 'special circumstances' has been considered in numerous decisions of the Federal Court and the AAT.

> The tenor of those decisions is that, before it may become appropriate to exercise that discretionary power, the circumstances must be special, in the sense of unusual, uncommon, or exceptional, such that the application of the relevant 'compensation recovery' provisions in Pt 3.14 of the Act will produce a result that is, in relation to the person concerned, unjust unfair, unreasonable or otherwise inappropriate ...

(Reasons, para. 26)

The AAT weighed up the issue of incorrect advice with the fact that he was represented by a solicitor in his claim for damages. The solicitor had been referred in correspondence to the relevant provisions of the Act and notice had been sent setting out the total amount of social security payments that had been paid. The AAT was not satisfied that Veness was prejudiced by lack of, or wrong, advice in a way to render recovery unjust. Neither were the medical or financial issues raised sufficiently grave, unusual, uncommon, or exceptional to warrant the exercise of the discretion.

Was the notice to the insurer validly issued?

This question was addressed in *Lawrie and Secretary to the DFaCS* (1998) 54 ALD 483 and in *Krpan and Secretary to the DFaCS* (unreported decision of the AAT, No. 1999 AATA 709). The former decision interpreted the subsection in a way that corrected the drafting errors and allowed s.1179(4)(a)(iii) to read: 'if a lump sum compensation payment is received after 20 March 1997'. *Krpan*, on the other hand, applied an interpretation based on the literal terms of the Act, albeit with knowledge that drafting errors were present. The AAT in Veness's case preferred and applied the approach in *Krpan*. From that decision the following was quoted with approval:

> At common law, the traditional approach to statutory interpretation is the literal approach whereby the words used in the relevant statutory provision are given their plain and ordinary grammatical meaning having regard to the statutory context in which they appear. An alternative, more contemporary, approach, at common law, to statutory interpretation is the purposive approach whereby the relevant statutory words are interpreted in such a way as will accord with or promote the purpose or object for which they were enacted. See, generally, Pearce and Geddes, Statutory Interpretation in Australia (4th edn, 1996), pp.22-26. The latter approach is required to be adopted in the interpretation of Commonwealth statutory provisions by reason of s.15AA(1) of the *Acts Interpretation Act 1901* which provides ...
>
> 'In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object' ...
>
> Accordingly, having regard to the considerations referred to in the preceding paragraph, the two specific drafting errors which the Tribunal considers to be present in ... (the subsection) are ...
>
> • the phrase 'lump sum compensation affected payment' should read 'lump sum compensation payment';
>
> • the phrase 'before 20 March 1997' should read 'on or after 20 March 1997'.
>
> In each case, however, the meaning of the existing words is clear and there is no ambiguity or obscurity. As regards the phrase 'lump sum compensation affected payment', the expression 'compensation affected payment' is itself exhaustively defined in s.17(1) of the Act ... and, accordingly, the clear and unambiguous meaning of that phrase is: a 'compensation affected payment' (as statutorily defined) in the form of a lump sum. As regards the phrase 'before 20 March 1997', its clear and unambiguous meaning is: earlier in time than, or prior to, 20 March 1997.
>
> In those circumstances, would it be appropriate for the Tribunal, in effect, to rewrite sub-para (iii) of para (c) ... so that it reads in the way set out ... In the Tribunal's opinion, it would not. Although it may be appropriate for the Tribunal, when called upon to interpret and apply a statutory provision which is open to more than one construction, to give that provision a strained construction or read words into it or otherwise clarify or modify the ordinary, grammatical meaning of the statutory language, in order to give effect to the intention or purpose of the legislature, it is not appropriate for the Tribunal to substitute words for the words that appear in the relevant statutory provision when the meaning of the latter words is 'intractable' and no construction, other than their ordinary grammatical meaning, is reasonably open: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320. For the Tribunal to engage in such an exercise would be for it to engage in rewriting the relevant statutory provision — that is, to engage in the function of legislation rather than in the function of interpretation or construction. As McHugh JA said in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423:
>
> 'But first and last the function of the court remains one of construction and not legislation'...
>
> ... In the Tribunal's opinion it is the responsibility of the legislature to correct drafting errors in its legislation by the process of statutory amendment and, in relation to sub-paras 1179(4)(a)(iii) and 1179(5)(c)(iii) of the Act, the relevant drafting errors are such that they can very easily be corrected by this means. It is not appropriate for the Tribunal in the present case in effect to usurp the function of the legislature by effectively rewriting the relevant statutory provision.

(Reasons, para. 34)

The AAT therefore applied the literal words of s 1179(4)(a)(iii) in accordance with their plain meaning. On this approach, no part of s 1179(4)(a) applied. However other parts of s 1179(4) could be applied in order to calculate a sum as a 'recoverable amount' for the purposes of a notice issuing under the section. However the sum so calculated was not the sum specified in the notice that had issued to the Insurance Commission of Western Australia. Furthermore, the sum as calculated by the AAT only resulted because of the drafting errors in the subsection. Hence it would be inappropriate for the Department to now issue a recovery notice for that 'wrong' amount. However the correct amount could be calculated under another section of the Act to arrive at the correct figure (being the sum of social security payments paid to Veness during the time it was later decided he was precluded from the receipt of such payments). That other section was s.1162(2) of the Act which is directed at recovery from the recipient of the settlement rather than the insurer.

The AAT ordered that this occur, namely that the Department pay back to the Insurance Commission the money recovered as a result of the invalid notice and then pursue the recovery of the moneys from Veness himself after service of notice upon him.

Formal decision

The AAT set aside the decision and remitted the matter to the Department to issue a notice to Veness rather than to the insurer, so as to recover social security payments which were not payable during a preclusion period.

[M.C.]