

## **Lump sum compensation: receipt of social security unrelated to event giving rise to compensation**

**GENAT and SECRETARY TO THE DFaCS**  
(No. 19990790)

**Decided: 22 October 1999 by S.M. Bullock.**

### **Background**

Genat sustained injuries in two separate motor vehicle accidents, one in 1985 and one in 1987. For the first, he received weekly compensation until he returned to work some five months later. At the time of the second, Genat was about to commence his own business in the liquor trade, which his father then had to manage until Genat could return to full-time work over a year later (in 1988). Genat had surgery in 1992 which occasioned a further three months off work. He was paid weekly compensation in that time.

Genat's claim in regard to the second (1987) accident was settled in 1992. No social security payments had been made in the time between the second accident and the receipt of the settlement moneys in regard to it. That matter therefore was not an issue before the AAT. The claim in regard to the first (1985) accident was not settled finally until 1997. Whilst in August 1996 a workers' compensation proceeding had been settled, other litigation with Gosford City Council in the District Court was not settled until 1997. Centrelink then determined that a charge was payable by Genat as he had received benefits during the preclusion period determined under the *Social Security Act 1991* (the Act) as a period running between 1993 and 1996.

Prior to the settlement, Genat's liquor business had ceased to be profitable and closed down in 1993. After the closure, Genat received jobsearch and newstart allowance until late 1996. In 1994 he was declared bankrupt.

Genat sought review by the AAT of the recovery of the charge, after the SSAT decided that it was correctly recovered and no sufficiently special circumstances existed to disregard any part of the amount paid so as to reduce or eliminate the charge.

### **The legislation**

The *Social Security Act 1991* (the Act) provides for recovery of monies in cir-

cumstances where a person receives compensation and has also received a compensation affected social security payment. However, in special circumstances the Secretary may treat the whole or part of compensation as not having been paid and this is dealt with through the discretion available under s1184 of the Act. It provides as follows:

**1184.(1)** 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.

**1184.(2)** If:

- (a) a person receives or claims a compensation affected payment; and
- (b) the person's partner receives compensation; and
- (c) the set of circumstances giving rise to the compensation are not related to the set of circumstances that give rise to the person's receipt of or claim for the compensation affected payment;

the fact that those 2 sets of circumstances are unrelated does not in itself constitute special circumstances for the purposes of subsection (1).

The main focus of the decision was whether there were special circumstances that would warrant the exercise of the discretion under s.1184 of the Act.

### **The circumstances**

Genat told the AAT that his first accident had been the more restricting of the two, involving an ankle injury that continued to be painful and impede mobility. His evidence, however, was that despite the restrictions caused by his injury, it was not the reason for selling the business or for the later need to apply for social security benefits.

When the business was sold in 1993 he had owed some \$350,000 on it and was in 'dire straits' because of interest rates and refusals of credit by suppliers. When the business was sold he was unable to find work and went on to jobsearch allowance some few months later. Shortly thereafter he filed for bankruptcy. He subsequently secured employment but it was away from his home and involved travel to Sydney, seeing his family only on weekends. He resigned from that position when a restructure meant that he would see his family less. He decided to seek employment locally though he was not immediately successful in this.

Genat told the AAT that the settlement moneys from the second (1987) accident had been used to discharge debts in his then ailing liquor business. When

all claims in regard to the first accident were settled in 1997 Genat was required to repay in excess of \$25,000 for social security benefits paid in the time that he was precluded from payment. That period as stated above ran between 8 June 1993 and 11 November 1996. During this time Genat had been paid benefit (in a sum totalling more than \$25,000) as it was this period that found him unemployed after the failure of his business.

At the time of giving his evidence to the AAT Genat had been unemployed since March 1999. In his evidence to the Tribunal it was clear that his work efforts had been focused locally though he appreciated that he may have to resort to employment in Sydney once again.

Genat told the AAT that he and his wife had purchased a coffee shop, financed by the workers' compensation money. That business was also not hugely successful and was at best an erratic income earner. Genat and his wife had placed the business on the market but despite one approach by a potential purchaser, had not been successful in selling the business.

Genat's evidence was that the family had been forced to rely on running up credit card debts for the purchase of food and necessities. He also gave evidence about health difficulties in the family including his own and a daughter's insulin dependent diabetes and a hormonal imbalance suffered by another daughter.

It had been accepted both by the DFaCS and by the SSAT that Genat's receipt of social security benefits in the preclusion period was unrelated to the injuries suffered as a result of the first accident. This was a main submission in Genat's case, namely that the commencement of his receipt of any social security benefit was the result of economic factors and not related to the motor vehicle accident. The economic factors were the financial difficulties experienced in his liquor business culminating ultimately in bankruptcy. It was further submitted that during the whole of the period from 1986 onwards Genat had received only some \$3000 as weekly compensation payments. It followed on Genat's submission that there was no element of 'double dipping' in his case.

The Department submitted that case law indicated that where the discretion had been exercised in cases where there was no relationship between the person's receipt of social security payments and an injury, it had only been exercised where this was one factor in the presence of other factors that included unacceptable hardship and dire financial circumstances. It was submitted

for the DFACS that Genat's circumstances were far from straitened and that he had the ability to work and was intending to undertake computer studies to better position himself for employment. It was further submitted that his most recent cessation of employment in 1999 was voluntary and not forced on him. The evidence had also revealed that family financial support was available and was given.

#### The weighing of the circumstances

After satisfying itself that the settlement was 'compensation' within the meaning of the Act and that the preclusion period had been correctly calculated, the AAT turned to the substantial issue between the parties, that of 'special circumstances'.

The AAT said that it was unable to be satisfied whether the settlement did or did not include a component for economic loss but that if it did 'it was indeed small as Mr Genat had resumed full time employment for a period before the settlement': Reasons, para. 58. The AAT found, as had the Department and the SSAT, that there was no connection between the receipt of social security benefits and the circumstances for which Genat eventually was compensated.

The AAT cited *Commonwealth v Daniels* (1994) 33 ALD 711 and *Secretary to the DSS and Hill* (1996) 2(1) SSR 9 as two cases where there was no element of a person being compensated for loss of earnings or of earning capacity when in receipt of benefit.

The AAT decided that the fact that there was no causal relationship between the events giving rise to the compensation and the events giving rise to the receipt of social security payments could be considered a special circumstance in Genat's case. The AAT further found that while current financial circumstances were difficult they were not straitened. However, it was a special circumstance of Genat's case, the AAT said, that the deprivation of some \$25,000 recovered as a charge in 1997 at a time when the family was in greater financial difficulties than later, was a special circumstance. The AAT held that it would be unjust and unfair to force on Genat a charge of that amount when all recognised that the payment of benefit was unrelated to his reasons for receiving compensation.

In so deciding, the AAT noted that s.1184(2) did not apply to Genat's case, as this was not a situation where Genat's partner was the recipient of the compensation. The AAT adopted the reasoning in *Hill* on this point that where the partner does not receive a compensation payment the subsection has no application

and consideration must therefore be confined to subsection 1184(1).

The AAT decided that the whole of the charge was not payable by Genat.

#### Formal decision

The AAT set aside the decision under review and substituted the decision that the whole of the amount of \$25,295.71 should be disregarded.

[M.C.]



## Compensation preclusion period: special circumstances; gambling

**MALES and SECRETARY TO THE DFACS**  
(No. 19990863)

**Decided: 17 November 1999 by J. Handley.**

#### The issue

Males had injured his back at work in August 1994 and had not worked since then. Weekly compensation payments under the Victorian Workcover scheme ended in August 1996, and he received various social security payments until 9 July 1998. A common law claim against his former employer was settled for \$200,000 on 1 July 1998.

It was not in dispute that the compensation provisions of the *Social Security Act 1991* (the Act) operated to preclude social security payments, including disability support pension, from 24 August 1994 to 20 April 2001. The issue was whether the preclusion period should be reduced by an exercise of the discretion in subsection 1184(1) of the Act that states:

1184.(1) 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 facts

After reimbursing the social security payments made during the preclusion period, paying legal costs, repaying loans, and buying a car, furniture and equipment, Males invested the remaining \$130,000. By December 1998 he was

virtually penniless having withdrawn the investments in amounts of \$20,000 at a time and losing them in poker machines at 'Tabaret' venues, despite having been informed that he would be precluded from social security benefits for many years.

Males described himself as a light, recreational gambler before he was injured, spending between \$20 and \$50 on the machines no more than once a week on Friday or Saturday nights. After the accident he began to attend the hotels more frequently, up to three or four times during the day and seven days a week, with the intention of spending only \$20. There were some large payouts, including one of \$2000, but they were also lost.

Males realised he had a problem with gambling as early as December 1994, and he had discussed it with a psychologist and a psychiatrist who were treating him, but neither gave him any guidance on how to end it. Between August 1994 and December 1998 he had made three or four attempts to avoid gambling by not driving past the hotels, succeeding for periods of up to a month. He had returned to gambling believing he could casually attend and 'put \$20 through the machine', and then rapidly 'became out of control'. He had received counselling for his gambling after all the money was spent.

Males said that he was depressed and bored at home where he could read, watch television or play on his computer. He attended the hotels not only to gamble, but because he could have people around him. But he did not want to interact with them. He did not drink alcohol and just played on the poker machines.

Males was 30, single and lived with his mother in a rural community of 10,000 people with a high unemployment rate. He had left school aged 15 without completing Year 9. Before the injury he earned \$320 net a week. He had not worked since the injury, being unable to do heavy labour. His mother gave him free board and lodgings, as well as \$20 a week. She was receiving weekly workers compensation, and owned her home without mortgage or debts.

#### The reasoning

In ... *Beadle v Director-General of Social Security* (1985) 60 ALR 225 ... the Full Federal Court acknowledged that circumstances need not be unique to be 'special' but 'they must have a particular quality of unusualness that permits them to be described as special'. The Court also said that the word 'special' in its context 'looks to circumstances which are unusual, uncommon or exceptional' and whether those circumstances exist will be dependent upon the context where a