

meant to be interpreted in s.1237 AAB of the 1991 Act.

(Reasons, para. 49)

The Tribunal therefore concluded that the waiver provision in s.1237AAB did not apply.

The Tribunal went on to consider the issue of estoppel on the basis of the argument that a decision maker is bound by the representations of another officer. The Tribunal noted that it could not exercise a common law discretion, but that a 'statutory framework' did not mean that Galatis could not argue rights under the common law.

The Tribunal considered that although the CDPP was silent when the issue of restitution was raised with the magistrate, the prosecutor did not have lawful authority to waive the debt on behalf of the Commonwealth:

It follows that the CDPP equally does not have the capacity to estop the recovery of such a debt, for it has no lawful standing (in the absence of a formal delegation) in that regard. Waiver and estoppel in that regard are conjunctive

(Reasons, para. 54).

The Tribunal also considered whether the magistrates' decision had any binding effect on the Department's capacity to recover the full amount of the overpayment. The Tribunal concluded that once the charges, in respect of that part of the overpayment that was not part of the prosecution were dropped, the magistrate had no jurisdiction to deal with that part of the overpayment that was not before him. Consequently the judgment did not give rise to claim for estoppel.

Formal decision

The Tribunal set aside the decision under review and decided that the Department was entitled to recover the part of the debt relating to the overpayment period — 8 November 1991 to 5 November 1993.

[R.P.]

Lump sum preclusion: special circumstances

SECRETARY TO THE DFaCS and EDWARDS
(No. 2000/752)

Decided: 28 August 2000 by D.W.Muller.

Background

Edwards was hit by a car and suffered an injury in September 1996. He claimed compensation which was settled in July 1999 and a lump sum payment of \$27,500 was made.

Edwards had not been working prior to the accident and it was agreed by the parties that there was no past economic loss because of this. However a figure of \$5000 was included as a 'nominal amount' for economic loss on the basis that he may have, at some time in the future, obtained work.

Centrelink decided that a preclusion period of 32 weeks applied. This decision was reviewed by the SSAT, which decided that special circumstances applied in this case. The special circumstances referred to were that:

- there was no causal relationship between the reasons for Edwards receiving his disability support pension (schizophrenia) and the basis upon which he received damages; and
- a very small portion of the damages related to economic loss. This was on the basis of a 'possibility' of future work.

The arguments

The submission presented by the Department was that the SSAT failed to consider s.1163(9) of the *Social Security Act 1991*. This section states as follows:

1163.(9) This Part operates in certain specified circumstances to affect a person's compensation affected payment because of compensation received by the person or the person's partner. This Part is not intended to contain any implication that, in addition to those specified circumstances, there needs to be some connection between the circumstances that give rise to the person's qualification for the payment and the circumstances that give rise to the person's or the partner's compensation.

It was argued that this subsection was included to cover situations where there was no causal link between the circumstances that gave rise to the granting of the pension and the circumstances that gave rise to the compensation payment. As this issue was specifically covered by

legislation, it could not form part of 'special circumstances'.

Special circumstances

The Tribunal considered the meaning of s.1163(9). It stated that the purpose of this subsection was to cover situations where there was no connection between the circumstances that gave rise to the pension and the circumstances that gave rise to the compensation payment. However, the subsection did not preclude the absence of a causal link being considered as a 'special circumstance'.

The Tribunal referred to one of the objects of this legislation, that is, to prevent 'double dipping'. The Tribunal found that this case was not one of double dipping and that the \$5000 set aside for future work was an amount to compensate for a 'remote possibility' of future work.

In conclusion, the Tribunal found that there were sufficient grounds to exercise the discretion under s.1184. The Tribunal noted that the failure of the SSAT to specifically refer to s.1163(9) did not mean that the Tribunal had not come to the right decision.

Formal decision

The Tribunal affirmed the decision under review.

[R.P.]

Disability support pension and wife pension debts: ordinary income on a yearly basis

LANGTON and SECRETARY TO THE DFaCS
(No. 2000/591)

Decided: 17 July 2000 by D. Muller.

The issue

In this matter the critical issue was how income from a brief period of casual employment should be treated for pension purposes.

Background

Mr and Mrs Langton were in receipt in 1997 of disability support pension (DSP) and wife pension (WP) respectively. In October and November 1997 Mrs Langton worked casually for two weeks plus one day, then had a week without work before working a further

week, earning in all \$1437. Mrs Langton supplied details of earnings, including payslips, to Centrelink, in December 1997. These earnings were the only earnings for the year and were below the relevant combined income free area of \$3120.

The issue

The Pension Rate Calculator for DSP is found in Module E under s.1064 of *Social Security Act 1991* (the Act), Step 1 of which states: 'Work out the amount of the person's ordinary income on a yearly basis'.

Centrelink contended that this required Mrs Langton's income during the period of her employment to be converted to an annual figure (that is, as if she had continued to earn at the same rate for a full year), which figure was then compared to the relevant income-free area. Using this approach, Centrelink raised an overpayment of \$253 in respect of both DSP and WP for the period 30 October 1997 to 27 November 1997. Mrs Langton contended that her earnings in her brief period of employment should have been treated as her yearly income, as she had no other earnings in the relevant year.

The decision

The Tribunal noted several cases where the matter of ordinary income on a yearly basis had been considered. In *Harris v Director-General of Social Security* (1985) 7 ALD 272 the High Court noted that '... an annual rate of income is not ascertained merely by extending to a year the income receipts of a shorter period without considering the period in respect of which the particular item of income has been received ...' and concluded that '... the means test requires that attention be given to the **actual income of the pensioner during the pension year...**' (emphasis added). Similarly, the Tribunal noted *Secretary, Department of Social Security v Moroney* (unreported 9 July 1998, Decision No 4108) and *Secretary, Department of Family and Community Services v Janet Rolley* (Federal Court, 20 June 2000). In the latter case the Federal Court accepted that:

... [t]he characterisation of some income by reference to its sources may require evaluative judgements as to whether or not it is to be treated as recurring income from which an annual rate may be extrapolated ... [A] one off payment for work unlikely to be repeated could be dealt with on the basis that it reflected the total income from employment likely to be derived in any period of twelve months.

Applying this approach, the Tribunal concluded that the earnings by Mrs Langton from one source of short-term employment should be regarded as her ordinary income on an annual basis.

Formal decision

The Tribunal determined that there were no overpayments of DSP or WP in the period in dispute.

[P.A.S.]



Lump sum compensation: preclusion period; special circumstances

SECRETARY TO THE DFaCS and NOLAN
(No. Q2000/157)

Decided: 9 May 2000 by K.L.Beddoe.

The issue

The Tribunal considered the appropriate amount to be taken into account in determining a preclusion period for benefit purposes, consequent upon a lump sum compensation payment.

Background

Nolan was injured at work in 1993 and received periodic compensation payments in 1993 and 1994 and then from February 1995 the disability support pension. In February 1995 the Department wrote to Nolan advising that repayment of benefits may be required if a compensation payment was made, and in May that year Nolan's solicitors sought the Department's advice as to estimates of recoverable amounts and preclusion periods based on a series of possible settlement amounts. Nolan's claim was settled in June 1999 for an amount of \$70,000 plus \$48,766 in respect of medical, hospital, rehabilitation and other expenses. The Deed of Settlement included an acknowledgment by the relevant Workcover authority that it waived its right to recover amounts of benefits it had paid to Nolan (which totalled \$48,766 as specified in the Settlement Deed).

The Department incorporated both the specified amounts in its determination of the relevant preclusion period. Nolan argued that he and his wife had considerable financial problems, but was unable to give full details as to the expenditure of the compensation payment, although he

had \$11,000 remaining at the time of the SSAT hearing of the matter in January 2000. The SSAT determined that, in calculating the preclusion period, any amount received by Nolan in excess of \$70,000 should be disregarded.

The law

The *Social Security Act 1991* (the Act) sets out the general principle that the compensation part of a lump sum compensation payment is to be 50% of the total payment (s.17). In turn, the compensation amount determines the period during which social security payments cannot be paid to the recipient (s.1165). However, pursuant to s.1184(1) the whole or part of a compensation payment may be treated as having not been made if it is considered appropriate to do so in the special circumstances of the case. If this discretion is exercised, the effect is that any preclusion period is reduced.

Discussion

The Tribunal heard evidence that Nolan was borrowing money from Centrelink and from charitable organisations during the time of the SSAT hearing (when his evidence was that some \$11,000 of the compensation amount was still available) and concluded that no weight could be given to his oral evidence. The Tribunal was unable to determine whether he was suffering financial hardship but, in the event, concluded that it was unnecessary to utilise the discretion afforded by s.1184 of the Act.

The Tribunal concluded that the appropriate figure for Department purposes was not the total amount payable as monetary consideration, but that amount received as payment on 'settlement of a claim'. This term could not include waiver of a charge not involving payments to the Department. Further, the Tribunal took the view that it would be contrary to the legislative intent if expenses in respect of medical, hospital and like treatment, incurred by the Workcover authority under its statutory obligations and in respect of which it had a right of recovery, should be deemed a portion of the compensation payment to Nolan.

The Tribunal concluded that the payment in settlement of Nolan's claim for damages was \$70,000 payable under the Settlement Deed, and that it was only this amount that should be used in calculating any preclusion period.

The formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]