

The Tribunal noted that the compensation divisor used to calculate Allan's conclusion period was \$403.20 and that at 1 July 2000 this figure was \$543.63. The Tribunal also noted the effect of the GST on the cost of living after 1 July.

In essence, it disagreed that \$59,000 would be sufficient to support Allan until the end of the preclusion period.

The Tribunal decided to exercise its discretion and reduced the preclusion period on the basis of using the compensation divisor in effect when Allan claimed disability support pension on 22 May 2000. The Tribunal therefore precluded payment until 1 July 2003. The Tribunal commented that this might give Allan some hope for the future, it reflected the increased cost of living in the future and acknowledged Allan's chronic pain, the treatment of which had unfortunately led to a drug addiction.

#### Formal decision

The Tribunal set aside the decision under review and substituted a new decision that, given the special circumstances of the case, the portion of the compensation awarded to Allan should be treated as not having been made under s.1184 as would allow the preclusion period to end on 1 July 2003.

[R.P.]

## Compensation: lump sum preclusion period; small component for economic loss

KEIGHLEY and SECRETARY TO  
THE DFaCS  
(No. 2001/0231)

**Decided:** 23 March 2001 by  
J.D. Campbell.

Keighley was granted disability support pension (DSP) in 1993, and it continued at all times. On 1 July 1994 he began working as a salesman for a company of which he was a director and shareholder, agreeing to accept \$50 a week until the company was in a stronger financial position. He was injured in a motor vehicle accident on 5 April 1995, returned to work on light duties on 4 August 1995, and resumed work as a salesman on 4 September 1995.

By consent judgement made on 3 March 1999, Keighley was awarded

\$150,000 plus costs of \$15,000 with no particularisation of any head of damage. Centrelink then recovered \$29,458.50 being DSP payments made from 6 April 1995 to 22 September 1998. Keighley applied for a review of that decision.

#### The issue

It was not in dispute that Centrelink had correctly applied the relevant provisions of the *Social Security Act 1991* (the Act) to calculate the amount recovered. The issue was whether some or all of the compensation should be disregarded under s.1184(1) of the Act to reduce the amount to be recovered. It provides:

**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.

Keighley had used the compensation money to buy a block of land with an incomplete house where he and his wife resided. They had lived in rental accommodation for five or six years before buying it. He was 58 years old, and his wife was an aged pensioner. They had no debts or assets except a small amount in the bank, and a weekly income of about \$300. They borrowed their son's car when needed and available. The son died on 26 February 1999 and, besides paying the funeral expenses, Keighley had assisted his son's wife and two small children when he could.

Keighley suffered from long-standing ulcerative colitis causing episodic abdominal pain and diarrhoea. After the accident he had a continuously painful right foot that swelled occasionally and required surgical footwear, and his right knee gave way every now and again. He later developed diabetes. He needed expensive special stockings to assist his circulation, and expensive surgical shoes and boots.

The AAT found that the amount claimed on Keighley's behalf in the negotiations prior to the consent order was \$3258 for past economic loss, and between \$15,000 and \$35,000 was discussed for future economic loss in the negotiations.

For Keighley it was argued that because the claim was settled by consent, the effect of s.17 of the Act was to take an arbitrary 50% of the total amount to be for lost earnings or lost capacity to earn. The calculation of the amount to be recovered was based on that figure. As the amount actually claimed for economic loss was well below 50% of

\$165,000, application of the 50% rule would be harsh and inequitable in his case. The discretion in s.1184(1) should be exercised so that the resultant preclusion period reflected the intent of both parties in respect of the amount for economic loss.

#### The cases

The AAT noted *SDSS v Banks* (1990) 56 SSR 762, *SDSS v a'Beckett* (1990) 57 SSR 779, *SDSS v Hulls* (1991) 60 SSR 834 and *SDSS v Cuneen* (1997) 3(3) SSR 36, and held that what is nominated in a statement of claim and in discussions is indicative of each party's consideration at those points in time, but a consent order is an independent document which may or may not reflect their earlier positions. Any attempt to imply or infer matters not stated on the face of the order must be resisted as it throws into question the process and validity of a consent order.

This matter could be distinguished from *SDSS v Beel* (1995) 38 ALD 726 and *SDSS & Caruso* (1996) AAT 11243, where special circumstances were found because the arbitrary 50% of the settlement amount was perceived to be at such significant variance with what was detailed as economic loss in consent orders. The AAT doubted that those decisions were consistent with the statutory intent of the legislation, adding that advocates for such a position were placing a significant emphasis on the proper construction of a consent order, while at the same time jeopardising the integrity of a statutory process which balanced both individual social need and a community's responsibility to ensure equity and probity of resource distribution to meet those needs.

The AAT referred to *Beadle & DGSS* (1984) 20 SSR 210 for the meaning of the phrase 'special circumstances', and to *Green & SDSS* (1990) 21 ALD 772 for a framework against which claims for special circumstances could be considered. In this case there was nothing unusual, uncommon or exceptional in adhering to the mandatory statutory process as others in similar circumstances would experience it, and as such it did not constitute special circumstances. While Keighley had been granted DSP for the ulcerative colitis he was still able to work in a particular capacity. Together with the injuries he received in the car accident, for which he had been compensated, and the subsequent onset of diabetes, his various medical conditions did not constitute special circumstances. He was not experiencing financial hardship, let alone exceptional

financial hardship. All of the circumstances taken as a whole did not constitute special circumstances.

#### Formal decision

The AAT affirmed the decision under review.

[K.deH.]

[Contributor's note: Although similar to the position taken in *Secretary, DFACS & Woolrich 4(7) SSR 87* about not 'going behind' consent orders, the same member has gone further here in expressing reservations about doing so in cases where the economic loss component is detailed in the order.]

## Federal Court

### Compensation: special circumstances

SECRETARY TO THE DFACS v  
EDWARDS  
(Federal Court of Australia)

Decided: 16 November 2000 by  
Drummond J.

The Department appealed against an AAT decision that special circumstances applied to Edwards so that a lump sum compensation payment paid to him should be disregarded.

#### The facts

Edwards was 32 years old and had been receiving a disability support pension since 1989 for schizophrenia. In September 1996 Edwards was knocked off his bike and suffered physical injuries. In July 1999 he settled his claim for compensation for \$27,500 from which he paid health and legal costs. Centrelink imposed a preclusion period of 32 weeks from the date of the accident, meaning that Edwards was precluded from receiving the disability support pension until April 1997. Centrelink proceeded to recover from the insurer the equivalent to the disability support pension paid to Edwards during that period, a sum of \$6369.30.

#### The SSAT decision

The SSAT decided that there were special circumstances and that the amount should not be recovered. Those circumstances were that there was no causal connection between the reason Edwards received the disability support pension and the reason he was paid compensation, and only a minor portion of the damages was for economic loss. Any economic loss would be in the distant future.

#### The AAT decision

The AAT agreed that there were special circumstances. Edwards had only been employed for a short period as a gardener and his chances of ever being employed again were minimal. He suffered no past economic loss.

#### The law

Section 1163(9) of the *Social Security Act 1991* (the Act) deals with whether there needs to be a connection between the reason for the compensation payment and the reason for payment of the social security benefit.

**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.

Section 1184(1) provides that if there are special circumstances the whole or part of the compensation payment may be disregarded. Section 1184(2) then provides:

#### 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).

#### Special circumstances

Drummond J found that the purpose of the 'Compensation Recovery' part of the Act was clear.

It is to prevent a person receiving certain kinds of social security benefit when they are also entitled to receive compensation ... only if the compensation is partly or wholly in respect of lost earnings or lost earning capacity.

(Reasons, para. 9)

There was no requirement for there to be a connection between the person's entitlement to a social security benefit and their entitlement to compensation.

The Court analysed s.1163(9) and stated that the subsection made it clear that a person's entitlement to social security will be affected by a compensation payment:

Without regard to whether there is some connection or causal relationship between the person's pensionability and his or her compensability ... in determining whether circumstances have arisen which invoke the operation of Part 3.14 in relation to compensation payments received by a pensioner, whether such a relationship exists is an irrelevant consideration.

(Reasons, para. 15)

However, this does not mean that this circumstance cannot be taken into account when considering special circumstances.

Section 1184(2) identifies a particular circumstance and then directs how that is to be dealt with when applying s.1184(1). That circumstance is:

That there is no causal relationship between the facts giving rise to the partner's receipt of compensation and the facts giving rise to the pensioner's receipt of the social security payment ... s.1184(2) directs the Secretary that it 'does not in itself constitute special circumstances for the purposes of sub-section (1)' [emphasis added]

(Reasons, para. 18)

That is, s.1184(2) acknowledges that the lack of connection is a relevant