

Administrative Appeals Tribunal

Preclusion period: recovery; special circumstances

KARAARSLAN and SECRETARY TO THE DFaCS
(No 2001/0838)

Decided: 5 October 2001 by M. Carstairs.

The issue

The issue to be determined was whether there could be said to be *special circumstances* sufficient to justify the exercise of the discretion to disregard some or all of a compensation payment (and the relevant preclusion period). If the preclusion period is reduced, the amount of recoverable payment made to an applicant during that period is, as a result, also reduced.

Background

Karaarsland was injured in June 1998, and later claimed and from September 1999 was granted disability support pension (DSP). She commenced action for damages in respect of her injury and this was settled on 18 April 2000 for a total of \$150,000, made up of \$110,000 for general damages, \$20,000 for loss of earning capacity, and \$20,000 for costs, disbursements and medical expenses. She continued to receive DSP until 13 March 2001, and subsequently the Department (Centrelink) determined that an overpayment of \$22,205 had occurred for the period June 1998 to March 2001. On appeal to the SSAT, the amount to be recovered was increased to \$22,418.

Karaarsland had four dependent children, and since her accident had been cared for by her husband who had ceased his former employment as a taxi-driver. The compensation payment had been spent almost entirely on household expenses, in paying off the mortgage on the family home, repairs to that home, and purchase of motor cars. The greater proportion of the settlement amount had been expended before Karaarsland became aware that moneys would have to be repaid to Centrelink. She stated that at the time of settlement her solicitor had not clearly advised her whether a repayment of moneys to Centrelink would be necessary, but had indicated that this was a possibility. Had she realised that this was a likely

outcome, she would not have settled or would have pursued a higher amount of compensation in respect of economic loss. The family had several outstanding debts and credit card payments, and were surviving on family tax payments and carer allowance payments.

The law

The *Social Security Act 1991* (the Act) by s.17(3) provides that where a compensation claim (which includes a component in respect of economic loss) is settled, 50% of the settlement is to be taken to be in respect of lost earnings. The relevant preclusion period, during which time no social security payments can be made to an applicant, is then calculated by reference to s.1165 of the Act. Although the Act required that 50% of settlement amounts be taken as in respect of economic loss (which was clearly a larger amount than the \$20,000 noted in the settlement itself), the Tribunal noted that this was the effect of the legislation in many settlements. In this matter the Tribunal was satisfied that the proportion of the settlement referable to lost earnings, and so the preclusion period, had been correctly calculated by Centrelink. The Tribunal also agreed that the amount paid by Centrelink to Karaarsland during the period in question was recoverable, although the quantum of the debt was re-calculated by the Tribunal at \$22,273.

The Tribunal then considered whether any or all of the compensation payments should be disregarded, and so whether the corresponding preclusion period could be reduced. The Act requires by s.184 that compensation payments may be disregarded in whole or part only if it is considered '... appropriate to do so in the special circumstances of the case'. The Tribunal noted *Beadle v Director General of Social Security* (1984) 6 ALD 1 where it was determined that the term 'special circumstances' should mean circumstances that are unusual, uncommon or exceptional, and where the imposition of the statutory charge would result in unfairness.

Karaarsland argued that her health, the low amount settled in respect of economic loss, inadequate legal advice, the lack of knowledge of a non-payment period, and their financial position, were all factors to be considered regarding the question of 'special circumstances'. The

Tribunal was satisfied that the family's financial position was difficult, but concluded that '... it does not appear that significant attempts are being made to curtail expenditure in areas that are discretionary' (Reasons para. 29). In this latter regard the Tribunal noted continuing weekly expenditures on entertainment and clothing. The Tribunal noted that Karaarsland still had substantial assets (cars and the family home), that avenues of redress were available in respect of any inadequate legal advice, and that Karaarsland had herself failed to advise Centrelink of the settlement (and so had contributed to the continuation of payments and in turn the debt). Although accepting that Karaarsland was disabled by her back condition, that of itself did not constitute circumstances either alone or in combination with the other matters raised, sufficient to justify the exercise of the discretion in this matter.

The decision

The Tribunal varied the decision such that the recoverable amount was \$22,273 but otherwise affirmed the decision under review.

[P.A.S.]

Parenting payment: PP child of two adults

WILLOCKS and SECRETARY TO THE DFaCS and DEAN (2nd respondent)
(No. 2001/0885)

Decided: 24 October 2001 by J. Cowdroy.

Willocks applied for parenting payment (PP) in respect of his two children born in 1992 and 1995. Centrelink rejected the applicant's claim, a decision which was affirmed by the authorised review officer. The SSAT set aside this decision. [This appears to be an error.] Willocks appealed to the AAT.

Willocks was married to Dean, the mother of the two children. The marriage was dissolved in June 1999. In June 1994 Willocks was involved in a motor vehicle accident that left him unable to undertake full-time work.