# Administrative Appeals Tribunal

## Age pension: assets test; valuation of shares

**FONG and SECRETARY TO THE DFaCS**
**(No. 2002/0172)**

**Decided:** 15 March 2002 by S.M. Bullock.

### Background

Fong's application for age pension was rejected by the delegate of the Secretary to the DFaCS because her assets were too high. This decision was affirmed by an Authorised Review Officer, and then on appeal by the Social Security Appeals Tribunal.

Fong held shares in a private company. Her brother, Fay, was the governing director of the company. He determined that no further transfer of shares would be allowed except to members of his immediate family at a price to be determined by him. He had offered to buy back Fong's 15,350 shares at $3.50 a share. Further, Fay had not allowed for a distribution of dividends to shareholders.

The Department decided that it was appropriate to value Fong's shares using the net asset backing method, that is, calculating the net asset value of the company and dividing by the number of shares issued. This was because Fong was entitled to participate in any surplus on the winding up of the company. Using this method the value of the shares was assessed at $298,350. Fong had other assets which meant that their combined asset value was assessed as $425,296 which was above the 'cut off point' for a married couple who own their own home.

Fong argued that the shares in the private company were in fact unrealisable. There was no likelihood of the company being wound up in their lifetime; it had been in existence for some 100 years and was still going strong, with a gross annual turnover of between nine and ten million dollars. The assets should be valued on the basis of the offer of $3.50 a share, as that is all that Fong could realise on the shares.

### The law

Section 11 of the Act defines 'asset' and 'unrealisable' asset.

### Discussion

In relation to the value of Fong's shares, the Tribunal noted that there is no statutory provision in the Act specifying any method for valuation of assets. The test which seems to have been applied by the Tribunal in a majority of cases is a net market value approach based on comparable sales and the 'best use' to which the asset could be put Eimberts and Repatriation Commission (1988) 16 ALD 19. In Woodhouse and Secretary, Department of Social Security (1987) 12 ALD 474, that Tribunal concluded that its task was to consider the value of the shares and not the financial effect which would result if the shares were realised by the applicant. Where an application of this process results in hardship, then those are circumstances in which the application of the hardship provisions contained within s.1129 of the Act should be applied. The Tribunal considered that the method most appropriate to valuing the shares was the net asset backing method. In this regard, the Tribunal followed the approach taken in Duncan and Repatriation Commission (1996) 42 ALD 778, Eimberts and Repatriation Commission (above), Angliss and Secretary, Department of Social Security (1988) AAT 12637 and Mackintosh and Repatriation Commission (1997) AAT 12499.

The Tribunal distinguished the applicants' circumstances from that detailed in *Secretary, Department of Family and Community Services and Dolesny* [1999] AATA 738. Fay offered Fong a price for shares at a value that she was not happy with because it was too low. She told the Tribunal that she was prepared to sell the shares but only at the right price. The Tribunal further noted that in *Brown and Secretary, Department of Social Security* (1993) 76 SSR 1098, that Tribunal referred to *Abrahams v Federal Commissioner of Taxation* (1944) 70 CLR 23 for authority for the proposition that 'in assessing the values of the shares in a company, the concept of a willing but not anxious buyer and seller should be the basis adopted'. Adopting this approach and noting the Company's value of $3,206,756, the Tribunal considered that Fong's 15,356 shares should be valued at $18.32432 cents per share, totalling $281,278. With the addition of the agreed assets of $127,946, the combined assessable assets for Mr and Mrs Sue Fong is $409,224. This is in excess of the asset value limit of $387,500 for the age pension and the combined rate of pension would be reduced to nil in these circumstances. Accordingly, the age pension is not payable to Mr and Mrs Sue Fong in accordance with s.44(2) of the Act (Reasons, paras 58–60).

### Formal decision

The Tribunal affirmed the decision under review.

**[A.B.]**

## Compensation: special circumstances arising from the application of the legislation

**DEE and SECREATRY TO THE DFaCS**
**(No. 2002/0195)**

**Decided:** 22 March 2002 by S.M. Bullock.

### The facts

In 1996 Dee fractured her pelvis, and in September 2000 she settled a claim for compensation as a result of that injury for an amount of $30,000. Prior to the injury Dee was in receipt of sole parent pension, as she was on leave from her employment due to an anxiety condition. While receiving sole parent payment she had worked a few hours a week in the family shop. Her income from this work was $120 a week, and this was the amount which she claimed as loss of income when she lodged a compensation claim following the injury.

The delegate of the Secretary to the DFaCS made a decision, which was affirmed by the Authorised Review Officer and then by the Social Security Appeals Tribunal that Centrelink was entitled to recover an amount of $4565.80 from the applicant's Insurance Company, AMP General Insurance Limited, following the settlement of the applicant's compensation claim, on the basis that Dee was subject to a compensation preclusion period during the

period 5 September 1996 to 20 February 1997. This decision in turn was based on the relevant legislation, that 50% of this payment was for economic loss and as a consequence, she was required to refund 27 weeks overpayment totaling $4565.80.

**The issue**

The issue before the Tribunal was whether Dee's circumstances were special such that all or part of the compensation payment should be treated as not having been made.

**The law**

The relevant legislation is set out in s.17.

> 17(3) For the purposes of this Act, the **compensation part of a lump sum compensation payment** is:
>
> (a) 50% of the payment if the following circumstances apply:
>
> (i) the payment is made (either with or without admission of liability) in settlement of a claim that is, in whole or in part, related to a disease, injury or condition; and
>
> (ii) the claim was settled, either by consent judgment being entered in respect of the settlement or otherwise; or
>
> (ab) 50% of the payment if the following circumstances apply:
>
> (i) the payment represents that part of a person's entitlement to periodic compensation payments that the person has chosen to receive in the form of a lump sum; and
>
> (ii) the entitlement to periodic compensation payments arose from the settlement (either with or without admission of liability) of a claim that is, in whole or in part, related to a disease, injury or condition; and
>
> (iii) the claim was settled, either by consent judgment being entered in respect of the settlement or otherwise; or
>
> (b) if those circumstances do not apply — so much of the payment as is, in the Secretary's opinion, in respect of lost earnings or lost capacity to earn.

Section 1165 provides that a pension, benefit or allowance is not payable to a person during a lump sum preclusion period and sets out the method for calculating the preclusion period. Section 1166 of the Act provides that a person may have to repay an amount where both lump sum and compensation-affected payments have been received.

**Discussion**

Dee argued that it was possible to quantify her loss from the accident as $120 a week for 26 weeks, being $3120. There was therefore no justification in maintaining, as Centrelink had done, that the economic loss component was $15,000. She was not 'double dipping', she was claiming only her actual loss.

The Tribunal found that the calculation of the preclusion period was correct and the quantum of the amount to be repaid on a strict application of the law was $4565.80. The Tribunal noted that this calculation was not disputed. The issue for Dee was whether this amount should be recovered in view of Dee's special circumstances (Reasons, para. 41).

Clearly in *Secretary, Department of Social Security v Smith* (1991) 30 FCR 56, the Federal Court specifically suggested that it was appropriate for the discretion contained within s.1184 of the Act to be used in cases where the arbitrary nature of the 50% rule results in unfairness in a particular case (Reasons, para. 44).

Dee does not rely on her financial circumstances or her health as special circumstances but rather, the unfair and unjust consequences of the application of the 50% rule to her individual case.

The Tribunal considers it well within the purview of s.1184 of the Act for unjust or unfair consequences of the application of legislation to be considered as special. Furthermore, in *Ellis v Secretary, Department of Social Security* (1997) 46 ALD 1, it was considered appropriate to consider the lack of causal relationship between an injury and the benefit entitlement as a special circumstance. As was noted in *Kirkbright v Secretary, Department of Family and Community Services* (2000) 106 FCR 281, the Tribunal in that matter had erred in its interpretation of the legislative intent of the amendments to s.1165 of the Act, as discussed in the *Explanatory Memorandum to the Social Security Legislation Amendment (Budget and Other Measures) Bill* 1996, Part 2 of Schedule 15.

The Tribunal concludes that even though in Dee's case, she does not have special circumstances in relation to her financial and health situation, this should not preclude consideration of the s.1184 discretion in relation to whether there is unfairness or an injustice arising out of the strict application of the legislation. In my view, and as concluded by Mansfield J in *Kirkbright* (above) and by von Doussa in *Smith* (above), s.1184 (or its 1947 equivalent) is designed to enable decision makers to ameliorate unfairness or injustice arising out of the strict application of the legislation. Mansfield J further concluded in *Kirkbright* (above) that the absence of other special circumstances such as financial or health matters, cannot by itself preclude the application of the special circumstances provision. This conclusion is supported by the authorities of *Beadle v Director-General of Social Security* (1985) 7 ALD 670 and more recently, *Martinez v Secretary, Department of Family and Community Services* [2000] FCA 1090 (Reasons, paras. 49-51).

Further:

> The Tribunal finds that unfairness occurs in Dee's case as a result of the application of the legislation itself.

(Reasons, para. 54)

> In calculating the reduction of the preclusion period, the Tribunal notes *Secretary, Department of Social Security v Thompson* (1994) 53 FCR 580, in which the Federal Court concluded it was appropriate to use 'intuitive justice' as to the amount of the reduction and that it would take 'legalism and bureaucratic pedantry too far' to require the artificial exercise of a calculation process in relation to the whole compensation payment. Accordingly, the Tribunal finds that section 1184 of the Act should be exercised in Mrs Dee's favour to allow so much of the lump sum to be regarded as not having been paid so as to treat $3120.00 as the amount to be considered in the calculation of the preclusion period. In so finding, the Tribunal does not consider that the consent settlement was in anyway manipulated to achieve a specific result with implication for Social Security benefits.

(Reasons, para. 55)

**Formal decision**

The matter was remitted to the respondent to calculate the preclusion period, on the basis an amount of compensation be treated as not having been made apart from the amount of $3120.00.

**[A.B.]**

## *Newstart allowance: whether failure to provide information about income*

**SECRETARY TO THE DFaCS and QUINN**
**(No. 2002/0081)**

**Decided:** 12 February 2001 by S.A. Forgie.

**Background**

Quinn was receiving newstart allowance (NSA) and each fortnight he completed an application for payment. In each form he was asked whether he worked in the fortnightly period just