

Compensation preclusion period: special circumstances; small component of economic loss

SECRETARY TO THE DFaCS and WILLIS
(No. 2002/267)

Decided: 18 April by B.H. Pascoe.

Background

Mrs Willis was receiving disability support pension (DSP) for diabetes and asthma when she was involved in a motor vehicle accident on 3 August 1998. She received significant injuries and, subsequently, developed heart problems, renal failure, a stroke and depression. She no longer drove, had problems with public transport, could no longer assist the family with whom she had developed a close relationship, and believed she was suffering considerable personal hardship. She had been receiving \$40 a week as a regular baby-sitter which ceased as a result of the disabilities arising from the accident, but she did not complain of any current significant financial hardship.

A compensation claim was settled on 29 August 2000 for a lump sum of \$30,964.55. The Insurance Commission of Western Australia advised this included \$6680 for past and future economic loss.

Under s.1165 of the *Social Security Act 1991* (the Act) the number of weeks in a preclusion period is calculated by dividing the compensation part of a lump sum by average weekly earnings. Section 1166 provides that a person in receipt of DSP must repay such amounts received during the preclusion period. Subsection 17(3) provides:

17(3) For the purposes of this Act, the compensation part of a lump sum 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)...
- (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 ...

Centrelink assessed the compensation part of the lump sum as \$16,362.27 and recovered \$6420.90 being DSP paid to Mrs Willis during a preclusion period commencing 3 August 1998 and ending 28 February 1999. These figures were not in dispute.

SSAT decision

However, on review, the SSAT decided to exercise the discretion in s.1184 of the Act to disregard so much of the lump sum as exceeded \$6680 and to calculate the preclusion period using \$6680 as the compensation part of the lump sum. The SSAT had properly recognised that for special circumstances to exist they must be 'unusual, uncommon and exceptional such that the strict application of the Act would result in an outcome that was unjust, unreasonable or inappropriate'. It had followed *SDSS & Beel* (1995) 38 ALD 726 in which similar facts were involved and the AAT had concluded that it was 'unfair, unjust and quite inappropriate' to apply s.17(3) where the amount paid for loss of income or income earning capacity was 'perfectly clear'.

After referring to *SDSS v Hulls* (1991) 22 ALD 570 and *Fowles & SDDD* (1995) 38 ALD 152, the AAT observed:

The difficulty in following the course taken by the SSAT and (with the greatest respect to my colleague) the Tribunal in *Beel* (supra), is that it allows an attempt at a dissection of the lump sum to find the proportion applicable to lost income and to enter into the consideration necessary to find that such proportion identified either by the parties or the Tribunal was a correct calculation and not a manipulated figure. By their very nature lump sums paid in settlement of claims represent a compromise and an amalgam of the various components of losses alleged in a claim. The course chosen by the legislation in s.17(3) is, by its very nature, arbitrary and is unlikely to produce a proper qualification of the amount for loss of income. For some recipients such as Mrs Willis, it may well produce a figure in excess of the real value of loss of income. For others, it may well produce a figure considerably below that real value. I am unable to see that, in cases where the applicant or the Tribunal believes the position is the overstatement of such value, it represents 'special circumstances'. It cannot be unusual, uncommon or exceptional where the legislation requires an arbitrary 50 per cent of lump sum to be the compensation part. It can be expected that, in the majority of cases, the calculation will produce an unfair result either for the pension recipient or the taxpayers generally. The applicant submitted that the approach of the SSAT in this case, if to be followed, would render s.17(3) nugatory. While not accepting that there can never be special circumstances requiring a modifica-

tion of the operation of that section, I am unable to find that they are present in this case.

(Reasons, para. 8)

Formal decision

The AAT set aside the SSAT decision and remitted the matter with a direction that the preclusion period is to be calculated on the basis that the compensation part of the lump sum was \$15,482.27.

[K.deH.]

Disability support pension: psychiatric confinement and rehabilitation

SECRETARY TO THE DFaCS and EAVES
(No. 2002/235)

Decided: 10 April 2002 by S.A. Forgie.

Background

Eaves was charged with a serious offence and pleaded not guilty. A jury found that he was not guilty on the ground of mental impairment. Vincent J, in the Supreme Court, ordered that Eaves be placed on a supervision order pursuant to s.26 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* for a nominal term of twelve years and six months. He was subsequently placed at the Thomas Embling Hospital on 25 September 2000.

Eaves applied for a disability support pension, and this was rejected on the basis that Eaves was not undertaking a course of rehabilitation. Therefore he was undergoing psychiatric confinement because he had been charged with committing an offence, and was not qualified for a disability support pension. This decision was set aside by the SSAT.

The law

Section 1158 of the *Social Security Act 1991* (the Act) provides that:

An instalment of a social security pension ... is not payable to a person in respect of a day on which the person is:

- (a) in gaol; or
- (b) undergoing psychiatric confinement because the person has been charged with an offence.

For the purposes of the Act (s.23(5)), the person is 'in gaol' if he or she:

- (a) is imprisoned in connection with the person's conviction for an offence; or