

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

- (b) is being lawfully detained in a place other than a prison, in connection with the person's conviction for an offence; or
- (c) is undergoing a period of custody pending trial or sentencing for an offence.

What is meant by 'psychiatric confinement' is the subject of **ss.23(8) and (9)**:

- (8) Subject to subsection (9), 'psychiatric confinement' in relation to a person includes confinement in:
- (a) a psychiatric section of a hospital; and
- (b) any other place where persons with psychiatric disabilities are, from time to time, confined.
- (9) The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken as psychiatric confinement.

Was Eaves undergoing psychiatric confinement because he had been charged with a criminal offence?

The AAT considered that Eaves was in psychiatric confinement because he had been charged with a criminal offence. There needed to be a causal link between the confinement and the fact of being charged with an offence. Eaves was undergoing psychiatric confinement because of the supervision order made by the Court under s.26 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. However, this Order could only have been made because he was found not guilty by reason of mental impairment. This in turn could only have occurred if he had been charged with an offence. Therefore, despite the intervening step of the supervision order having been made, there was a direct connection between Eaves being charged and his undergoing psychiatric confinement, within the meaning of s.1158(1)(b).

Rehabilitation

The primary issue was whether Eaves was undergoing a course of rehabilitation within the meanings of s.23(9). If so he would not be disqualified from receiving disability support pension.

The evidence given was that the Thomas Embling Hospital consisted of three stages, the acute stage, the transitional stage and the final or continuing care stage. All were parts of a holistic process of rehabilitation.

The AAT looked at a number of earlier decisions which considered the definition of a 'course of rehabilitation', namely *Secretary to the DFACS and Fairbrother* (1999) 56 ALD 784, *Pardo and Secretary to the DFACS* (2000) 32 AAR 381, *Secretary to the DFACS and*

Franks [2001] AATA 738, *Secretary to the DFACS and De Alwis-Edrisinha* [2001] AATA 760. However, Forgie DP was in disagreement with aspects of those decisions.

Regarding the word 'rehabilitation' the ordinary dictionary meaning was:

... 1 Orig., the formal restoration of a person's privileges, rank, possessions, etc.; re-instatement in a previous position. Now usu., re-establishment of a person's reputation, vindication of character. L15. 2a The action of restoring something to a previous (proper) condition or status. M19. b Restoration of a disabled person, a criminal, etc., to some degree of normal life by appropriate training etc. M20. ... [*The New Shorter Oxford English Dictionary*, 3rd edition, 1993]

1. restoration to former health. 2. restoration of rights, privileges or reputation. 3. Med. the use of medical, social, educational or vocational measures or a combination of those to train or retrain someone who has a disability as a result of illness or injury. ... [*The Macquarie Dictionary*, 2nd edition, 1991].

The AAT considered that two of these meanings were concerned with restoration to a previous state of health, or of such matters as rights or reputation. That previous state may or may not have been the fullest potential he or she could attain. The third ordinary meaning focused on training a person. That training was directed in the *Macquarie* definition to the restoration of a person with a disability and to training a person who had a disability as a result of an illness or injury but not with treating the illness or injury. In the *Oxford* definition, it was directed to the restoration of a person disabled by illness, injury or behaviour to some degree of normal life.

Whilst rehabilitation could cover all three stages of rehabilitation, the word when used in s.23(9) did not contemplate all three such stages. Regard needed to be had to s.23(8) and s.1158.

It is apparent from **ss.1158 and 23(8)** that a person who is confined in a psychiatric section of a hospital or in any other place where persons with psychiatric disabilities are from time to time confined, is not entitled to a disability support pension. It is a matter of common understanding that people are no longer confined in the psychiatric section of a hospital or other such place with no assistance given to them. That is apparent from Mr Poulter's evidence. Treatment in the form of medication can at least be expected to be offered to a person. It can also be expected that there will be some plan of treatment. That is, it can be expected that the first stage of rehabilitation will be undertaken if a person is confined to a psychiatric institution. If the word 'rehabilitation' were interpreted to include treatment and assuming that the treatment can be characterised as a

course of treatment, the practical result would be that s.23(9) would nullify the exclusion provisions of **s.1158(b)**. That would follow from the fact that every person in psychiatric confinement would be undertaking a course of rehabilitation. It seems to me that Parliament cannot have intended to nullify the effect of one provision with another.

What, then, does the word 'rehabilitation' mean in the context of **ss.1158, 23(8) and 23(9)**? It seems to me that the word is used in the third of its ordinary meanings. In that sense, it has two elements and one qualification. The first is training and the second is that the training must be directed to enabling a person to participate at some level in normal life in the community. Training does not need to be directed to full participation in normal life in the community or even to the fullest participation that the person may ultimately be able to achieve. Training may take many forms and may range from formal study to discussion groups and counselling provided that it is directed to enabling a person to participate at some level in normal life in the community. There must, however, be a qualification upon this meaning. It is apparent from the ordinary meaning of the word that it is directed to training a person who has a disability or who is disabled by reason of physical or mental illness. It is not directed to treating the cause of that disability. In the context of **s.23(9)**, this leads me to conclude that the training contemplated by rehabilitation does not incorporate treatment of the person's condition.

(Reasons, paras 66–67)

Course of rehabilitation

As to the meaning of the phrase 'course of rehabilitation', the AAT found that there were three distinct stages of rehabilitation at Thomas Embling Hospital. There was the acute phase and transitional phase which focused on treatment and stabilisation of mental state. The third stage focused on a person's rehabilitation and community re-entry. Within the third stage there were three components:

... First, the search process by which the common patient rehabilitative issues and concerns are logged and mutually owned. Second, the process by which patients examine their common personal voyage and achieve personal growth and self-reconstruction. Third, the process by which patients achieve self-reconciliation and accommodate to the realities of their public status.

(Reasons, para. 69)

It was concluded that the acute and transitional phases could not be regarded as courses of rehabilitation. In those stages the programs incorporated medication and a range of activities directed to treatment and stabilisation, as well as patient involvement in their treatment and stabilisation. However, it was only once a

person's condition has been treated and stabilised (even if treatment such as medication is ongoing in order to maintain stabilisation) that the focus could move to restoration of that person to a point at which he or she could participate once more at some level in the community.

In Eaves' case, his condition was treated and stabilised and he was

progressing well toward re-integration into the community. He was at the beginning of the third stage of the Hospital program. He was engaged in a range of activities directed to equipping him with the skills and understanding for community re-entry. He was thus undergoing a course of rehabilitation even though it was not possible to point to the time at which he would achieve

these goals. This was a matter that required ongoing assessment.

Eaves was therefore qualified for disability support pension.

Formal decision

The decision of the Social Security Appeals Tribunal was affirmed.

[A.T.]

Federal Court Decisions

Disability support pension: confinement in a psychiatric institution; rehabilitation

SECRETARY TO THE DFaCS v FRANKS
(Federal Court of Australia)

Decided: 8 May 2002 by Cooper J.

The Secretary appealed against the AAT decision that Franks was undergoing a course of rehabilitation whilst detained as a restricted patient and was thus entitled to receive a disability support pension.

The facts

Franks was receiving the disability support pension when he was charged with an indictable offence. He was referred to the Queensland Mental Health Tribunal to decide whether he was able to stand trial. Franks was found to be not fit to stand trial and he was detained as a restricted patient in a hospital under the *Queensland Mental Health Act*.

Whilst detained in hospital Franks participated in rehabilitation programs as part of his treatment. He was given restricted leave to visit sporting activities and art classes. Franks' period of detention was uncertain. He was monitored by the Patient Review Tribunal who would decide when he could be released. He continued to participate in rehabilitation programs while he was detained. Franks' pension was suspended on 13 April 2000 because he was regarded as undergoing psychiatric confinement because he had been charged with an offence. The AAT decided that Franks was not undergoing psychiatric confinement because he was undergoing a course of rehabilitation.

The law

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

1158. An instalment of a social security pension, a social security benefit, a parenting payment or a pensioner education supplement 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.

'Psychiatric confinement' is defined in s.23(8) as including confinement in a psychiatric section of a hospital. Section 23(9) states:

23.(9) The confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be **psychiatric confinement**.

The AAT decision

According to the AAT s.23(9) distinguished being confined in a psychiatric institution from being confined in a psychiatric institution to undertake a course of rehabilitation. The AAT narrowed the issue to whether there was a difference between a course of rehabilitation for a defined period and a course for an indefinite period. The AAT followed a previous AAT decision of *Pardo and Secretary to the Department of Family and Community Services* (2000) 4(7) SSR 84 deciding that 'during a period' in s.23(9) was to be construed as requiring a temporal connection between the confinement and the program of rehabilitation. Providing the confinement and rehabilitation are undertaken contemporaneously s.23(9) will apply.

The issues

The Secretary argued that there was a distinction between rehabilitation and a course of rehabilitation. Section 23(9) only applied to a course of rehabilitation. A course of rehabilitation had to have a structure and be for a defined period. Detention under the *Mental Health Act* was for a statutory purpose

and did not necessarily involve rehabilitation. Franks argued that he was undertaking structured rehabilitation. An issue raised by Cooper J was whether s.23(9) was relevant where a person was confined because that person had been charged with an offence.

Confined in a psychiatric institution

Cooper J noted that under the *Mental Health Act* a person was detained as a restricted patient while criminal proceedings were pending. That is, the person was detained because they had been charged with an offence until it was decided whether the person was fit to stand trial. It was an error of law by the AAT to restrict the issue it considered to the proper construction of s.23(9).

Section 23(9) is part of a definition of the term 'psychiatric confinement'. As such, it should not be treated as a substantive provision.

(Reasons, para. 28)

The function of a definition clause is to indicate the meaning of certain words or phrases found in that particular statute or part of a statute. A definition clause has no effect except in the construction of the statute. Therefore ss.23(8) and (9) can only be considered in the context of s.1158.

The critical words in s.1158 are that the person is being confined 'because the person has been charged with committing an offence'. The confinement is because the person has been charged.

For the purposes of s.1158(1)(a)(ii) of the Act, it is not confinement of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation: (s.23(9)), if there is not also the operative reason that the confinement is because the person has been charged with committing an offence.

(Reasons, para. 32)

The relevant issue is what was the operative reason for the person undergoing psychiatric confinement. If it were because the person was charged with an offence s.1158 would be satisfied.