

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.

The Court then considered the history of this section and concluded that the statutory policy was that persons confined in psychiatric institutions as a consequence of being charged with an offence were supplied with the essentials of life and had no need for the pension. Treatment for a mental illness whilst detained did not change this situation. There was a difference between a person who was being confined because they had been charged with an offence, and a person being confined to undertake a course of rehabilitation.

Cooper J considered the two previous Federal Court decisions of *Blunn v Bulsey* (1194) 53 FCR 572 and *Garden v Secretary to the Department of Family and Community Services* (2001) 33 AAR 280, and found that both cases were concerned with the issue of why the person had been detained.

### Rehabilitation

According to Cooper J there was:

No statutory intention that a person who is in psychiatric confinement because he or she has been charged with committing an offence and is thereby deprived of the right to a pension, may render s.1158(1)(a)(ii) inoperative merely by undergoing a course of rehabilitation. To read such an intention into s.23(9) is to give the definitional section a substantive effect which is not the function of such a section ... Section 23(9) was to remind or warn those reading the section of the need to properly characterise the reason for the psychiatric confinement by asking whether or not the existence of a pending charge was or was not the reason for the confinement.

(Reasons, para. 55)

The AAT should have addressed the question of why Franks was undergoing psychiatric confinement. If the answer to the question was because he had been charged with an offence the fact that Franks was undertaking rehabilitation would not change the reason for or the character of Franks' confinement. While Franks was confined because he was charged with an offence he would be subject to s.1158.

### Formal decision

The Federal Court set aside the AAT decision and remitted the matter to the AAT to be reconsidered according to law. The Court did not make an order about costs because the appeal was allowed for a reason different from the grounds of appeal.

[C.H.]

[Editor's note: If this interpretation of ss.1158, 23(8) and (9) is adopted, then s.23(9) is in effect rendered nugatory. That is, it is difficult to see how the 'rehabilitation' exception in s.23(9) can

ever come into effect to exempt a claimant from the general rule in s.1158, that he or she is not eligible for disability support pension whilst in gaol or in psychiatric confinement in connection with an offence. It is also difficult to see what other role s.23(9) could be intended to play other than to provide such an exception. The interpretation of Cooper J is surely inconsistent with the intention of the legislative scheme.]

## Compensation: whether an award of interest is compensation

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

Decided: 12 November 2001 by  
Dowsett J.

DFaCS appealed against the decision of the AAT that the compensation part of the lump sum paid to Mourilyan did not include the interest paid on damages for past economic loss.

### The facts

Mourilyan was injured on 2 December 1993 and received weekly payments of compensation under Queensland compensation law until 14 June 1996. He received social security payments from 27 June 1996. Mourilyan commenced common law proceedings and on 26 August 1998 the court awarded him \$201,620.01. The judgment included an award for past economic loss with interest. The sum of \$78,410.76 was repaid to the Workers Compensation Authority from the judgment and Centrelink imposed a charge of \$15,838.24 being pension payments made from 24 June 1996 to 20 August 1998.

### The law

The *Social Security Act 1991* (the Act) provides that a person is precluded from receiving a social security benefit during a preclusion period. A preclusion period is imposed where a person receives a lump sum compensation payment. The preclusion period is calculated by dividing the *compensation part of a lump sum compensation payment by the income cut-out amount*. The term compensation is defined in s.17(2) of the Act and includes a payment of damages and a payment made under a scheme of compensation under a state law *made wholly or partly in respect of lost earnings or lost capacity to earn*. Section 17(3)(b) defines the compensation part

of an award of compensation as '... so much of the payment as is, in the Secretary's opinion in respect of lost earnings or lost capacity to earn'.

Dowsett J noted that both s.17(2) and (3) refer to a payment to the person.

The amount of a judgement is not itself a payment; nor is any amount allowed for lost earnings or lost capacity to earn which may be included in the judgement. The exercise contemplated by par 17(3)(b) must commence with the identification of an amount actually paid to the relevant person. Where the judgement has been reduced for some statutory reason, only the reduced amount will be paid to the plaintiff. That reduced amount will be the starting point for the purposes of par 17(3)(b). The Secretary must then determine the part of that payment which is in respect of lost earnings or lost capacity to earn.

(Reasons, para. 11)

### The award of interest

The Court identified the issue to be decided as whether the award of interest on past economic loss was in respect of lost earnings or lost capacity to earn. The SSAT had decided that it was but the AAT had decided that it was not.

Dowsett J referred to the High Court's reasoning in *Hungerford v Walker* (1988) 171 CLR 125 where it was decided that an award of interest was damages independent of any statutory provision and intended to provide a person with some protection against late payment of damages. It was a foreseeable loss directly related to the defendant's breach of contract or tort.

Whilst the award of damages for lost earnings or capacity to earn focuses on the loss of income, the award of interest (pursuant to the statute or as damages) focuses on the plaintiff's likely use of his or her income ... he or she is still seeking either the cost of borrowing or the value of a lost opportunity to invest.

(Reasons, para. 17)

### In respect of

The phrase 'in respect of' is very broad in meaning and describes the relationship between lost earnings or lost capacity to earn and the compensation lump sum. However too broad a construction might catch many other components of a personal injuries award than was intended. Also when awarding interest a court may take into account that the person had already received weekly compensation payments or the lost opportunity to earn interest on the amount awarded. Dowsett J decided that:

Par 17(3)(b) must be read as providing for the identification of any amount paid in respect of lost earnings or lost capacity to