

Parliament on the introduction of the changes and could find no support for the Department's approach. The Tribunal expressed the view that it was not correct to assume that paragraph (d) was satisfied merely because Nicholls' partner lodged a claim for a compensation-affected payment and the rate of his payment was reduced to nil by operation of s.1173. The Tribunal observed that in contrast to s.1174(1)(d), there was nothing in s.1173 which required the decision maker to establish the claimant was actually qualified for the compensation-affected payment. The Tribunal found there to be no evidence before it that Centrelink had turned its mind to whether Nicholls' partner was qualified for NSA and noted that it appeared, on its face and on the evidence before it, that the NSA claim exercise was conducted solely for the purpose of calculating Nicholls' PP rate. Whilst not being satisfied there was sufficient evidence before it to make a finding about whether Centrelink actually properly contemplated the NSA qualification requirements, the Tribunal accepted Nicholls' submission, conceded by the Department, that Nicholls' partner was not qualified for a compensation-affected payment during the periodic payments period. It followed that s.1174 had no operative effect for the purposes of calculating Nicholls' rate of PP.

Finally, the Tribunal noted Nicholls' submission that Centrelink's interpretation of the legislation was unfair and discriminatory and that misleading advice had been provided. The Tribunal did not accept that Centrelink's incorrect interpretation of s.1174 was unexceptional and found Centrelink's error caused the cancellation of Nicholls' PP. Centrelink's advice caused Nicholls' partner to lodge a claim for NSA which he would not have otherwise lodged. The Tribunal found that the lodgement of a claim for NSA may have led to a finding that Nicholls' partner was qualified for a compensation-affected payment, potentially affecting Nicholls' PP rate in accordance with s.1174. The Tribunal held that Centrelink's error, albeit deriving from erroneous policy advice, was exceptional and resulted in consequences that were unfair, unintended and unjust. The Tribunal found that, were it necessary, it would have found special circumstances existed within the meaning of s.1184K.

Formal decision

The AAT set aside the decision under review and directed Nicholls' PP entitle-

ment be recalculated from 20 September 2001 on the basis that her partner's periodic compensation payments be treated as ordinary income.

[S.L.]



Compensation: special circumstances; loss of earnings after retirement age

**CRITTENDEN and SECRETARY
TO THE DFaCS
(No. 2003/506)**

Decided: 30 May 2003 by N. Bell.

Background

Crittenden was injured as a result of a workplace accident on 22 February 1999. He sought legal advice and damages were claimed with a final settlement payment of \$140,000 (including costs) on 20 December 2001.

On 8 January 2002 Centrelink calculated a preclusion period on the basis of a lump sum figure of \$110,000 and advised the applicant of this. This decision was affirmed by an authorised review officer, and in turn, the Social Security Appeals Tribunal.

At the hearing before the AAT it was accepted that the preclusion period should have been based on the amount of \$140,000 rather than \$110,000, however, the Department indicated at the hearing that it did not propose to recalculate the preclusion period.

The issue

The issue was whether part or all of the compensation payment be treated as not having been made under s.1184K of the *Social Security Act 1991*.

The evidence

Crittenden outlined to the Tribunal the expenditure of the lump sum, which included repayment of debts, gifts to children and repayment of social security payments received during the preclusion period.

The applicant continued to suffer from various medical conditions including diabetes and right knee pain.

His main argument was that he continued to spend money after receiving notification from Centrelink about the preclusion period because his solicitor

told him that he thought he would be able to get the pension back for him.

The applicant told the Tribunal that he had investigated selling his house but as the building of the house was not complete he could not obtain the necessary certificates. The land was on 22 acres, and he had investigated subdivision but was unable to get approval. He had three daughters and two sons who were all working and his wife was receiving age pension.

The applicant also argued that the lump sum payment related only to loss of wages until the age of retirement and that there was no element in the settlement for future economic loss.

Evidence was given that the applicant was unsure whether he would have continued working beyond the age of 65.

Findings

The Tribunal found that there were not sufficient grounds to warrant the exercise of the discretion under s.1184K(1).

The Tribunal accepted the applicant's evidence in relation to his expenditure of the lump sum and the advice given by his solicitor.

In relation to the claim that the lump sum only covered entitlement to retirement age, the Tribunal concluded that it was not possible 'to dissect, with any accuracy, the lump sum settlement received by the applicant, given the ambit of his claim'.

It found that the applicant's medical conditions were unfortunate but not unusual. It also found that the applicant's use of settlement moneys was not unusual and that, although the applicant had no savings and was dependent on his children, some of the settlement money had been gifted to the children.

No specific findings were made in relation to the advice given by the solicitor.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]