recoverable by 30 June 1992. It was no longer an asset of Mr and Mrs Szmerling from that date. Even if an asset constituted by a loan to the trustee continued to exist after the mortgagee entered possession, which I am unable to accept, such an asset would have been disposed of under the Part X arrangement and, again ceased to be an asset of Mr and Mrs Szmerling.

(Reasons, paras 9, 10)

Formal decision

The Tribunal set aside the decisions under review and held the applicants had no asset in the nature of a loan account to the trust since 1992.

[S.L.]

Austudy: progress rules; allowable study time

MARTINSEN and SECRETARY TO THE DFaCS (No. 2003/801)

Decided: 15 August 2003 by O. Rinaudo.

Background

Martinsen commenced a law degree, full time, at James Cook University in 1996, which he later continued at Queensland University of Technology. His Austudy was cancelled on 6 March 2002 on the basis that he had exceeded his 'allowable study time'. It was not in dispute that, at that time, he had completed 3.625 years of study.

Centrelink later varied that decision, deciding that Martinsen's allowable study time would expire at the conclusion of semester two, 2003.

Legislation

Austudy entitlement provisions are in Part 2.11A of the *Social Security Act 1991* (the Act).

Section 569(1) of the Act requires that a person will satisfy the activity test for Austudy if they are '*undertaking qualifying study*' which in turn requires satisfying the '*progress rules*' (s.569A) which, for tertiary students, are set out in s.569H(1):

> **569H.(1)** A person who is a full-time student in respect of a tertiary course satisfies the progress rules if:
>
> (a) in the case of a person who is enrolled in the course — on the day on which the person enrolled in the course; or
>
> (b) in the case of a person who is not yet enrolled in the course but intends to enrol in the course — on the day on which enrolments in the course are next accepted;
>
> the time already spent by the student on the course, or on one or more other tertiary courses at the same level as that course, does not exceed the allowable study time for that course.

Allowable study time is defined by s.569H(3)

> **569H.(3)** The allowable study time for a course undertaken by a full-time student or a 66% concessional study-load student is:
>
> (a) if the minimum amount of time needed to complete the course as a full-time student is one year or less — that minimum amount of time; or
>
> (b) if the minimum amount of time needed to complete the course as a full-time student is more than 1 year and:
>
> (i) the student is enrolled, or intends to enrol, in a year-long subject; or
>
> (ii) the student's further progress in the course depends on passing a whole year's work in the course;
>
> the minimum amount of time plus 1 year; or
>
> (c) in any other case — the minimum amount of time needed to complete the course as a full-time student plus half an academic year.

Submissions

Martinsen submitted that calculation of allowable study time under s.569H(3)(b)(i) should occur at the commencement of his course, (January 1996) taking into account whether or not he was *then* enrolled in a year long subject (which he was). This resulted, he said, in five-year allowable study time, which was fixed for the duration of his enrolment in the law degree, provided he did not withdraw from the course. It then became a matter of determining when that study period expired. (Centrelink and the SSAT had calculated his allowable study time as four and a half years, because he had not been enrolled in a full-year subject in 2002.)

The Department submitted that allowable time must be recalculated each time a student re-enrolled in their course, stating the structure of s.569H does not allow for a prospective determination, only a determination as to whether or not allowable time had been exceeded at a certain date. Each determination remains in force until the next re-enrolment date. The Department argued:

> It is then incorrect to find that the substantive decision under review is, say, 'to assess the applicant's total allowable time for Austudy payment purposes as 4.5 years to expire at the conclusion of semester 2, 2003, as varied by Centrelink on 20 November 2002'.
>
> Such a determination could only be made were the applicant to re-enrol for Semester 1, 2004 and claim Austudy for that period. At that point in time the assessor would calculate the applicant's allowable study time and the time already spent on the course, less disregarded matters pursuant to subsection (7).
>
> There are good reasons for this. No person can currently know, for example, whether the applicant will fail further subjects and have these disregarded for the purposes of the progress rules. Such a situation would result in the applicant being entitled to Austudy for a longer period of time.

(Reasons, para. 17)

The Department referred to *Priest and Secretary, Department of Family and Community Services* [2002] AATA 1191, para. 25:

> ... the 'further progress' referred to is progress beyond the current enrolment period. Mr Priest's current enrolment is for semester-based subjects only and so his further progress in the course does not depend on passing a whole year's work in the course.

(Reasons, para. 18)

The Department concluded by submitting that the substantive decision under review was that, as at 26 June 2002, Martinsen satisfied the progress rules, and remained eligible for Austudy. After disregarding subjects failed due to illness (under s.569H(7)), Martinsen had not exceeded his allowable study time.

The Department also submitted that:

> Arguably the determination to calculate the applicant's allowable time limit is not a reviewable decision ...
>
> Even were it to be viewed a reviewable decision it has had absolutely no affect [sic] on the applicant's present circumstances, and is subject to change (for instance, it is dependent on the applicant's subject choices in his final allowance year of study). He is not a person affected by the decision, and does not have the requisite standing to request a review under s.129.

(Reasons, paras 20 and 22)

Discussion

The AAT accepted the Department's submission in relation to the decision under review, and noted that Centrelink had conceded Martinsen's eligibility as at 26 June 2002 and continued to pay him.

The AAT considered that Martinsen had misconstrued the legislation, saying about s.569H(1)

> Clearly, this provision envisages initial enrolment and re-enrolment. Re-enrolment will, of course, occur on a number of occasions during the course. After successfully

completing an enrolment period, the student will be required to re-enrol for the next study period. This is clearly indicated in the words used in the section 'the time already spent by the student on the course'.

The Tribunal cannot accept the ... contention that the date referred to in this section can only ever be the date that the student initially enrols in the course ... [O]n each occasion there is a re-enrolment, Centrelink must calculate the allowable study time in accordance with the provisions of section 569H(3). If, at the point of re-enrolment, the applicant has completed 4 years of study but requires another year to complete the study, then section 569H(3)(b)(i) would apply and the student would have a further one year period to complete the study. However, it would be ridiculous to suggest that if the student had completed 4 years of study but required only a further semester or half-year to complete the course of study, that section 569H(3)(b)(i) should apply and the student be entitled to a further year. Clearly, in that case, section 569H(3)(c) would apply.

The AAT also accepted the Department's submission that the calculation of allowable time was not a reviewable decision.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that Martinsen remained eligible for Austudy as at 26 June 2002.

[H.M.]

Compensation: special circumstances; loss of earnings after age of retirement

SECRETARY TO THE DFaCS and KELAVA
(No. 2003/834)

Decided: 27 August 2003 by J. Handley.

Background

Kelava suffered back injuries from his employment. On 27 November 2000 he received a lump sum payment of $28,492 under the *Accident Compensation Act*. He received a further lump sum of $80,000 plus costs on 18 January 2002 by way of a common law payment.

The preclusion period was calculated by Centrelink on the basis of both payments of compensation.

The SSAT set aside the decision on the grounds of special circumstances and decided that the lump sum received by Kelava should be taken as not having been made beyond 9 October 2002, the date of his 65th birthday.

The issues

The AAT considered two issues:

- whether the preclusion period could be based on both compensation payments;
- whether special circumstances existed where the compensation payment was structured to take account of weekly compensation only to the age of 65.

Dual compensation payments

The law in relation to the first issue was set out in s.1171(1) of the *Social Security Act 1991* as follows:

1171(1) If:

(a) a person receives 2 or more lump sum payments in relation to the same event that gave rise to an entitlement of the person to compensation (the multiple payments); and

(b) at least one of the multiple payments is made wholly or partly in respect of lost earnings or lost capacity to earn;

the following paragraphs have effect for the purposes of this Act and the Administration Act:

(c) the person is taken to have received one lump sum compensation payment (the single payment) of an amount equal to the sum of the multiple payments;

(d) the single payment is taken to have been received by the person:

(i) on the day on which he or she received the last of the multiple payments; or

(ii) if the multiple payments were all received on the same day, on that day.

1171(2) A payment is not a lump sum payment for the purposes of paragraph (1)(a) if it relates exclusively to arrears of periodic compensation.

This section was introduced in 2001, consequently it was not in force when Kelava received his first compensation payment. The Tribunal expressed the view that the first payment was not a compensation payment as it was payment only for physical impairment; however, the second payment had the effect of changing the character of the first payment by virtue of this subsection. The Tribunal noted that this was 'surely an unintended consequence'. However it took this matter no further focusing on the issue of special circumstances.

Special circumstances

Section 1184K allows a discretion to treat all or part of a compensation payment as having not been made where special circumstances exist. The special circumstances alleged in this case were that the lump sum received by Kelava related only to weekly compensation up to the date of his retirement, the age of 65.

It was argued that the imposition of a preclusion period until 7 November 2003 had the effect of denying Kelava payment of age pension beyond his 65th birthday, a period of time during which he had no entitlement to accident compensation.

It was argued that there was no 'double dipping' in this case and strict application of the law would result in an inequitable situation.

The Department submitted that there was no evidence to substantiate the claim that the lump sum related solely to payments pre retirement. It was also submitted that age pension is included as a 'compensation affected payment' and consequently Parliament intended that age pensioners would be precluded from the pension if they received a payment of compensation as defined by the Act. It was also argued that the '50% rule' was introduced to avoid manipulation by people as a result of payment of compensation claims.

Evidence provided by Kelava's solicitor in relation to the accident claim was that 65 was the compulsory retiring age and that s.93F of the *Accident Compensation Act* limited entitlement to weekly payments to the period before retirement age.

The Tribunal was satisfied that the lump sum of $80,000 was structured so as to take account only of weekly compensation to the age of 65. The Tribunal referred to the case of *Kirkbright v Secretary, Department of Family & Community Services* (2000) FCA 1876, quoting comments of Mansfield J:

> Indeed in my view s.1184 is designed specifically to enable the respondent and on review the Tribunal to ameliorate such unfairness or injustice when it appears by virtue of strict application of the Act.

The Tribunal concluded that it was not reasonable to expect that Kelava be disqualified from both accident compensation and social security payments beyond the age of 65. To do this would be 'unreasonable, unjust and inappropriate'.

The Tribunal found this was consistent with the legislative objective of the Act as stated in the *Guide to Social Security Law* published by the Department which states under the subheading of