

# Administrative Appeals Tribunal

## ***Income test: treatment of lump sum where one-off payment under a court settlement***

**CLEMENTS and SECRETARY TO  
THE DFaCS**  
(No. 2004/7)

**Decided:** 9 January 2004 by  
R.G. Kenny.

### **Background**

The Department decided that, for the purposes of assessing the rate of newstart allowance payable to Clements, a lump sum that he had received pursuant to a court order should be treated as ordinary income over a period of 52 weeks.

The amount of the lump sum was \$12,301.96 and included reimbursement of costs of \$2250 which represented amounts paid by the applicant as a result of his involvement in a class action.

### **Submissions**

Clements argued that the payment should not be treated as income as it was a one-off payment. He argued that it was not a redundancy package or payment for unfair dismissal and that he was required to make contributions to litigation funds, such that there was no guarantee that he would receive payments. There was the very real prospect that he could lose money as a result of this expenditure in relation to costs.

He therefore submitted that the amount that he received was an exempt lump sum.

The terms of the court order were subject to confidentiality provisions preventing the release of information.

The Department argued that the lump sum 'was embraced' by the definition of income contained in the *Social Security Act 1991* and that s.1073 required this amount to be taken as having been received over the 12-month period.

The Department referred to the *Social Security Guide* which gives examples of exempt lump sums, such as lottery wins, legacies and one-off gifts that are unexpected. The Department argued that in this case the applicant had

outlaid money in excess of \$2000 and expected to receive a return. Therefore the amount could not be considered an exempt lump sum.

### **Conclusion**

The AAT accepted that the lump sum received did not fall within the definition of income found in s.8(1).

The Tribunal then considered whether this amount was an exempt lump sum as defined in s.8(11).

An amount received by a person is an exempt lump sum if:

- (a) the amount is not a periodic amount (within the meaning of subsection 10(1A)); and
- (b) the amount is not a leave payment within the meaning of points 1067G-H20, 1067L-D16 and 1068-G7AR; and
- (c) the amount is not income from remunerative work undertaken by the person; and
- (d) the amount is an amount, or class of amounts, determined by the Secretary to be an exempt lump sum.

Note: Some examples of the kinds of lump sums that the Secretary may determine to be exempt lump sums include a lottery win or other windfall, a legacy or bequest, or a gift — if it is a one-off gift.

The Tribunal found that the first three criteria were met, the issue being whether section (d) was satisfied.

The Tribunal referred to the note attached to the subsection, as well as the *Guide to Social Security Law* which states at paragraph 1.1.E.180:

For the purposes of all income support payments, exempt lump sums are amounts that are unlikely to be received again and cannot reasonably be expected to be received or anticipated. They do not represent the receipt of money for services rendered directly or indirectly.

Examples:

- one-off gifts,
- lottery winnings (not winnings paid on a periodic basis), and
- superannuation lump sums.

The Tribunal also referred to specifically provided lump sum exemptions described in the Guide but found that the lump sum in this case did not come within any of the prescribed categories.

The Tribunal concluded that to be an exempt lump sum:

The relevant characteristics are that the payment of the sum is unlikely to be repeated, was one which was not reasonably

expected to be received or necessarily anticipated and which did not represent payment for services rendered. In the applicant's case, while I am satisfied that there was no guarantee that he would ever receive any amount of money, I am also satisfied that there was always a reasonable expectation and an anticipation that some amount would be received by him. It was for those reasons that he continued to attend meetings with his lawyers and fellow litigants and continued to make contribution to the costs of the litigation process.

(Reasons, para. 24)

The Tribunal found that the lump sum was consequently not an exempt lump sum as defined in s.8(11) and that there was no provision in the Act to take into account the amount of the component which represented a reimbursement. Consequently s.1073(1) applied and the amount was to be taken to be received by Clements over the 12-month period.

### **Formal decision**

The AAT affirmed the decision under review.

[R.P.]

## ***Age pension: whether bonuses accrued on endowment policy prior to receipt of age pension 'income'***

**REYE and SECRETARY TO THE  
DFaCS**  
(No. 2002/757)

**Decided:** 17 December 2003 by  
D.W. Muller.

### **Background**

Reye began a life insurance policy with AMP in 1975. The policy provided for annual premiums and in the absence of a contingent event, bonuses were calculated over the life of the plan. On maturity, the amount paid to Reye would be a combination of premiums plus bonuses. Although bonuses were allocated over the years, they were not payable when allocated and not declared as income in years in which they notionally accrued.

Reye and his wife commenced receiving age pensions in 2001 and 2000 respectively and, upon the policy maturing in November 2001, Reye received a lump sum of \$63,486. The sum comprised of \$28,306, representing total premiums paid, and \$35,180 which represented the total accumulated bonuses over 25 years. Centrelink decided to treat the latter sum as 'income' for a period of 12 months from February 2002, which resulted in a reduction in age pensions for the ensuing 12 months. The SSAT affirmed Centrelink's decision.

### The issue

The AAT needed to determine whether the bonuses accumulated in the years prior to receipt of age pension were 'income' for the purposes of the social security law. If that was so, consideration needed to turn to whether the sum could be disregarded as an 'exempt lump sum'.

### The law

Section 8(1) of the *Social Security Act 1991* ('the Act') broadly defines 'income' to include 'an amount earned, derived or received by the person for the person's own use or benefit'. Section 1073 provides for certain lump sums to be assessed over an ensuing 12-month period. Section 8(11) permits the Secretary to deem an amount or class of amounts as an 'exempt lump sum' with the following note:

Note. Some examples of the kinds of lump sums that the Secretary may determine to be exempt lump sums include a lottery win or other windfall, a legacy or bequest, or a gift — if it is a one-off gift.

### Discussion

The AAT commented that the definition of 'income' was indeed very broad and encompassed almost all money received, subject to the specified exemptions. The AAT thought the exclusion of the component representing total premiums paid was 'probably obvious' (Reasons, para. 9), but the position in relation to accumulated bonuses was not so clear.

It was submitted by Reye that the matter should be approached in exactly the same way it would have been if Reye had opened an interest bearing account and made periodic payments to it. Upon first applying for age pension, the balance would have been treated as an asset with only interest earned thereafter being 'income'. The Department submitted that there was a public policy requirement to direct public expenditure to those in actual need. Furthermore, there was no point in comparing bonuses to interest on bank accounts as

such amounts were taxed in the year they accrued, but bonuses were not so treated.

The AAT did not accept the Department's submission:

Whilst the Tribunal accepts that people should use their own resources before they call on public expenditure, the provisions of the social security legislation do not require them to be totally destitute before they get a benefit. The rate of payment of benefits is governed by an assets test and an income test. Those tests allow pensioners to have a certain amount by way of assets without affecting the rate of payments. The income test only relates to income received during the period when the pensioner is receiving a pension, not to income that was received when the pensioner was not receiving a pension. As noted above, not all monies received are treated as income for the purposes of calculating pensions.

The fact that bonuses which accrue on an endowment policy are not declared as income, and no tax is payable on them, is irrelevant so far as this review is concerned. There are numerous examples of situations where people may increase their assets without paying tax on the increase ...

(Reasons, paras 14,15)

The AAT took a contrary view about 'income':

It is the view of the Tribunal that in the case of Mr. and Mrs. Reye, that part of the lump sum which Mr. Reye received on the maturity of his insurance policy, which represented premiums plus bonuses accrued up until either of them began to receive social security benefits, represented part of his assets at that date and none of it was 'income' for the purposes of the Act. Consequently, the bonuses accrued prior to receipt of benefits was not 'ordinary income' for the purposes of calculating the rate of payment of pensions.

(Reasons, para. 16)

Having reached that conclusion, the AAT decided it unnecessary to consider whether the amount was an 'exempt lump sum' for the purposes of s.8(11).

### Formal decision

The AAT set aside the decision under review and directed that the portion of the lump sum which represented bonuses accumulated prior to 23 June 2000 was not 'income' for social security purposes.

[S.L.]

## Age pension: meaning of 'loan'; relevance of financial hardship to waiver

SMART and SECRETARY TO THE DFaCS  
(No. 2002/293; 2002/294)

Decided: 22 December 2003 by D.G. Jarvis.

### Background

Mr and Mrs Smart ran a furniture-making business in partnership for many years. They did not take profits, instead reinvesting funds back into the business. In 1990, they created W.L. & J.E. Smart Pty Ltd ('Smart Company') and a loan account was created to reflect the sale of the business, which included property, to Smart Company. A sum of \$350,000 was also created as 'goodwill'. Mr and Mrs Smart successfully applied for age pensions on 18 April 1996 and disclosed they were self-employed and owned shares. Furthermore, they advised the business had ceased operating on 17 January 1996 when the building and equipment were destroyed by fire. The business was not revived, although the applicants' son continued to work in a 'hobby' capacity and continued to lodge tax returns. Although indicating in the original claim that a loan to the company existed, the applicants failed to do so in response to questions on subsequent review forms. Centrelink became aware of the erroneous assessment in 2001 and levied debts in the sums of \$28,926.64 each.

### The issue

The AAT was required to decide whether the indebtedness of Smart Company to the applicants was a 'loan' for the purposes of s.1122 of the *Social Security Act 1991* ('the Act'). If that was so, the Tribunal needed to decide if debts existed and whether there was any basis for waiver.

### The law

Section 1122 of the Act provides as follows:

1122. If a person lends an amount after 27 October 1986, the value of the assets of the person for the purposes of this Act includes so much of that amount as remains unpaid but does not include any amount payable by way of interest under the loan.

Section 1237A(1) provides for waiver where a debt arises solely from administrative error and payments are received in good faith. Section