

## Compensation-affected payment: age pension preclusion period waived due to special circumstances

TORDA and SECRETARY TO THE DFACS  
(No. 2004/338)

Decided: 1 April 2004 by  
J.D. Campbell.

### Background

Torda had been employed by the Department of Corrective Services (NSW) at the time she ceased work in 1994 because of a work-related injury. In 1996, she was declared unfit for work and she received weekly periodic payments between 1994 and 2000 totalling \$74,905. Torda turned 60 in 1999 and commenced receiving age pension payments in 2000.

In 2002 Torda was awarded damages in the amount of \$139,936 for past economic loss, with \$74,905 paid by way of periodic payments to be deducted, leaving a residual amount of \$65,031. She was also awarded \$9795.52 for past loss of superannuation. No award for future economic loss was made as the court considered she would have ceased working at the age of 60.

Centrelink calculated a preclusion period by adding the amounts for past economic loss (\$65,031) and past loss of superannuation (\$9795.52) and dividing the total by \$602, being the divisor at the time. This resulted in a preclusion period of 124 weeks, commencing in January 2000 (the day after cessation of periodic payments), with the end date being May 2002.

Centrelink determined that Torda had been paid age pension amounting to \$20,272.15 during the preclusion period, and that this amount should be recovered from her as it was a compensation-affected payment which she was not entitled to receive because of the 124-week preclusion period.

### The issues

The issues were:

- had Centrelink, in seeking to recover the compensation-affected payment of \$20,272.15 correctly interpreted the provisions contained in ss.17 and 1170 of the *Social Security Act 1991* ('the Act'), and if so
- did special circumstances exist to disregard either part or whole of the

compensation payment pursuant to s.1184K of the Act?

### The law and discussion

The AAT concluded that Torda received a payment of damages of \$65,031 for past economic loss and \$9795 for lost superannuation, which together amounted to \$74,826 of compensation pursuant to s.17(2) of the Act. The AAT also found that the compensation part of the lump sum compensation payment was \$74,826 as provided for by s.17(3) of the Act.

The AAT considered the 'lump sum preclusion period' under s.1170 of the Act. Those provisions state:

**1170(1)** Subject to subsection (2), if a person receives both periodic compensation payments and a lump sum compensation payment, the lump sum preclusion period is the period that:

- begins on the day following the last day of the periodic payments period or, where there is more than one periodic payments period, the day following the last day of the last periodic payments period; and
- ends at the end of the number of weeks worked out under subsections (4) and (5).

...

**1170(3)** If neither of subsections (1) and (2) applies, the lump sum preclusion period is the period that:

- begins on the day on which the loss of earnings or loss of capacity to earn began; and
- ends at the end of the number of weeks worked out under subsections (4) and (5).

Torda argued that s.1170(3) should apply, and not s.1170(1). It was argued that s.1170(1) is concerned with a situation where an individual receives periodic payments and, by way of redemption or commutation of those periodic payments, a lump sum payment. In Torda's case it was said that while she had previously received periodic payments, their character as periodic payments was lost when they were treated as an offset for the damages awarded for economic loss.

The AAT did not concur with these arguments. It considered the language used in s.1170(1) was neither ambiguous nor unnecessarily complex. It speaks of a person receiving both periodic compensation payments and a lump sum compensation payment. The term compensation payment is clearly defined within s.17(2) of the Act with a lump sum included within s.17(2)(d). The AAT considered that the definition of compensation would include both the following situations:

- where an individual receives periodic payments and such payments are re-

deemed or commuted by way of payment of a lump sum

- where an individual receives periodic payments and is awarded damages for economic loss by way of a payment of a lump sum, albeit with an offset having been made for previously paid periodic payments.

Accordingly the AAT did not accept that s.1170(1) of the Act only applied to a situation where periodic payments are redeemed or commuted.

The AAT also rejected Torda's arguments that there was a change in the character of such payments and that the preclusion period should not be calculated in accordance with s.1170(1).

The AAT considered the cases *Australian Iron & Steel Pty Ltd v Government Insurance Office of New South Wales* [1977] 2 NSW LR 447, *Australian Iron and Steel Pty Ltd v Government Insurance Office of New South Wales* [1978] 2 NSW LR 59 and *Jackson v Secretary, Department of Social Security* [1997] 1111 FCA. It observed that while liability for compensation payments and liability for damages payments arise from independent heads of liability, with relevant payments bearing the character of their origins, payments made by way of compensation have a dual character, namely the payment made for liability arising in compensation and payments for damages for which credit would have to be given if damages were later recovered. As a consequence the compensation and damages are two interrelated sums and are not two sums independently calculated by reference to separate consideration.

The AAT concluded that the creation of a preclusion period pursuant to s.1170(1) of the Act which extended for a period of 124 weeks from 6 January 2000 to 22 May 2002 was correct. The AAT further found that Torda had been paid a compensation-affected payment during this period and as such this amount was a debt to the Commonwealth.

### Special circumstances

The AAT then considered s.1184K which provides that the whole or part of a compensation may be treated as not having been made or not liable to be made according to the special circumstances of the case. The AAT considered that 'the purpose of the basic thrust of the legislation was to avoid a claimant being entitled both to social security benefits and benefits in the nature of income through lump sum payments'.

The AAT concluded that the strict application of the Act had resulted in an outcome which was unfair and unjust. Torda

was not awarded damages for future economic loss; damages for past economic loss were awarded up to her 60th birthday; periodic payments paid to 5 January 2000 were deducted from the gross damages award for past economic loss; and age pension payment commenced on 6 January 2000. Thus, any issue of double payment did not exist. Another consequence of a preclusion period was that Torda was deprived of 124 weeks of age pension payments, during which she received no compensation by virtue of the judgment of June 2002. The AAT concluded that pursuant to s.1184K(1) of the Act, special circumstances existed and determined to treat the whole of the compensation payment as not having been made.

#### Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that special circumstances existed pursuant to s.1184K(1) of the Act and the whole of the compensation payment was to be treated as not having been made. In the absence of any compensation payment having been made, a preclusion period therefore did not exist and as such compensation-affected payments could not be recovered.

[S.P.]

## Compensation: two claims settled together; whether one or two lump sums

SECRETARY TO THE DFaCS and  
GOODALE  
(No. 2004/571)

Decided: 4 June 2004 by E.K. Christie.

#### Background

Goodale suffered workplace injuries on 28 July 1998 and 26 March 1999. He suffered lower back injuries whilst lifting heavy items. He made separate claims in respect of each event and on 10 December 2002, both claims were settled in one compromise agreement and one payment made to Goodale.

Centrelink calculated a preclusion period on the basis that one lump sum was received. The SSAT, however, decided that in substance, two lump sums were received which, by convenience, happened to be paid by way of one

cheque. The Department disagreed and applied for review at the AAT.

#### The law

Section 17(2) of the *Social Security Act 1991* ('the Act') provides the following:

17(2) Subject to subsection (2B), for the purposes of this Act, compensation means:

- (a) ... or
- (b) ... or
- (c) a payment (with or without admission of liability) in settlement of a claim for damages or a claim under such an insurance scheme; or
- (d) ...

(whether the payment is in the form of a lump sum or in the form of a series of periodic payments and whether it is made within or outside Australia) that is made wholly or partly in respect of lost earnings or lost capacity to earn resulting from personal injury.

Section 23(b) of the *Acts Interpretation Act 1901* ('the Interpretation Act') provides that unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular.

Section 1184K of the Act provides for some or all of a compensation payment to be disregarded if 'special circumstances' exist.

#### The issue

The AAT was required to decide whether there were one compensation lump sum or two. A conclusion that the former was correct would result in a compensation charge against Goodale of \$280.

#### Discussion

The AAT formed the view that the SSAT had incorrectly decided that there were two lump sums. The AAT stated:

Following the course directed in *Blue Metal Industries v Dilley* [1970] AC 827 and in the context of the Act, the central issue becomes whether the legislature intended to exclude its operation where there was more than one lump sum compensation payment made. That is, whether it was intended that the term 'lump sum' should be understood to be limited to a single lump sum and to exclude a plurality of lump sums.

In the Tribunal's view, the legislature had such an intention. That 'lump sum' should be read by excluding the plurality of lump sums is consistent with the operation of section 23(b) of the Interpretation Act ...

(Reasons, paras 15, 16)

The AAT observed the term 'lump sum' was not defined in the Act, and referred to *Secretary, Department of Social Security v Banks* (1991) 20 ALD 19. The AAT commented that the reasoning in that case was consistent with the

intent of the legislation to treat as singular lump sum compensation payments received simultaneously or at different times in relation to one or more injuries arising from the same event. The AAT stated:

The meaning of 'lump sum' by von Doussa J further extends to apply to treat as the singular, a lump sum payment where the total is arrived at by adding amounts for different heads of loss. Moreover, this meaning of 'lump sum' extends to treat as the singular, payments received that consist of the aggregate of several amounts which could have been paid separately or at different times.

(Reasons, para. 16(e))

Having reached that conclusion, and being satisfied that the legislation had been applied as it was intended, the AAT decided that 'special circumstances' within the meaning of s.1184K did not exist to disregard any amount of the compensation payment.

#### Formal decision

The AAT set aside the decision under review and remitted the matter to the Department with the directions that the amount to be recovered be assessed on the basis of a single lump sum payment.

[S.L.]

## Compensation preclusion: inclusion of legal costs

FULLER and SECRETARY TO  
THE DFaCS  
(No. 2004/615)

Decided: 18 June 2004 by  
Justice G. Downes.

#### Background

Fuller was injured at work and received compensation payments from Comcare. A settlement was reached between the parties and Fuller received a lump sum. The parties reached an agreement about legal costs, namely a sum of \$13,500, which was included in the lump sum for the purposes of calculating the preclusion period.

#### The issue

The AAT was essentially required to determine whether the sum of \$13,500, representing legal costs, should be included in the lump sum.