

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.

### The law

Section 17(2) of the *Social Security Act 1991* defines compensation to include a payment in settlement of a claim for damages, whether in the form of a lump sum or series of payments, where the payment is made wholly or partly in respect of lost earnings or lost capacity to earn. Section 17(3) defines the compensation part of a lump sum as 50% of the lump sum payment.

Section 1171 provides that if a person receives two or more lump sums in relation to the same event giving rise to entitlement to compensation, the person is taken to receive one lump sum. Section 1184K permits some or all of a compensation payment to be treated as not having been made in 'special circumstances'.

### Discussion

The AAT observed that 'lump sum' was not defined in the Act and commented:

... I was not, at first, attracted to the submission that the term 'lump sum compensation payment' connoted the total sum paid under the Award pursuant to the settlement ... Including agreed amounts for costs in lump sum compensation payments will have some unfortunate consequences. If a claim is settled at an early stage the costs will be small and the impact on the lump sum preclusion period slight. However, if the respondent resists the same claim until the last minute so that substantial costs are incurred by the applicant and those costs are agreed to and agreed to be paid then, even though the actual amount of compensation is identical, the preclusion period will be longer ... I was candidly informed on behalf of the Department that if a settlement is reached inclusive of costs, whether those costs are separately identified or not, the practice has been for the total figure to be treated as the lump sum compensation payment. However, if a matter is settled on the basis that costs are to be paid subsequently, after being assessed, then the preclusion period is calculated without reference to the costs because to do so would result in hardship because the lump sum cannot be released until the preclusion period is calculated. This is a most capricious result ...

(Reasons, para. 15)

The AAT considered relevant authorities, including *Secretary, Department of Social Security v Banks* (1990) 23 FCR 416, *Secretary, Department of Social Security v Hulls* (1991) 22 ALD 570, and *Secretary, Department of Social Security v Cunneen* (1997) 78 FCR 576. The AAT stated:

Two things should be said about the observations of Foster J and O'Loughlin J following the remarks of von Doussa J. First, it is apparent that the underlying object of the legislation was to neutralise the advantage of obscuring the economic loss components of workers compensation settlements. That obscuring effect could be achieved by load-

ing provisions for costs as well as by loading provisions for non-economic loss. The latter would be easier to achieve than the former ... Secondly, the whole amount of the payment is to be included not because it is characterised as compensation but because it is paid in a lump sum ...

(Reasons, para. 18)

The AAT observed that the question was not whether a component of a payment was or was not compensation but whether the component was to be treated as part of the payment. The AAT observed that in *Banks* and *Cunneen*, the court was looking at what was 'a lump sum' rather than what was 'compensation'. The AAT stated:

I have set out above the observations made by von Doussa J, agreed in by Foster J, as to what is 'a lump sum'. I must say that when I first came to this matter I had in mind the Oxford English Dictionary meaning of lump sum, namely 'a sum which covers or includes a number of items' where the noun 'lump' has its primary sense of 'a compact mass of no particular shape; a shapeless piece or mass', the essence of the lump sum being a total amount known to be made up of components where those components are not identified. If this is the meaning of 'lump sum' in the legislation then there was no lump sum in the present case ...

(Reasons, para. 20)

The AAT, although expressing concern about the correctness of the case law, recognised that the meaning given to the phrase 'lump sum' accorded with the purpose of the legislation. The AAT, in reference to the authorities, concluded that 'I am not prepared to depart from that construction and I prefer in comity with them to follow it' (Reasons, para. 22).

The AAT further concluded that in accordance with s.1171 of the Act, there was only one lump sum which included legal costs.

The AAT went on to consider s.1184K:

I have referred above to the anomaly which arises from the way in which the respondent treats settlements which provide for costs to be subsequently assessed. It excludes the costs from the calculation of the lump sum preclusion period. It does this because of the hardship that would result from delay. In adopting this approach the respondent must be exercising a discretion relating to the application of the Act. It is presumably the discretion conferred by s.1184K. If hardship is a basis for the exercise of such a discretion it seems to me that unfairness must also be a basis for the exercise of that discretion. Section 1184K is not confined to hardship. Moreover, being treated unequally can be a hardship. Where the costs agreed in a settlement are a genuine assessment of those costs it seems to me that there is an unfairness arising out of the different way in which applicants are treated. I do not see any reason why in a case in which an agreed

sum of costs is a genuine assessment of those costs the applicant should not be treated in the same way as an applicant who is a party to a settlement where costs are to be subsequently agreed or assessed ...

The AAT commented that it thought it appropriate that the respondent 'should reconsider the way in which it makes the preclusion period calculation and to do so taking into account the unfairness that seems to me to result ...' (Reasons, para. 28).

### Formal decision

The AAT remitted the matter to the Department for reconsideration in accordance with the recommendation that consideration be given to whether, by parity with its practice not to include legal costs where such costs are not agreed at settlement, a decision ought be made in the present and all similar cases whether costs should be taken into account in calculating the lump sum preclusion period.

[S.L.]

## **Age pension assets test: land valuation; whether part of home leased to a tenant is part of the 'principal home'**

**DEMOVICH and SECRETARY TO THE DFaCS**  
(No. 2004/647)

**Decided:** 24 June 2004 by R. Purvis.

### Background

Demovich was in receipt of age pension (AP) and was the owner of a property at Guilford and also of his home at Summer Hill, the rear portion of which he occasionally rented out to boarders. This rear portion was fully self-contained, though accessible from the main part of the house via an internal door which could be bolted from either side but was rarely locked. The rear portion had a separate electricity meter and the tenant paid these accounts, in addition to rent.

The Australian Valuation Office (AVO) in October 2002 valued the Guilford property at \$310,000 and the rear portion of the Summer hill property at \$95,000 (later in the same month adjusted to \$100,000). When the mortgage