interfere with the length of the lump sum preclusion period.

However, in this case Higgins was seeking a reduction in the amount recovered by Centrelink by way of a s.1184G debt. The issue was the recovery of that debt, and therefore it was appropriate to consider s.1237AAD that permits waiver of the right to recover all or part of a debt if special circumstances exist (see *Secretary, Department of Family and Community Services v Sekhon* (2003) 73 ALD 41).

At the heart of this case was Centrelink's incorrect estimate provided to Higgins prior to settlement of his claim. He relied on the estimate of charge received from Centrelink and negotiated a settlement on that basis. Subsequently Centrelink recovered an amount that was almost three times greater than the estimated charge. It was common ground that the calculation of the estimate of charge was in error.

In the Secretary's submission Centrelink's error did not constitute special circumstances because there was no certainty that Higgins would have received a more favourable settlement if he had been advised of the correct amount of the charge. The Tribunal did not accept that submission.

It said that the purpose of providing the estimate was to enable Higgins to take into account the amount he would have to repay to Centrelink if he settled his claim for the nominated amount of $300,000. Therefore, it was up to Centrelink to ensure that the estimate was accurate when it was issued.

The Tribunal considered the meaning of special circumstances and said, essentially, in order to be considered special the circumstances must have a particular quality of unusualness (see *Beadle v Director-General of Social Services* (1984) 6 ALD 1). Further, considering the circumstances in the context of the applicable law, if it is found that something unfair, unintended or unjust has occurred then special circumstances may exist (see *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541).

In this case the Tribunal was satisfied that special circumstances did exist. Although the Tribunal considered that Higgins' circumstances were straitened, he was not in financial hardship and his ill health did not distinguish him from many others within the ambit of the social security scheme.

The special circumstance in this case was the wrong estimate provided by Centrelink. In the Tribunal's opinion a person was entitled to rely on specific information that is provided by the Government, see *Secretary, Department of Social Security and McAvoy* (1996) 44 ALD 721. That was especially so where the advice was provided to enable the recipient to properly take into account the amount he or she may have to repay to the Commonwealth on settlement of a compensation claim. Had Higgins been given a correct estimate of charge he would have had the opportunity to negotiate a settlement in the full knowledge of the amount he would be required to repay to the Commonwealth. By being given incorrect advice he was denied that opportunity. It was unfair in those circumstances to strictly enforce the compensation recovery provisions.

The fact was that he settled his claim for the lesser amount of $200,000 on the basis that he would be required to repay an amount of approximately $5219.

The Tribunal was satisfied that it was appropriate to waive part of Higgins' debt under s.1237AAD ($9133.54 thereby reducing the amount from $14,353.50 to the amount of $5219.96).

Formal decision

The decision under review was set aside and substituted with a decision that the Commonwealth's right to recover $9133.54 of Higgins' compensation recovery debt under s.1184G of the Act be waived in the special circumstances of his case pursuant to s.1237AAD of the Act.

[S.P.]

Compensation preclusion period: special circumstances

SLADEN and SECRETARY TO THE DFaCS (No. 2004/792)

Decided: 29 June 2004 by G.A. Mowbray.

Background

Sladen suffered a work-related injury between October 2001 and March 2002 while working for the Advertising Standards Bureau (ASB) and became increasingly incapacitated for work. She finally stopped work on 13 March 2002 and received worker's compensation until 17 May 2002 after which she claimed newstart allowance.

Sladen was paid newstart allowance from 18 May 2002 until 29 October 2003. On 3 November 2003 she settled a claim for workers compensation with ASB for a lump sum of $150,000 which included lost earnings, legal costs and employment entitlements. The settlement of the compensation claim was conditional on Sladen resigning from her position and therefore employment entitlements were included.

Centrelink advised Sladen on 7 November 2003 that because she had received a lump sum payment, she would not be eligible for Centrelink payments until 19 November 2004 because of the imposition of a preclusion period.

Sladen requested a review of Centrelink's decision to apply the preclusion period and on 16 December 2003 a decision was made that the original decision was incorrect because costs were added onto the settlement, whereas they were in fact part of the settlement. The preclusion period was therefore re-calculated to end on 20 August 2004. On 12 January 2004 the authorised review officer affirmed that decision. The Social Security Appeals Tribunal also affirmed the decision on 10 February 2004.

The issues

The Tribunal looked at the following issues in this appeal:

- whether the employment entitlements were 'compensation' for the purposes of s.17(2) of the *Social Security Act 1991* ('the Act'), and whether they could be excised from the lump sum for the calculation of a lump sum preclusion period under the Act, and
- if the employment entitlements were compensation, whether there were special circumstances which allowed the amount received to be disregarded under s.1184K.

The law

The Tribunal considered s.17(2) of the Act:

> Subject to subsection (2B), for the purposes of this Act, compensation means:
>
> (a) a payment of damages; or
>
> (b) a payment under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme; 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) any other compensation or damages payment;

(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.

The decision

Sladen argued that the Tribunal should look to the purpose behind the legislative provisions and contended that the legislation was designed to prevent double-dipping in compensation payments. In this matter, however, the accrued employment entitlements were not compensation and therefore Sladen could not be accused of double-dipping. It was submitted that the employment entitlements were in fact only included with the lump sum compensation for convenience and normally they would have been divided into different entitlements. They should therefore be regarded as separate for the purposes of determining the preclusion period.

In determining whether the employment entitlements were compensation for the purposes of s.17(2) the Tribunal noted various documents including the terms of settlement of the dispute between Sladen and the ASB in the Magistrates Court, the deed of settlement and a letter from the ASB's solicitors to Sladen's solicitor.

The Tribunal referred especially to the cases of *Fuller and Secretary, Department of Family and Community Services* [2004] AATA 615, *Secretary, Department of Social Security v Banks* (1990) 23 FCR 416 and *Secretary, Department of Social Security v Cunneen* (1997) 78 FCR 576. Although these cases concerned different factual situations, the Tribunal was satisfied that it could not excise Sladen's accrued employee entitlements of $13,393.85 from her lump sum compensation payment. The Tribunal considered that the total figure of $150,000 was properly characterised in terms of s.17(2)(c) of the Act.

The Tribunal therefore found that the total figure of $150,000 was compensation for the purposes of the Act and that it was a lump sum compensation payment.

The next issue considered by the Tribunal was whether there were any special circumstances which would allow for part of the compensation payment to be disregarded. The Tribunal in considering s.1184K(1) looked at a number of cases including *Kottakis and Great Barrier Reef Marine Park Authority* [2001] AATA 807, *Fuller and Secretary, Department of Family and Community Services* [2004] AATA 615, and *SDFaCS v Sammut* (1998) 58 ALD 691.

The Tribunal considered there were circumstances that took the case out of the ordinary and made it exceptional. The Tribunal considered that the payment of the lump sum including the employment entitlements could be characterised as unfair to Sladen and could justly be regarded as leading to an arbitrary result because:

- the $13,393.85 was included in the settlement to cover accrued employment entitlements;
- these entitlements were a matter of right for Sladen, not a matter of discretion;
- in many if not most circumstances such entitlements would have been dealt with quite separately from compensation for an injury; and
- in those circumstances they would not have been considered by Centrelink in determining a lump sum preclusion period.

Formal decision

The Tribunal set aside the decision and sent the matter back to Centrelink with a direction to disregard the sum of $13,393.85 when calculating the compensation part of the lump sum and the lump sum preclusion period in the special circumstances under s.1184K(1) of the Act.

[S.P.]

Rent assistance: are fortnightly forms requests for review?

LAURENT and SECRETARY TO THE DFaCS (No. 2004/683)

Decided: 18 June 2004 by J. Cowdroy.

Background

Laurent was in recept of newstart allowance and rent assistance until 16 September 1999 when Centrelink cancelled his payments on the basis that he had failed to respond to their requests for information. However, Centrelink had sent correspondence to an incorrect address. The correspondence was returned undelivered. On 20 September 1999, Centrelink updated its records with Laurent's correct address and restored his newstart allowance. A letter was sent advising him that his payments from 12 October 1999 would be $392.70, which included an amount of $76.00 for rent assistance. On 27 September 1999, Centrelink wrote to Laurent advising that his payments for the period 14 September 1999 to 27 September 1999 would be $386.75. No mention was made of rent assistance. Between 28 September 1999 and 4 December 2000, Laurent was sent a number of letters advising him of his rate of payment. These letters did not mention rent assistance. Throughout this period Laurent lodged a number of 'Application for Payment of Newstart Allowance' forms. Laurent contacted Centrelink in January 2001 advising that he had not been paid rent assistance since August 1999. Centrelink determined that arrears of rent assistance could only be paid from 4 December 2000, which is the date of the last letter sent to Laurent setting out its decision about the rate of pension payable to him.

This decision was before the Tribunal in January 2002 (*Laurent and Secretary, Department of Family and Community Services* [2002] AATA 202). The Tribunal set aside the decision under review and substituted its decision that arrears of rent assistance be paid from 27 September 1999. The Tribunal found that rent assistance was a social security payment, in that it was an allowance under the *Social Security Act 1991* ('the Act') and therefore fell within the definition of 'social security payment' in s.23(1) of the Act. The Tribunal further found that s.109(3) of the *Social Security (Administration) Act 1999* ('the Administration Act') operated to entitle the applicant to arrears of rent assistance from 27 September 1999.

The Department appealed this decision to the Federal Court. In September 2003 the Federal Court (see *Secretary, Department of Family and Community Services v Laurent* (2003) FCA 1017; (2003) 5(11) *SSR* 150) set aside the Tribunal's decision and remitted the matter to the Tribunal for re-hearing. The Court found that rent assistance has no independent existence from, nor is it payable otherwise than as a part of, a benefit to which s.1068 of the Act applies. The Court held:

> **33.** In my opinion, the AAT erred in holding that 'rent assistance' fell within par (c) of the