

give up on his education at MHS because his needs were not being met there or pursue his education at a place that could meet those needs.

Formal decision

The AAT set aside the decision under review and determined that the applicant needed to live away from home for the purposes of education.

[K.deH.]

Compensation: lump sum preclusion period; special circumstances

**GULCAN and SECRETARY TO
THE DfaCS**
(No. 2001/552)

Decided: 19 June 2001 by J. Brassil.

The issue

The issue to be decided in this matter was whether Gulcan should have been granted partner allowance when he applied in March 1999, given that he had previously received a lump sum compensation payment and the Department had imposed a non-payment (preclusion) period as a result.

Background

Gulcan was born in Turkey in 1934 and turned 65 years of age on 5 September 1999. He worked in the motor vehicle industry from shortly after his arrival in Australia in 1973, until he was injured at work in April 1990. As a result of his accident he suffered significant physical disability and post traumatic stress disorder. In December 1995 he received \$42,456 in a lump sum settlement of his action for compensation. He also sued at common law and on 5 June 1997 this action was settled for \$135,000. The evidence of Gulcan was that this compensation amount was determined in part on the basis of his likely earnings until he turned 65 years of age, as he would not have been able to work in the motor vehicle industry beyond his 65th birthday. He had accepted the compensation payment on this basis.

Gulcan received weekly compensation payments until 27 March 1998. In May of 1998 he was advised by Centrelink that a preclusion period

would apply from 5 June 1997 until August 2000 due to his receipt of a lump sum compensation payment. Gulcan applied for the partner allowance in March 1999, but was refused because of the preclusion period. At the time of his application, he had expended essentially the whole of the \$135,000 he had received on his mortgage, household furniture, an overseas trip, living expenses, and gifts to his children, although at that date his wife was still alive and was herself in receipt of disability support pension.

Gulcan's wife died in January 2000 and he took her body to Turkey for burial, staying there some eight months.

The law

The *Social Security Act 1991* (the Act) in s.17 defines what is 'compensation' and the 'compensation part' of a lump sum, while s.1165 sets out the formula by which a preclusion period is calculated. The Act in s.1184 provides that part or all of a lump sum compensation payment may be treated as not having been made if considered '... appropriate to do so in the special circumstances of the case'.

Discussion

It was agreed between the parties that a worker in good health in the motor vehicle industry would work to the age of 65 years and then apply for age pension. Gulcan did not contest (and the Tribunal agreed) that the preclusion period had been correctly applied and calculated on the basis of the compensation Gulcan had received.

The Tribunal noted the seminal criteria set out in *Beadle and Director-General of Social Security* (1984) 6 ALD 1 that for 'special circumstances' to exist they must be 'unusual, uncommon or exceptional'. The Tribunal also noted the comments in *Groth and Secretary, Department of Social Security* (1995) 37 ALD 797 that 'special circumstances' could exist '... if one were to conclude that something unfair, unintended or unjust had occurred [indicating] that there must be some feature that is out of the ordinary'.

The Tribunal accepted that Gulcan was not in such straightened financial circumstances as could be characterised as unusual or exceptional. However, the Tribunal accepted that the provision for economic loss included in Gulcan's lump sum settlement amount, had been calculated on the basis that he would work only until his 65th birthday — that is, until September 1999. Noting that the

intention of this aspect of the Social Security legislation was to avoid 'double-dipping' — that is, an applicant receiving two payments for the one period — the Tribunal determined that in Gulcan's circumstances it would be unjust, unreasonable or otherwise inappropriate to extend any preclusion period beyond his 65th birthday.

The decision

The Tribunal determined that special circumstances did exist such that 30% of the lump sum payment should be treated as not having been made, the effect of which was to reduce the preclusion period by 50 weeks. This in turn meant that Gulcan was eligible for partner allowance from the date he had applied, and for age pension from the date of his wife's death.

[P.A.S.]

Compensation: preclusion period; calculation

**MORGAN and SECRETARY TO
THE DfaCS**
(No. 2001/734)

Decided: 10 August 2001 by J. Handley.

Morgan was injured in a motor vehicle accident in 1992. She received weekly compensation payments from the Transport Accident Commission (TAC) until 17 June 1995, and payments of disability support pension (DSP) started the next day.

Her claim against the TAC was settled for \$320,000 on 1 June 1998. DSP was cancelled, a preclusion period from 18 June 1995 to 7 December 2002 was imposed, and \$21,406.30 (all DSP paid to Morgan since 18 June 1995) was recovered from the settlement amount.

Morgan did not dispute that a preclusion period must be imposed, nor the amount recovered. She sought review by the AAT of the preclusion period calculations.

The legislation

Subsection 17(1) of the *Social Security Act 1991* (the Act) provides that DSP is a compensation affected payment. The formula to calculate the period during which a payment of a compensation affected payment is precluded, following the receipt of a compensation lump sum after 20 March 1997, is set out at

s.1165(8) of the Act. In effect the 'compensation part of a lump sum' (CPLS) is divided by the 'income cut-out amount' (ICOA), and the result is the equivalent of the number of weeks in the preclusion period.

The ICOA, the divisor, is defined at s.17(1) to be the amount of weekly earnings at which the single rate of pension is no longer payable. Prior to 20 March 1997 it was based on 'average weekly earnings'. A table provided to the AAT by the Secretary showed it to be \$571.90 immediately prior to 20 March 1997, \$402.20 from that date, and \$410.00 on 1 June 1998.

The CPLS is defined at s.17(3) of the Act to be 50% of the payment made in settlement of the claim where the claim was settled after 9 February 1988.

Section 1184 of the Act permits some or all of the compensation payment to be treated as not having been made, or as not liable to be made, if there are special circumstances.

The calculation

For Morgan it was argued that in calculating the preclusion period the CPLS was only \$120,000 because a letter from the TAC's solicitors recorded that the \$320,000 represented \$200,000 for general damages and \$120,000 for economic loss and costs. The AAT did not agree, holding that the effect of s.17(3) was that the CPLS was 50% of \$320,000, namely \$160,000.

It was also argued for Morgan that the divisor in the calculation, the ICOA, was not \$410, the value used, but was in the vicinity of \$530-\$560 as stated in the SSAT's reasons for decision. However, the origin of the SSAT's figures was not readily apparent, while the \$410 was the correct figure at the date of the settlement. The AAT noted that the Act had been amended to take effect from 20 September 2001 to define the ICOA as 'that in force at the time when the compensation was received'. Nevertheless, prior to that date, and in the absence of any legislative mandate, it was departmental policy to apply the divisor in effect at the date of settlement. The AAT considered that the policy should be applied so there was consistency in decision making. Logically, that was the date which should be used to determine the ICOA because the duration of the preclusion period was calculated at the date of settlement.

The discretion

The AAT then considered whether the discretion in s.1184 could be applied in

Morgan's case. It found that Morgan received about \$195,000 from the settlement after costs and the refund of DSP payments. This was used to repay mortgages over her home and other debts, and to buy a car, furniture and shares. At the date of the hearing Morgan and her husband owned a house and land of 2.5 acres near Echuca valued at \$300,000, with an outstanding mortgage of \$17,000 to the Defence Force Retirement Benefit Fund repaid at \$156 a month. House contents were valued at \$15,000 and their car at \$40,000. Morgan received no income but her husband received a war pension at \$289 a fortnight from the Department of Veteran's Affairs, and a carers pension of \$75 a fortnight. Her two sons lived at home and paid \$50 a week board. The costs and charges for Morgan's continuing medical care, including travel to Melbourne, were incurred wholly by the TAC.

The AAT observed that the legal charges by Morgan's solicitors appeared to be excessive. Morgan indicated that she had considered a complaint to the Law Institute but was told she was 'out of time'.

Morgan had been made aware by her solicitors, prior to the settlement that a preclusion period would be imposed, but was told it would expire in 2000. The AAT considered that any consequence arising from that advice — if negligent — should be exercised by her against the solicitors. It was not a circumstance which could be regarded as being special to reduce or disregard the compensation payment when calculating the preclusion period.

The AAT concluded that despite the impact on Morgan's domestic, personal and financial circumstances as a result of the injuries suffered in the accident, she had received settlement funds and had considerable assets. After referring to *Beadle and Director General of Social Security* (1984) 20 SSR 210 as to the meaning of the phrase 'special circumstances', it was unable to find that there were any special circumstances.

Formal decision

The AAT affirmed the decision under review.

[K.deH.]

Psychiatric confinement: course of rehabilitation

SECRETARY TO THE DFaCS and FRANKS
(No. 2001/738)

Decided: 24 August 2001 K.L.Beddoe.

Background

Franks was in receipt of a disability support pension when he was charged with an indictable offence. He was remanded in custody until April 2000 when the Mental Health Tribunal found that he was of unsound mind and was not fit to plead at his trial. Franks was then transferred to a psychiatric hospital as a restricted patient and remained so at the date of the AAT hearing. The criminal proceedings were deferred indefinitely while Franks remained unfit to stand trial. The psychiatric hospital was not a place declared to be a prison under the Corrective Services (Establishment of Prisons) Regulations 1992.

Franks was diagnosed with a degree of Korsakoff's Syndrome and was reported as being of below average intelligence with limited education and literacy and numeracy deficits. He was at the psychiatric hospital formally for the purpose of psychiatric assessment but he had also participated in a rehabilitation program designed to assist his long-term prospects.

The period of detention at the hospital was uncertain. Franks' progress was monitored each three months by the Patient Review Tribunal and that Tribunal would decide when he was ready to be released from the hospital. The rehabilitation activities were being provided for an uncertain period because they would continue while Franks remained at the hospital pursuant to the order of the Mental Health Tribunal.

Issues

The issue was whether disability support pension was payable to Franks, and this depended on whether he was a person undergoing psychiatric confinement, after having been charged with committing an offence. If so, he would not be entitled to disability support pension unless he was undertaking a course of rehabilitation.

Legislation

Section 1158(1) of the *Social Security Act 1991* (the Act) states that a social security pension is not payable if the person (otherwise entitled to payment) is: