

becoming so qualified) . . . a lump sum payment by way of compensation'.

Payment of pension precluded

The AAT referred with approval to the earlier Tribunal decision in *Krzywak* (1988) 45 SSR 580; and decided that the amendments made in 1988 to the post-16 December 1987 version of s.153(1) caught Grima even though he had received his compensation payment and had applied for a pension (a term which included unemployment and sickness benefit) before 16 December 1987.

Calculating the preclusion period

Section 152(2) provides that the 'lump sum payment period' (that is, the period during which payment of pension is precluded) is to be calculated by dividing 'the compensation part of the lump sum payment' by average weekly earnings.

Where a compensation claim was settled before February 1988, 'the compensation part of the lump sum payment' was to be that part of the lump sum payment which was, in the opinion of the Secretary, 'in respect of the incapacity for work'.

In the present case, the Victorian Accident Compensation Tribunal had said in its order that the sum of \$44 000 was to be paid to Grima in settlement of all forms of future compensation, other than medical and similar expenses.

Despite the terms of the award, Grima's solicitors had written to the DSS, advising that \$24 000 of the settlement figure represented an estimate of Grima's pain and suffering and loss of enjoyment of life; and that only \$20 000 represented 'compensation . . . in respect of any incapacity for work'.

The AAT said that it would not go behind the terms of the compensation award. It pointed out that the *Accident Compensation Act* 1985 (Vic.) did not authorise the Accident Compensation Tribunal to award payment of compensation for matters such as pain and suffering or loss of enjoyment of life. Accordingly, the AAT decided, the whole of the amount of compensation awarded to Grima (namely \$44 000) should be used for the purpose of calculating 'the lump sum payment period'.

The AAT also decided that there were no 'special circumstances' in this case which could support an exercise of the discretion in s.156 to disregard all or part of the compensation payment.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Special benefit: rate of benefit

ALAI and SECRETARY TO DSS
(No. V88/22)

Decided: 2 November 1988 by
H.E.Hallowes, H.C.Trinick and
G.F.Brewer.

Abdool Alai came to Australia in November 1986 on a 1-month temporary visa. In December 1986, he applied to the Department of Immigration and Ethnic Affairs (DIEA) for permanent resident status; and was eventually granted that status in November 1987.

Meanwhile, in December 1986, Alai applied to the DSS for a special benefit (having been told by the DIEA that it would be an offence under the *Migration Act* for him to engage in employment).

Initially, the DSS rejected Alai's application; but eventually the DSS granted him special benefit at one-third of the unemployment benefit rate between December 1986 and November 1987, when he was granted unemployment benefit. Alai asked the AAT to review that decision.

The legislation

Section 129(1) of the *Social Security Act* gives the Secretary a discretion to grant a special benefit, where the Secretary is satisfied that the person is 'unable to earn a sufficient livelihood'.

Section 130 gives the Secretary a discretion to fix the rate of special benefit, 'but not exceeding the rate of unemployment benefit or the sickness benefit which could be paid to that person if he were qualified to receive it.'

From 1 October 1987, s.129(3) provides that a special benefit was not payable to a person when the person was not a resident of Australia or was a prohibited non-citizen within the meaning of the *Migration Act*. However, that amendment did not apply to a person who was receiving special benefit immediately before 1 October 1987: s.4(14), *Social Security and Veterans' Entitlements Act* (No. 2) 1987.

The rate of benefit

Alai had come to Australia with his wife. He had savings of \$1000. He bought a car and, by the time he claimed special benefit, he had only \$144 left. Alai and his wife stayed with his sister, but were obliged to borrow \$6060 from her in order to support themselves, of which he had managed to repay \$2060. During the period in question, Alai's wife fell pregnant and had a miscarriage, which involved then in unforeseen expense.

The AAT referred to earlier AAT decisions on the rate of special benefit - *Macapagal* (1984) 20 SSR 236; and *Bahunek* (1985) 24 SSR 287. The AAT said that the s.130 discretion should be exercised to pay special benefit at the rate of unemployment benefit which would have been payable to Alai. On the date of his application he had only \$144 in his bank account:

'We are satisfied that he had no sufficient livelihood after that date. His sister could not provide for him out of her own resources. It is unreasonable to expect her to continue to provide board and lodgings in her own home beyond the one month period she had anticipated providing for her brother and sister-in-law. The applicant's dependent wife had unforeseen medical expenses.'

(Reasons, para.12)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Alai be paid special benefit at the rate of unemployment benefit that would have been paid to him if he were qualified for that benefit, from 23 December 1986 to 17 November 1987.

[P.H.]

Overpayment: recovery

GREEN and SECRETARY TO
DSS

(No. S88/87)

Decided: 31 October 1988 by
R.A.Layton

Between 1978 and 1980, Dawn Green received unemployment benefits to which she was not entitled, as a result of false representations. Green was then single and childless. In October 1980, she was convicted in a magistrate's court of 15 offences under the *Crimes*