In 1986, he travelled alone to Yugoslavia in order to seek treatment for his eye condition. In mid-1987, Resetar and his wife purchased a restaurant, to be operated by Resetar's wife.

Affidavit evidence given to the Family Court in 1986 showed that Resetar had worked actively on the demolition of a house and the construction of two home units. Resetar's 1985 employment supervisor, told the AAT that Resetar's work had been demanding and dangerous. A member of the SSAT which had heard Resetar's earlier appeal told the AAT that he had seen Resetar walking in the city of Melbourne unaided. Finally, a private investigator said that he had observed Resetar assisting his wife in their restaurant.

Not 'permanently blind'

The AAT adopted the approach taken in *Leach* (1983) 13 *SSR* 135 and *Cowley* (1986) 33 *SSR* 423 and said that the term 'permanently blind' in s.24 of the *Social Security Act* meant totally blind, although a person would be regarded as totally blind where he or she was so severely blind that the effect of the blindness on day-to-day living was essentially the same as the effect of total blindness.

In order to determine whether a person was permanently blind, the person's vision should be tested when corrected by glasses or contact lenses.

The AAT said Resetar suffered from retinitis pigmentosa, had very poor vision, unless there was good light, and had a considerably restricted field of vision. But the evidence established that the effect of his reduced sight did not have the same effect on him as if he were totally blind.

> 'I am not satisfied that the tests carried out by [specialist] accurately reflect what the field of vision is. Whatever it may be, I am satisfied that he has some sight such that although his lifestyle is very much restricted his remaining sight permits him to function with a greater degree of independence than would be the situation if he were totally blind.'

(Reasons, para. 29)

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Compensation payment: precluded from pensions?

TALLON and SECRETARY TO DSS

(No. N87/1089)

Decided: 25 March 1988 by C.J. Bannon, J.R. Gibson and D.J. Howell.

Kevin Tallon was injured at work in March 1984. He received periodic workers' compensation until 5 June 1987, when an order was made for a lump sum compensation payment to Tallon of $35 000, which was paid to him on 19 June 1987.

On 15 June, 1987, Tallon applied to the DSS for sickness benefit. The DSS decided that this benefit was not payable because of s.153(1) of the *Social Security Act* [then numbered s.135SC].

Tallon asked the AAT to review that decision.

The legislation

When Tallon claimed sickness benefit, s.153(1) provided that,

> 'where a person who is receiving a pension receives ... a lump sum payment by way of compensation ... a pension is not payable to the person at any time during the lump sum payment period.

Section 152 defined 'a pension' as including a sickness benefit.

From 16 December 1987, s.153(1) was amended so that it prevented payment of a pension during the lump sum period, 'where a person ... who is qualified to receive a pension, receives ... a lump sum payment by way of compensation'.

Section 117(1) [formerly s.108910] provides that a person is qualified to receive a sickness benefit if the person 'satisfies the Secretary that' he or she is temporarily incapacitated for work and has suffered a loss of income because of the incapacity.

Not precluded by compensation payment.

The AAT considered the effect of s.153(1), following its amendment from 16 December 1987. From that date, it prevented payment of sickness benefit to a person who received a lump sum payment by way of compensation while the person was *entitled* to receive sickness benefit. The AAT said:

> '[U]ntil grant, an applicant for a pension or benefit, especially a sickness benefit, is simply a claimant. There is no property in a statutory application for such a benefit ... Similarly, with the concept of qualification to receive a sickness benefit, no person is qualified to receive such benefit unless and until the Secretary is satisfied as to one or other of the matters stipulated in s.107(1)(c)(i) or (ii) of the Act.
>
> The person who has to be satisfied is the Secretary ... However, the Secretary has refused the application and it appears to us that in those circumstances it is open to the Tribunal, pursuant to the *AAT Act* 1975, to make the decision which the primary decision maker should have made ... We see no reason why we should not accept the applicant's claim that he fulfils the terms of s.117(1)(c)(i) of the Act and we so find in his favour.'

(Reasons, pp.6-7)

The AAT commented that the amended version of s.153(1) -

> 'would have been effective to terminate payment of a benefit to a person qualified to receive a sickness benefit as and from the date it came into operation if that person received a lump sum payment after that date. The amending Act is not expressed to be retrospective and does not apply to payments received before it came into operation.

(Reasons, p.7)

The AAT said that, because it was reviewing a claim for sickness benefit made before the amendments came into force on 16 December 1987, the review should be based on the law before that date. This, the AAT said, was in line with the Federal Court's decision in *Banovich v Repatriation Commission* (1986) 69 ALR 395.

Section 53(1), as it stood before 16 December 1987, only applied where a person received a lump sum compensation payment while 'receiving a pension'. The words 'receiving a pension' in s.153(1), the AAT said, should be given their plain ordinary meaning and should not be interpreted as meaning or including 'entitled to receive a pension'. On that basis, s.153(1) as it stood prior to 16 December 1987, did not operate to prevent payment of sickness benefit to Tallon.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for assessment of rate of sickness benefit payable to Tallon.

DI PIETRO and SECRETARY TO DSS

(No. W88/19)

Decided: 20 April 1988 by R.D. Nicholson.

Luigi di Pietro was injured at work. He was paid weekly compensation for 5 months and then settled his compensation claim for $35 000.

That settlement was entered as a consent judgment on 25 August 1987 and the money was paid to him shortly after 3 September.

On 20 August 1987, the DSS decided that 70% of the compensation payment should be treated as the incapacity component: and that di Pietro was precluded from receiving invalid pension (for which the DSS accepted he was qualified) for 55 weeks - until September 1988.

Di Pietro asked the AAT to review that decision.

The legislation

The AAT said that the DSS preclusion decision was supported by s.153(1) of the *Social Security Act*. According to the AAT, this precluded payment of pension to a person who received a lump sum payment by way of compensation while qualified to receive a pension.

The AAT referred to DSS guidelines, which said that the Department should treat 70% of any lump sum award as the 'incapacity component' of the award, where the award did not distinguish any of the components of the award.

Section 156, on which the AAT focused in this review, gave the Secretary a discretion to treat all or part of a compensation payment as not having been received if the Secretary thought this appropriate 'in the special circumstances of the case'.

No 'special circumstances'

Di Pietro said that his doctor had advised him that he would be entitled to receive invalid pension as well as his compensation payment; and that he had spent all the award in paying debts and renovating his house.

His current assets were conservatively valued at $115 000, and he owed debts of $7,600. He told the AAT that his regular outgoings exceeded $1,800 a month.

The AAT said that di Pietro had spent the compensation award after he had been informed that s.153 would be applied against him; this prevented him from showing 'special circumstances'. The Tribunal discounted, as a special circumstance, di Pietro's claim that he had entered into the settlement on the understanding that he would continue to receive invalid pension. The AAT said that it should also be borne in mind that 'only 70% of the amount received has been taken into account in calculating the period of preclusion': Reasons p.8.

[Comment: The AAT did not mention that the version of s.153(1), used by it, came into effect *after* the decision under review, namely 15 December 1987. The relevant version of s.153(1) was worded quite differently.

The guideline used by the DSS was apparently intended to 'codify' the Secretary's discretion under s.152(2)(c) of the Act. However, the AAT did not refer to that discretion; nor did the AAT examine the question whether arbitrary rule in the guideline was appropriate to the present case. This at least raises the possibility of a failure, on the part of the AAT, fully to exercise its review powers; see *Drake v. Minister for Immigration* (1979) 2 ALD 60.] [P.H.]

Tribunal's review powers

SARINA and SECRETARY TO DSS (No.A88/14)

Decided: 18 March 1988 by R.K. Todd

Ronald Sarina had applied to the AAT for review of a DSS decision to cancel his age pension because of his failure to provide the DSS with a statement of assets, as required by a notice issued under s.135TE(2) of the *Social Security Act* [now s.163].

When hearing of the application commenced in December 1986, Sarina agreed to supply the DSS with a list of his assets and the AAT adjourned the hearing.

When Sarina supplied the list of his assets to the DSS, a local office of the DSS 'cancelled' Sarina's pension because the value of his assets exceeded the assets test limits. In December 1987 the AAT learnt of this course of events.

After examining the evidence, the AAT decided to *affirm* the original cancellation of Sarina's pension. It emphasized that the later action taken by the DSS had not affected the Tribunal's obligation to deal with that original decision:

> '[T]he prima facie position is that in the absence of some particular provision in the relevant legislation it is not open to a decision maker to alter or otherwise tamper with a decision once it has become the subject of an application for review to this Tribunal. I have noted in more than one jurisdiction in recent times that an imperfect understanding of this proposition may be entertained by some decision makers. The decisions of the High Court of Australia in *R v Moody;* ex parte *Mithen* (1977) 17 ALR 219, and of this Tribunal in *Re Bloomfield and Sub-Collector of Customs, Australian Capital Territory* (1981) 4 ALD 219.'

(Reasons, para.6)

[P.H.]

Rehabilitation allowance: jurisdiction to review

CHRISTIANS and SECRETARY TO DEPARTMENT OF COMMUNITY SERVICES (No. V87/420)

Decided: 22 April 1988 by R.A. Balmford.

The applicant, Christians, applied to the Department of Community Services (DCS) in June 1986 for a rehabilitation allowance under s.135B of the *Social Security Act*. The application was rejected and Christians applied to the AAT for review.

The legislation

At the time of the decision under review, s.135(1) gave the 'Secretary' power to provide 'treatment and training' to -

> 'persons who are suffering from a physical or mental disease . . . who would be likely to derive substantial benefit from that treatment and training'.

The treatment and training could include, according to s.135(2)(b) and (c), the payment of tuition fees and the provision of incidental amenities.

According to s.135A(2)(b), a person was not eligible for treatment and training unless, *inter alia*, the person's physical or mental disability was, or was likely to be, 'a substantial handicap . . . to the person's undertaking employment.'

Section 135B(1) provided that a person was eligible to receive a rehabilitation allowance, if (a) the person was undertaking a rehabilitation program and (b) was qualified to receive a pension, benefit or allowance under the Act.

Jurisdiction

The DCS raised the question whether the AAT had any jurisdiction to review the decision of the DCS.

Section 17 of the *Social Security Act* [formerly s.15A] allowed for an application to the AAT for review of a decision 'made by the Secretary' which affirmed, varied or set aside a decision (under the Act) of an officer that had been reviewed by an SSAT.

Christians' original application had been rejected in October 1986. An SSAT reviewed that decision in May 1987; and the Secretary to the DCS had affirmed the original decision on 3 June 1987.

Christians had applied to the AAT for review of that decision on 9 July 1987.

At the time of Christians' original application, the DCS original decision, the SSAT review and the affirming decision by the Secretary to the DCS, s.6(1) of the *Social Security Act* defined 'Secretary' as meaning the Secretary to the DCS where the DCS was administering the part of the Act in question; or the Secretary to the DSS where the DSS was administering the part of the Act in question.

Throughout this period, the term 'officer' was defined in s.6(1) to mean an officer or person exercising functions under the Act.

The administration of Part VIII of the Act (which included s.135) had been transferred from the DSS to the DCS at some time before Christians' application.