Compensation preclusion: 2 payments

SECRETARY TO DSS and WILLIAMS

(No. 9134)

Decided: 19 November 1993 by T.E. Barnett.

The Department of Social Security (DSS) asked the AAT to review the SSAT decision that a preclusion period for sickness allowance be calculated with reference to a receipt of compensation of $3406 instead of $53,406.

The facts

Mr Williams was injured in an accident at work in Victoria in August 1990 and received weekly payments of compensation which became subject to appeal. In 1992 he commenced a common law action against his employer, claiming general damages only. At a settlement conference held on 10 February 1993, agreement was reached settling the common law action for $50,000. Mr Williams also accepted an offer to settle the appeal over weekly payments for a lump sum redemption payment of $3406 under s.115A of the *Accident Compensation Act* 1985 (Vic.) and a deed of agreement was signed on 11 February 1993. Mr Williams applied to the DSS for sickness allowance and then disability support pension (DSP). The DSS rejected the claims on the basis that the $50,000 and $3406 were compensation payments and a lump sum preclusion period applied.

The legislation

Section 1165 of the *Social Security Act* 1991 provides that sickness allowance/ or DSP is not payable during a 'lump sum preclusion period', the length of which is calculated by a formula which takes into account the amount of the lump sum compensation payment. Section 17(2) defines 'compensation' and requires that the payment be 'made wholly or partly in respect of lost earnings or lost capacity to earn'. In issue was whether the amount of $50,000 was 'compensation' and the resultant length of the preclusion period.

Both parties agreed that the reason the settlement moneys were divided into two separate payments of $50,000 for general damages and $3406 for pecuniary loss was because it was required to be done that way by the *Accident Compensation Act* 1985 (Vic.) which provided:

- under s.135: that a worker who is or may be entitled to compensation in respect of an injury arising out of, or in the course of, employment shall not, in proceedings in respect of the injury, recover any damages in respect of pecuniary loss; and
- under s.115A: that a person who accepts a lump sum payment under this section is not then entitled to any further compensation under the Act or to recover damages in any proceedings.

(Section 115A(6) specified that a payment under s.115A was a capital sum for loss of earning capacity.)

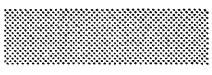
Both parties also agreed that there was no pecuniary loss in the payment of $50,000 standing alone. The issue in dispute was whether the two payments could be aggregated. The DSS, citing *Chidiac* 67 *SSR* 961, argued that as both payments arose out of the same accident they should be aggregated, and that the combined amount of $53,406 should then be characterised as having been made partly in respect of lost capacity to earn as this element was brought in by the s.115A payment.

The AAT distinguished *Chidiac* stating that in that case each payment had been made wholly or partly in respect of lost earning capacity whereas in this case the payment of $50,000 did not involve any compensation for loss of earning capacity and was not, therefore, 'compensation' as defined in s.17(2). The AAT stated there was no justification at law to allow the payment to be aggregated with, and characterised by, the smaller s.115A payment.

Formal decision

The AAT affirmed the decision of the SSAT that the preclusion period be calculated taking into account only the sum of $3406 and remitted the matter to DSS to determine Mr Williams entitlements.

[B.W.]



SECRETARY TO DSS and KILINC

(No. 9200)

Decided: 22 December 1993 by J.R. Dwyer, L.S. Rodopoulos and A.Argent.

On 3 March 1993 Kilinc was awarded $22,500 in compensation as a result of an injury to his back at work. He applied for a sickness allowance and was advised by DSS that he was precluded from receiving a benefit from 3 March 1993 to 7 July 1993. The period was calculated on the basis that $22,500 was a lump sum of compensation. Kilinc requested review by the SSAT which decided that the lump sum compensation was $500. DSS requested review of this decision by the AAT.

On 10 September 1993 the AAT granted DSS a stay order which meant that the SSAT decision would not be implemented until the AAT made its decision.

The compensation settlement

Kilinc issued proceedings in the County Court at common law, and workers compensation proceedings pursuant to the *Accident Compensation Act* (1985) (*AC Act*). Kilinc signed two releases in settlement of these claims. In relation to the common law claim, Kilinc received $22,000 plus costs for the non-pecuniary loss arising out of his work accident. In relation to the workers compensation claim, he received $500 in settlement of his claim for weekly payments and future medical costs pursuant to s.115A of *AC Act*.

Kilinc explained that he had to accept the offers made by the workers compensation authority because he did not have the money to pay the legal costs associated with pursuing his claim. His solicitors told him that his entitlement to a social security benefit would not be affected by this settlement.

The *Accident Compensation Act* (Vic) (1985)

Section 115A(5) provides that a person who accepts a settlement pursuant to this section is not entitled to any further compensation or to recover damages for the injury in any proceedings against the (workers compensation) authority. Therefore, after Kilinc signed the release with respect to his workers compensation claim, he would not be entitled to damages at common law. For this reason Kilinc settled his common law proceedings at the same time as he settled his workers compensation claim.

Section 135 of the *AC Act* stipulates that damages awarded as a result of a common law claim for a work injury, can only be awarded for non-pecuniary loss.

The preclusion period

Pursuant to s.1165(1) and (2) of the *Social Security Act* 1991 the preclusion period is calculated by dividing the compensation part of a lump sum by average weekly earnings. 'Compensation' is defined in s.17(2) as:

'(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) ...

(whether the payment is in the form of the whole or part of a lump sum or in the form of a series of periodic payments) that is:

(e) made wholly or partly in respect of lost earnings or lost capacity to earn...'

Section 17(3) provides that 50% of the lump sum is the compensation part of the lump sum. However, 'lump sum compensation payment' is not defined. So the length of the preclusion period depends upon whether $22,500 is the lump sum compensation payment or $500.

The AAT noted that the $22,000 paid as a result of the common law proceedings is clearly a payment of damages. But because of the wording of s.135 of the *AC Act* the damages were for non-pecuniary loss only and not wholly or partly in respect of lost earnings or lost capacity to earn. On behalf of the DSS it was submitted that the $22,000 was part of a lump sum compensation payment which included the $500. Evidence before the AAT showed that the 2 claims were settled with 2 separate releases and paid with 2 separate cheques. There was no evidence before the AAT regarding the negotiations to settle both claims.

Similar issues were considered in the recent AAT decisions of *Booker* and *Williams* (reported in this issue). The AAT distinguished this case from *Booker* on the basis that Booker had received his compensation in one cheque. In the present case the settlement amounts were paid separately and the AAT had to decide if these two amounts could be treated as one lump sum. In *Williams* the settlement moneys were paid in 2 separate cheques, and the AAT decided that the settlement of the workers compensation claim only was 'compensation' under the SSA.

The AAT then carefully considered the Federal Court cases of *Banks* (1990) 56 *SSR* 762 and *Hulls* (1991) 60 *SSR* 834 and concluded that in *Banks* the court had been considering one sum only which had been paid to a worker, not 2 separate payments as in this case. The payment of $22,000 did not have the characteristic of being 'made wholly or partly in repect of lost earnings or lost capacity to earn'. Similarly *Hulls* could be distinguished because it also referred to one lump sum. Both *Hulls* and *Banks* were concerned with payments which were made as a result of the same proceedings which was not the case here.

On behalf of the DSS it was submitted the the sum of $500 could not represent Kilinc's total loss of future earning capacity. In spite of the legislation, the $22,000 must also represent loss of earning capacity. The AAT agreed:

> 'That submission seems sensible but it ignores the provisions of the Compensation Act [AC Act] . . . We do not see how we can make a finding on the evidence that the $22,000 paid in settlement of the common law claim "is a claim made wholly or partly in respect of lost earnings or lost capacity to earn". Such a finding is required by s.17(2) before a payment can be characterised as "compensation"'.

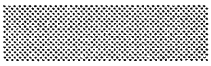
(Reasons paras 24 and 25).

The AAT conluded that the Act worked 'capriciously' so that if the 2 claims were settled with 2 separate cheques then only one amount was caught by the compensation preclusion provisions. This was regarded as an undesirable outcome by the AAT and it recommended that the Act be amended to overcome this 'loophole'. The AAT appreciated that this decision would be 'frustrating to the administrators' but was the only decision possible as the legislation now stood.

Formal decision

The AAT affirmed the SSAT decision and lifted the stay order.

[C.H.]



SECRETARY TO DSS and BOOKER

(No. 9111)

Decided: 9 November 1993 by I.R. Thompson, I.L.G. Campbell and L.S. Rodopoulos.

The respondent was injured in an industrial accident in February 1989. He received weekly payments under the *Accident Compensation Act* 1985 (Vic.) until 19 October 1992. In December 1990 he sued in the County Court for damages in respect of the injuries suffered by him. In July 1992 the Victorian Accident Compensation Commission paid him $22,278 under the 'Table of Maims' provisions of the Act. In September of the same year the common law action was settled for a net amount of $67,722 being $90,000 less the $22,278 already paid under the Act. The respondent was also to make an application to have his weekly payments reduced and to seek a 'redemption payment': that is a redemption of the Accident Compensation Commission's obligation to pay future weekly amounts for loss of earnings or incapacity. This redemption payment was assessed to be about $22,852. In November 1992 the respondent received $90,573.52 (being the sum of $67,722 and the redemption payment of $22,851.52) less $1852.24 tax and $2000 in legal fees. Thus the respondent received a cheque for $86,721.28.

Effect of the lump sum payment

Section 1165 of the *Social Security Act* provides that where a person has received a lump sum compensation payment the person is precluded from receiving payment of job search allowance for 'the lump sum preclusion period'. This period is arrived at by dividing the compensation part of the payment by the current 'average weekly earnings'.

'Compensation' is defined in s.17(2) as covering various payments: a payment of damages, a payment under a scheme of insurance or compensation under a Commonwealth, State or Territory law, a payment in settlement of a claim for damages under such an insurance claim or any other compensation or damages payment other than a payment to which the recipient has contributed. The payment must also have been 'made wholly or partly in respect of lost earnings or lost capacity to earn'.

Section 17(3) states that the 'compensation part' of a lump sum compensation payment is 50% of the payment if the payment is made in settlement of a claim that is in whole or in part, related to a disease, or injury or condition and the claim was settled on or after 9 February 1988.

The DSS had calculated the lump sum preclusion period on the basis of a compensation payment constituted by all three payments received by the respondent.

The SSAT decision

The SSAT had decided that the only payment which was a lump sum compensation payment was the redemption payment received under the Victorian Act. This was because at the time of the County Court claim s.135 of the

Accident Compensation Act precluded claims for damages for loss of earnings or loss of earning capacity. The other payment made under the *Accident Compensation Act* was for loss of function under the Table of Maims and not for loss of earnings or loss of capacity to earn. Thus these two payments did not meet the criteria in s.17(2) of the *Social Security Act*.

The AAT's view

The AAT referred to the decision of the Federal Court in *Banks* (1990) 56 *SSR* 762 which stated the purpose of the provisions as being to prevent double-dipping by providing a rule of thumb which calculated which part of the payment was for lost earnings or lost earning capacity. Without such a provision there might be a problem in determining which part of a lump sum payment was for loss of earnings. This was exemplified in cases where there were claims under different heads of damage and a consent judgment inflated the amount awarded under one head of compensation in order to understate compensation for lost earning capacity so as to defeat the provisions in the *Social Security Act*. The AAT commented that the effect of the SSAT decision was to negate the attempt of the legislation to prevent this occurring.

The Tribunal referred to the decisions in *Hulls* (1991) 22 ALD 570, *Graham* (1993) 75 *SSR* 1093 and *Chidiac* (1992) 67 *SSR* 961 which had dealt with aggregated payments made under different heads or in separate processes. In those case the separate amounts were either regarded as arising out of the claimant's employment or paid in respect of the same incapacity. The Tribunal then concluded:

> 'Having regard to the history of the statutory provisions which preceded those with which we are concerned in the present case, we are satisfied that the amount of $90,573.52 was a lump sum compensation payment. It was paid as the result of negotiations which effectively settled both claims at the same time. Although the precise amount to be paid by way of redemption of the employer's liability to continue to pay compensation for future incapacity or loss of earnings had still to be calculated, that was little more than a formality. What really determined how much it would be was the agreement that the respondent should make formal application for his weekly payments of compensation to be reduced to $30.15 and to request the redemption payment. It was not a matter of chance that the two claims were settled together. That is clear from the two-page agreement and deed of release, which the respondent's solicitors had him sign. The payment of the amounts agreed to was made to give effect to the settlement of the two claims. That they should have been paid together, aggregated into one lump sum, was a natural consequence of those circumstances. It was, we are satisfied, a lump sum compensation payment.'

Loophole?

The AAT commented on the problem that might have arisen if the payments had been made separately. It asked whether that might have prevented the payments being considered as a lump sum. The Tribunal said:

> 'We express no opinion on that question but would suggest that consideration should be given to amending the Act appropriately to ensure that what may be, or at least appear to some to be, a loophole in the provisions intended to prevent "double-dipping" is closed before attempts are made to exploit it, setting off another round of litigation which has dogged those provisions and the provisions which preceded them.'

Formal decision

The AAT set aside the SSAT decision and substituted a decision that the lump sum preclusion period due to the receipt of compensation is to be calculated on the basis that there was a lump sum compensation payment of $90,573.52 of which the compensation part is 50% of that amount.

[B.S.]

Comment

Double dippers or two-time losers?

Victoria's Workcover and the preclusion provisions

The issues raised in *Kilinc* (p. 1125) and *Booker* (p. 1126) are familiar to those working in the compensation and social security jurisdictions in Victoria. Following substantial amendments to the *Accident Compensation Act* (1985) (Vic.) in December 1992, many workers receiving weekly compensation payments were made offers by the workers compensation authority to settle their claims. Often settlement of a workers compensation claim will occur at the same time as any common law settlement, or within a few days. As alluded to in *Kilinc*, a worker must settle the common law claim either at the same time or before settlement of the workers compensation proceedings, or lose common law rights. The DSS has determined that a common law settlement and a workers compensation settlement is one lump sum. Even though at common law a worker is only entitled to non-pecuniary damages, the DSS assesses that payment together with the workers compensation payment as 'compensation'. In *Booker* the AAT agreed with the DSS because the two lump sums were paid in one cheque and 'agreement in respect of each was essential to the overall settlement'. In *Kilinc* the two settlements were paid in two separate cheques, and so the common law settlement was treated separately. The AAT in *Kilinc* did not consider whether the 'agreement in respect of each was essential to the overall settlement'.

In *Kilinc* the AAT suggested that the *Social Security Act* 1991 should be amended to overcome the 'loophole' in the legislation exposed by this case. The Minister proposed to do this by means of the *Social Security (Budget and Other Measures) Legislation Amendment* Bill 1993. In the Senate certain sections were deleted from the Bill and it was eventually passed to become the *Social Security (Budget and Other Measures) Legislation Amendment Act* 1993, No. 121. The sections of the Bill removed by the Senate would have overcome the 'loophole' referred to by the AAT. These sections redefined 'compensation' so that it was no longer connected to loss of income or capacity to earn. However the following sections of the Bill which also amended the compensation preclusion provisions remained in the Bill and became part of the amending Act. A number of these sections refer to the new definition of 'compensation' which is not a part of the Act. Consequently a number of the compensation preclusion provisions are nonsense!

[C.H.]