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SOCIAL SECURITY

Opinion

Compensation payments, retrospective amendments and legal creativity

The provisions in the *Social Security Act* designed to prevent 'double-dipping' by people who have received compensation for work incapacity have always been complex (and have generated a high proportion of the AAT's workload). In May last year, wide-ranging changes to these provisions came into force: see (1987) 40 *SSR* 510.

The new provision centred on s.153, which allowed DSS recovery of various income support payments from compensation awards (sub-s.(2)), and 'precluded' people who had received such awards from being paid invalid pension, and sickness, unemployment and special benefits for a period of time (sub-s.(1)). (The period is calculated by dividing the compensation payment by current ABS figures on average weekly earnings.)

The inadequate drafting of s.153(1) was identified in the AAT's decision in *Tallon* (1988) 43 *SSR* 544. An amendment introduced from 16 December 1987 (also discussed in *Tallon*) attempted to remove the anomaly. However, this amendment still left people who recovered compensation *before* qualifying for pension or benefit unaffected. So the *Social Security Amendment Act* 1988, further amended s.153(1). This amendment was declared to be retrospective to 1 May 1987. It inserted into s.153(1) a phrase presumably intended to preclude a person from pension or benefit whenever the person received a compensation payment after 1 May 1987.

However, the person who drafted the 1988 amending legislation ignored the fact that s.153(1) had two different forms: between 1 May and 15 December 1987, it referred to a person who 'is receiving a pension'; and, from 16 December 1987, it referred to a person who 'is qualified to receive a pension'. Accordingly, the insertion into s.153(1) of the phrase 'or has received (whether before or after becoming so qualified)' achieved the Government's objective as from 16 December 1987 but produced something of a nonsense between 1 May and 15 December 1987.

In *Krzywak* (p.580), the AAT accepted that the meaning of the pre-16 December 1987 form of s.153(1) had not been changed by the 1988 amendment. But the AAT decided that the post-16 December 1987 form of s.153(1) would catch a person who received a compensation payment before that date (but after 1 May 1987) and later qualified for pension or benefit. This was despite the fact that the preclusion imposed by s.153(1), in its post-16 December 1987 form, is not retrospective in effect, although it is

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invoked by the receipt, at any time from 1 May 1987, of a compensation payment.

One interesting feature of the AAT's decision in Krzywak was its acceptance that the retrospective impact of the preclusion provisions and the consequential 'injustice' to the applicant was a 'special circumstance' within s.156, so that the AAT could treat part of the compensation payment as not having been received.

In Jovanovic (p.581) the AAT took a more radical approach to the complexities of s.153(1). It described the terms of the pre-16 December 1987 version of s.153(1) as 'a manifest absurdity' which was 'well nigh incapable of rational interpretation'; and proceeded to resolve this absurdity by consulting the Explanatory Memorandum, as permitted (according to the AAT) by s.15AB(1) of the *Acts Interpretation Act* 1901. The result of doing this was a rewriting by the Tribunal of s.153(1), so as to give it the same form before and after 16 December 1987.

The difficulty with this approach is that it depends on a finding that the pre-16 December 1987 form of s.153(1) produces a result which is 'manifestly absurd'. At the risk of stressing the obvious, it should be noted that it is not enough that the form of words is 'manifestly absurd' - it is the result of those words which must be 'manifestly absurd' before s.15AB can be invoked. What result would that form of s.153(1) produce? Only a form of 'double dipping' by a person who received a compensation payment before applying for pension or benefit; and this would be limited to the period between May and December 1987. Is that result 'manifestly absurd'? If not, then how can the recourse to s.15AB and the rewriting of s.153(1) be justified?

[P.H.]

Administrative Appeals Tribunal decisions

Cohabitation

HAIM and SECRETARY TO DSS (No. Q87/358)

Decided: 2 August 1988 by M. Allen, W.A. De Maria and H.M. Pavlin.

Shirley Haim was granted a supporting parent's benefit on 23 February 1984. This was cancelled on 29 May 1986 and an overpayment of $3108 was raised on the ground that she had been living as the wife of R in a *bona fide* domestic relationship. Haim appealed to the AAT.

The evidence

Haim argued that, whatever the former status of her relationship with R, during the relevant period they were friends who had an 'association for economic purposes'.

Haim had known R since the early 1970s and had purchased a property in the names of Shirley and Gary R as joint tenants. She stated that she and R had a sexual relationship until soon after the birth of her second child. Although Gary R was registered as the father of her child, Haim stated that another man, M, may well have been the father. Haim stated that she had forged R's signature on the birth certificate. Haim had also represented herself to a Finance Company as R's wife, in order to enhance his chances of getting a loan to buy a car. Haim had also used the name R in various other property purchases, and had represented herself as R's wife in other loan dealings.

It appears that, during the relevant period, Haim and R had shared accommodation, partly in rented property and partly in property owned jointly by them. Haim stated that they had spearate bedrooms and led separate lives. Haim said that R did not go out socially.

Haim conceded that she had not always been honest in statements made to the DSS; and the AAT concluded that they would not accept Haim's evidence unless corroborated. In this context, the Tribunal noted Haim's failure to call R as a witness. M, the other possible father of Haim's second daughter, did give evidence. Haim had suggested M had given her an engagement ring; he described it as a friendship ring. A neighbour stated that she thought Haim and M were engaged and that R was not Haim's boyfriend.

The majority's assessment

The majority of the AAT, **Allen and Pavlin,** concluded:

> 'The relationship between the applicant and R is not the normal marriage as might generally be understood. However, in the context of the peer group of the applicant, neither the fact that she apparently also had a co-existing sexual relationship with M, nor that R was not apparently interested in social activities, destroys the composite picture of a couple whose financial and personal affairs were so intertwined that, during the period in question, it can be said that they were not living together as man and wife in a *bona fide* domestic relationship.'

(Reasons, para.46)

The minority view

The other member of the AAT, **De Maria,** noted that Haim had said that she did not get on well with her mother and that she had recently had a few fights with R - which might explain her failure to call them as witnesses. He drew attention to the 'wide frame of reference' of the DSS when it adduced facts which had occurred up to 13 years before the current relevant period; the only relevant evidence, in his view, related to the overpayment period.

In relation to the joint purchase of various properties, De Maria said: 'If the applicant is credible then the home purchases were characteristic of a profit-oriented business relationship she had with R during the overpayment period': Reasons, para.18. In relation to Haim's daughter, he noted that the AAT was looking, not for evidence of paternity but for evidence of fathering, when trying to establish whether there was a *bona fide* domestic relationship between Haim and R. Haim had stated that R had not taken a fathering role, evidence confirmed by R's neighbour.

De Maria concluded:

> '. . . Mrs Haim has not demonstrated to me that she was not living in a *bona fide* domestic relationship with R during the relevant period. But then again neither has the Commonwealth demonstrated that she was. . . When I think of the Haim-R relationship, the word that comes to mind is "convenience", whereas if the Department was to succeed, the word should be "commitment". The Commonwealth did not raise any evidence which suggested that the Haim-R relationship in the relevant period was marked by this commitment to each other. On this point the deficits in the evidence that could lead to a contrary view are striking:
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> (1) no evidence of exclusivity in the relationship;
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> (2) no evidence of care for each other;
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> (3) no evidence of a family relationship which would include Leisha;
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> (4) no evidence of a shared social life (as a pattern);
>
> (5) no evidence of the existence of a household.