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Centrelink preclusion periods: interpreting the 50 per cent rule

'The 50 per cent rule does not apply when a case proceeds to trial . . .'

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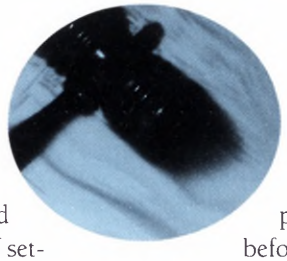
In the recent Federal Court decision of *Secretary, Department of Family and Community Services v Chamberlain*[1], the court considered the operation of the '50 per cent' rule which applies under the provisions of the *Social Security Act* 1991 to determine the period of time in which claimants whose cases are settled will be precluded from receiving Centrelink benefits following receipt of a compensation award.

The court determined that 'unfairness' resulting from the strict application of the 50 per cent rule alone cannot amount to 'special circumstances' under the Act.

BACKGROUND

The plaintiff suffered personal injury in a motor vehicle accident which occurred in January 1999. She was 60 years of age. Prior to the accident, the plaintiff had been in receipt of an age pension and she had previously received a disability support pension.



The plaintiff issued proceedings for recovery of damages. The plaintiff's claim was settled out of court. The total of the compensation was $35,000 plus $4,000 for costs. Of that amount, $31,500 was attributed by the parties to her pain and suffering and medical expenses and $3,500 was for her loss of earnings to the date of settlement and for any future loss of earnings.

The plaintiff's evidence was that the component of $3,500 for past loss of income was on the basis of the loss of opportunity for her to teach music theory after the accident. The Administrative Appeals Tribunal accepted that the amount of $3,500 was 'a token amount of compensation for the loss of her ability to teach due to her loss of concentration as a result of the accident'.

Because a component of the settlement sum represented damages for loss of earnings, Centrelink applied the statutory formula under the provisions of the Social Security Act to determine the period of time in which the plaintiff would be precluded from receiving Centrelink benefits.

In accordance with the statutory formula, 50 per cent of the total settlement sum ($17,500) was taken and then divided by the relevant 'income cut-out amount', as prescribed by the Act. The nett result was that Centrelink determined that the plaintiff was precluded from receiving her pension for a period of 41 weeks, and was required to re-pay Centrelink the sum of $7,643.36, being double the amount she actually received as compensation for economic loss.

The plaintiff appealed, firstly, to the Social Security Appeals Tribunal, and then to the Administrative Appeals Tribunal (AAT) where she was successful. The tribunal found that there were 'special circumstances' arising from the strict operation of the 50 per cent rule in this instance and remitted the matter to Centrelink with a direction that $28,000 of the $35,000 received should be disregarded in calculating the 'lump sum preclusion' period. The critical part of the tribunal's reasoning was as follows:

'Where a settlement sum is specifically itemised and a genuine amount has been set for economic loss, the discretion to disregard some or all of the compensation payment in order to ameliorate the effect of the 50% rule is at least opened up.

This is not a case where there was an attempt to hide compensation for economic loss or to double-dip on the social security system. This is a case where an elderly lady was given a token figure in her compensation payment to cover what was effectively her "play money" – the little extra she earned above her pension to make life that bit easier.

$31,500 was given to her specifically for her pain and suffering and for her medical expenses. By having to pay money to Centrelink out of that figure she is in fact in a worse position than that which the payment intended to put her. This is a case where Centrelink has in effect double-dipped and that can not have been the intention of the legislature.'

Centrelink appealed the AAT's decision to the Federal Court.

ARGUMENT

It was not suggested by either party that there was any error in the calculation of the preclusion period undertaken by Centrelink. The question before the court was whether the unfairness resulting from the strict application of the 50 per cent rule could amount to 'special circumstances' under the Act.

Centrelink argued that the AAT had treated the application of the 50 per cent rule as itself having an unjust result. It contended that the result following the strict application of the statutory calculation cannot be equated with the 'special circumstances' referred to in s1184 of the Act. It also argued that the comparison of what was intended by the parties as the economic loss component, with the amount to be repaid to Centrelink, was not valid since it was clear that the statute did not intend that the component parts of a settlement be taken into account. ▶

FINDINGS

The court found that, unlike a presumption, which may be rebutted by evidence, the purpose and effect of the deeming provision (that is, the 50 per cent rule) is to prevent any attempt, by either party, to prove the truth. The court held that the statutory formula prescribed by the Act is to overcome the need in each case to determine what part of a lump sum compensation payment in truth represents economic loss. It was stated that although the assumptions to be made and the result reached are necessarily arbitrary, it is a course which has to be taken for administrative simplicity.

The court held that the AAT was in error of its assessment of 'special circumstances' and that its decision be set aside.

COMMENT

By reason of the strict application of the 50 per cent rule, the plaintiff was required to repay Centrelink more than double the amount which she recovered for past and future economic loss. The court recognised that the 50 per cent rule may operate at times to achieve an unfair and arbitrary result, but noted that it applies for the sake of administrative simplicity.

The 50 per cent rule does not apply when a case proceeds to trial and there is a verdict by a judge or jury detailing the specific amount awarded as damages for pecuniary loss.[2]

There have been five recent decisions of the Social Security Appeals Tribunal, issued on instruction from the Senior Master's Office of the Supreme Court of Victoria, where the operation of the 50 per cent rule has been able to be avoided to the advantage of the plaintiff.[3] In each of those cases, the plaintiff had been a person under a disability as defined in Order 15 of the Supreme Court Rules. In accordance with the rules, their litigation guardian had been required to make an application to a judge or master to have the proposed compromise of their claim approved by the court.

The Social Security Appeals Tribunal held in each of those five cases that an Order Approving a Compromise of a Claim is not a settlement or a consent judgment within the meaning of section 17(3)(a) of the Act. Accordingly, the tribunal held that it was incorrect for Centrelink to apply the 50 per cent rule when calculating the relevant preclusion periods, and directed that Centrelink take into account the amount which each plaintiff had *actually* received as damages for pecuniary loss. Evidence as to the amount which the respective plaintiffs had actually received as damages for pecuniary loss was able to be obtained from the advices which had been prepared by the counsel acting for the respective plaintiffs at the time that the application for approval of the compromise had been made to the court. PL

Endnotes:

1. [2002] FCA 67 (18 February 2002).
2. Section 17(3)(b) *Social Security Act* 1991 (Cth).
3. *Mason v Secretary, Department of Family & Community Services* (unreported SSAT Appeal No M213581), *Morrall v Secretary, Department of Family & Community Services* (unreported SSAT Appeal No 213580), *Nikoro v Secretary, Department of Family & Community Services* (unreported SSAT Appeal No M213579), *Renna v Secretary, Department of Family & Community Services* (unreported SSAT Appeal No M213582), *Hobby v Secretary, Department of Family & Community* (unreported SSAT Appeal No M214376).