sult of the review, it was discovered Frugtniet was conducting a migration agency business and was also employed until 7 July 2000.

On 11 February 2002, Centrelink raised a debt of newstart allowance encompassing the period 21 August 1998 to 6 July 2000 in the sum of $19,665.85.

The issue

The AAT needed to determine if a recoverable debt existed. More importantly, however, the AAT needed to consider the stringent requirements of the *Data-matching Program (Assistance and Tax) Act 1990* ('the Data-matching Act') and the effect, if any, on Frugtniet's debt.

The law

Section 10 (3) of the Data-matching Act provides that a source agency must commence any action in relation to information it receives within 12 months from the date that it receives the information from the matching agency. Section 11 provides the following:

> Subject to subsections (1A), (1B) and (4), where, solely or partly because of information given in Step 1, 4 or 6 of a data matching cycle, an assistance agency considers taking action:
>
> (a) to cancel or suspend any personal assistance to; or
>
> (b) ... or
>
> (c) ... or
>
> (d) to recover an overpayment of personal assistance made to;
>
> a person, the agency:
>
> (e) must not take that action unless it had given the person written notice:
>
> (i) giving particulars of the information and the proposed action; and
>
> (ii) stating that the person has 28 days from the giving of the notice in which to show cause orally or in writing why the action should not be taken; and
>
> (f) must not take that action until the person has responded orally or in writing to the notice or the 28 days end, whichever occurs first.

Discussion

The Tribunal was entirely satisfied that a debt existed in the calculated sum, and was further satisfied that Frugtniet had knowingly made false statements and could not, therefore, seek the protection of s.1237AAD of the *Social Security Act 1991*.

The Tribunal turned its mind to s.10(3) of the Data-matching Act. Frugtniet argued Centrelink failed to comply with the requirements of that provision as it did not commence action within 12 months of the date it received information from the ATO. The AAT rejected that suggestion, observing that Centrelink received the data match on or about 8 August 2001 and sent a letter pursuant to s.11 of the Data-matching Act on the same day. The AAT was satisfied that it could not be said that Centrelink failed to act within 12 months.

The AAT then considered Frugtniet's contention that Centrelink's data match notice failed to satisfy the requirements of s.11 of the Data-matching Act. The AAT observed that Centrelink's letter of 8 August 2001 disclosed the particulars of the information received from the ATO, but in relation to proposed action, only stated that 'If the ATO records are correct, we might need to adjust the amount of newstart allowance received' (Reasons, para. 40). The AAT observed that no mention was made of the possibility of recovering an overpayment or that newstart allowance would be cancelled or suspended. The AAT also considered the requirements of s.11(1)(e)(ii) and that nothing was said in the letter about the granting of 28 days from the giving of the notice to show cause orally in writing why the action should not be taken.

The AAT commented that the requirement to comply with the Data-matching Act had been held as a strict requirement by the Tribunal in *Sawyer and Secretary Department of Social Security* (AAT 11336, 25 October 1996) and *Secretary Department of Social Security and Southcott* (AAT 11741, 2 April 1997). The AAT concluded that the letter of 8 August 2001 was defective as it failed to give particulars of the proposed action, being recovery of an overpayment, and it failed to advise Frugtniet he had 28 days to show cause why action should not be taken.

Finally, the AAT observed that there was nothing preventing Centrelink from raising and recovering an overpayment as it was open to issue another notice which complied strictly with the Data-matching Act. The AAT observed that was the course adopted in the *Sawyer* and *Southcott* cases.

Formal decision

The AAT set aside the decision and held that all sums recovered towards the debt needed to be refunded to Frugtniet, however, in accordance with s.43(5B) of the *Administrative Appeals Tribunal Act 1975*, decided the decision was not to come into operation before 31 October 2004.

[S.L.]

Age pension: compensation preclusion period; special circumstances

AVANESSIAN and SECRETARY TO THE DFaCS (No. 2004/840)

Decided: 11 August 2004 by R. Hunt.

Background

Avanessian was injured at work in September 1999 aged 64. He could not continue working and, when he turned 65 in April 2000, he claimed and received the age pension. Avanessian received periodic compensation payments until they ceased in April 2001. In March 2003, an arbitrator made an award of $227,906 that included $20,000 for economic loss, plus costs. Centrelink determined that no debt to Centrelink or any preclusion period for a pension payment arose. Avanessian appealed the compensation award. His appeal was settled in August 2003 for $230,000 made up of $180,000 plus $50,000 costs. Centrelink claimed a repayment and applied a preclusion period from 23 April 2001 to 14 November 2004.

Issues

The issue was whether there were any special circumstances to warrant waiving the preclusion period.

The legislation

Subsection 1184K(1) of the *Social Security Act 1991* ('the Act') allows the Secretary to treat the whole or part of a compensation payment as not having been made if the Secretary thinks it appropriate in the special circumstances of a particular case.

Special circumstances

Avanessian's wife appeared on his behalf as he suffered severe depression which caused him to become very agitated easily. He did not attend the hearing. She told the Tribunal that she and Avanessian believed that no part of the damages award settlement would have to be repaid to Centrelink and that there should be no effect on Avanessian's age pension entitlement. Their solicitors had given them this advice. Before the Tribunal were copies of letters from the solicitors giving this advice and also referring to advice from Centrelink that there would be no preclusion or repayment required.

Avanessian's wife advised the Tribunal that the couple's only source of income was her Carer's Allowance. She

then accounted for the dispersal of the bulk of the settlement monies remaining after repayment to Centrelink. This included rent to a community housing organisation; additional expenses incurred for their accommodation such as gardening and maintenance fees, electricity; heavy pharmaceutical expenses; illness and death of her father in Armenia; a visit to Australia from a relative; dental and medical expenses; and repayment of loans from her daughter including an additional $30,000. Avanessian's wife further explained that she spent an unusual amount on food and grooming. She told the Tribunal that she had health problems including serious dental problems; had an extremely high cholesterol level which meant she had to buy the most expensive cuts of meat and other produce. She further explained that because her husband was confined to the house all day, had limited mobility and suffered from severe depression, she placed a lot of importance on taking him on excursions. When they went on such trips, they would sit in the open and she would buy coffee and cake while they sat.

The Department submitted that self-induced financial hardship should not be considered special circumstances for reduction of the preclusion period. The Department submitted that the daughter of Avanessian's wife had not earned any income for some of the period of the loans she advanced. It also argued that it is not the fault of the Secretary that the couple are in their current situation. Instead it was the incorrect advice from their specialist accredited solicitor which meant that Avanessain relied on outdated Centrelink advice in agreeing to the terms of the settlement and arranging his financial affairs.

The Tribunal found that the consequences of Avanessian's accident were more severe and long term than had been expected. Avanessian received less as a result of the settlement than he would have received under arbitration; the reduced amount received together with the debts already incurred by him and his wife led to the rapid disappearance of the award. As a result Avanessian had not been receiving the treatment he needed for either his physical problems or his depressive condition and Avanessian's wife had not been able to obtain expensive dental treatment for herself and was managing with temporary repairs. The couple also received no concession fares for travel or other benefits given to social security pension recipients.

The Tribunal relied on *Secretary, Department of Social Security and Bolton* (1989) 18 ALD 464 to look at a global assessment of the circumstances. It noted that additional factors may influence a Tribunal decision, apart from reliance on negligent advice. The Tribunal had listed factors for and against exercising the discretion for special circumstances in *Secretary, Department of Social Security and Gibala* (1989) 17 ALD 441. The Tribunal considered that the only factor against exercising the discretion was the $30,000 given to the daughter. But it found this was a small sum compared to the likely continuing medical and other essential expenses for the couple as a result of Avanessian's injuries. The Tribunal found that the factors for exercising the discretion included frankness of disclosure, failure by the Department to advise of the preclusion provisions, good faith of the applicant including failure of his or her solicitor to advise, and the health of the applicant.

The Tribunal noted that several other cases indicated that failure by solicitors to advise of a preclusion period is not a persuasive factor in establishing special circumstances. But it also referred to a range of cases that left open the possibility of it being relevant in some cases: *Secretary, Department of Social Security and VXY* (1993) 30 ALD 681, *Secretary, Department of Social Security and VYS* (1995) 40 ALD 745, *Comcare v A'Hearn* (1993) 119 ALR 88, *Secretary, Department of Social Security and Hickman* (1996) 43 ALD 75.

The Department submitted that the Tribunal should have regard to all the circumstances and that the special circumstances must be something more than hardship. The person needs to be in unusual, uncommon or exceptional circumstances to justify consideration under s.1184K of the Act. *Beadle v Director General of Social Security* (1985) 60 ALR 225 is also authority for the proposition that where a person is misled by a departmental officer or where unfair or inappropriate circumstances arise through the negligence of a third party, these factors may be special circumstances.

The Department argued that it was the responsibility of Avanessian's solicitor to correctly advise him of the legal position. The Tribunal noted however:

> the obligation of the solicitor or professional adviser may not entirely absolve Centrelink from blame for the misunderstanding. The Secretary must be aware that applicants rely on advice furnished by his Department and that there is potential for a misunderstanding where no caveat is attached to an estimate of liability in particular cases. In any event, the Full Federal Court in *Beadle v Director General of Social Security* (1985) drew no distinction between a misunderstanding caused by the department in question and a third party.

(Reasons, para. 15)

The Tribunal found that of the net amount received by Avanessian — $126,652.24 — almost $100,000 was disbursed in ways that were not reckless, self induced or entirely inappropriate. Only $30,000 was a self-induced deprivation. Avanessian's condition had deteriorated seriously and he was unlikely to improve greatly due to his age and especially as he could not afford treatment. The suffering of Avanessian and his wife was something out of the ordinary and to prolong it unduly would be unjust. The Tribunal noted there were a range of cases that supported ill health resulting in increased medical costs and an incapacity to engage in paid employment being considered relevant to finding special circumstances.

Additionally, the Tribunal considered a further relevant factor was the presence of cultural perceptions: *Secretary, Department of Social Security v Thompson* (1994) 53 FCR 580 and *Secretary, Department of Social Security and Ah Sam* (AAT 9699, 25 August 1994).

The Tribunal found the couple were suffering extreme hardship and that the preclusion period should be reduced. The Tribunal considered that as Avanessian was left with approximately one quarter of his award after deductions, his preclusion period should be reduced to a similar degree.

Formal decision

The Tribunal set aside the decision under review and substituted a decision that the length of the preclusion period should be reduced by 30 months.

[M.A.N.]