

Sickness benefit: obligation to refund

IVOVIC and DIRECTOR-GENERAL OF SOCIAL SERVICES

(No. V81/21)

Decided: 15 July 1981 by A.N. Hall, J.G. Billings and W.B. Tickle.

Predrag Iovic was injured in a motor vehicle accident in October 1974. He returned to his job after seven weeks off work but, in August 1976, he was forced to give up work.

On 13 June 1978 he applied to the DSS for sickness benefit which was granted with effect from 1 June 1978 and paid until 7 November 1979. A total of \$6607.64 was paid during this period. (In November 1979, Iovic was accepted as qualified for an invalid pension; and he was still being paid this pension at the time of his AAT appeal.)

In 1979 Iovic began an action in the Supreme Court of Victoria against the owners of the motor vehicles involved in the accident. This action was settled for \$75 000 plus costs in April 1980. Iovic, his solicitors and the third party insurers of the motor vehicles had been notified by the DSS (before this settlement) that, upon any settlement of Iovic's claim, the payments of sickness benefit were repayable to the DSS.

Under the terms of settlement, Iovic and his solicitors undertook to pay out of the \$75 000 any money owing to the DSS and to indemnify the defendants against any claim brought by the DSS.

On 23 July 1980, Iovic's solicitors requested the DSS to waive repayment of the \$6607.64. On 28 August the DSS refused to waive repayment. An appeal was then lodged to an SSAT, dismissed by that Tribunal and, on 3 February 1981, a delegate of the Director-General affirmed the decision not to release Iovic from his liability. Iovic then applied to the AAT for review of this decision.

The obligation to repay sickness benefit is created by s.115(4) of the *Social Services Act*:

115. (4) Where —

- (a) a person has received, in respect of an incapacity by reason of which he became qualified to receive a sickness benefit, a payment of the kind referred to in sub-section (1); and
- (b) the whole or portion of that payment is in respect of a period in respect of which sickness benefit has been paid to him without reduction in accordance with sub-section (1),

that person shall be liable to pay to the Director-General an amount equal to so much of the benefit as would not have been paid if the rate of the benefit had been so reduced.

Subsection (1) refers to 'a payment by way of compensation in respect of the incapacity by reason of which he is qualified to receive that sickness benefit'.

Section 115(4A) gives the Director-General a discretion to waive payment:

115. (4A) Where the Director-General is satisfied that special circumstances exist by reason of which a person liable by virtue of the last preceding

sub-section to pay an amount to the Director-General should be released in whole or in part from the liability, the Director-General may release the person accordingly.



The Argument

It was the Director-General's refusal to exercise this discretion which Iovic challenged before the AAT. The 'special circumstances' which, according to Iovic justified an exercise of this discretion were:

- (1) his solicitors had accounted to him for all the settlement moneys;
- (2) these moneys had been committed to the construction of a house for himself and his family;
- (3) due to rising building costs, this house was uncompleted although habitable (its estimated cost of construction was \$80 000; while the funds available to Iovic, after meeting other liabilities, were no more than \$51 000);
- (4) Iovic had no further borrowing capacity (to raise funds to complete the house);
- (5) Iovic had accepted a 'compromise' settlement of \$75 000 in the belief that no money was to be repaid by him to the DSS (otherwise he would not have accepted the settlement); and
- (6) the only way in which he could repay the \$6607.64 was by selling his uncompleted house, which was the only shelter available to him and his family.

The AAT's findings on the facts

The AAT found that Iovic and his solicitors had, well before the settlement, received full notice of his potential liability to repay the sickness benefit payments; that, at the time of the settlement, Iovic was fully aware of his liability; that he was fully aware of his liability at the time that he undertook to construct his new house; and that it should have been clear to him that 'by proceeding with the proposed construction it would place it beyond his capacity to pay the sum of \$6607.64': Reasons for Decision, para. 46.

The AAT accepted 'that it may well impose hardship on the applicant and his family' if he had to sell the uncompleted house in order to repay the DSS; but this hardship was of his own making, 'due to

his decision to proceed with the construction . . . which was beyond his financial resources . . . without making any provision for payment of his acknowledged debt': Reasons for Decision, para. 47.

'Special circumstances'

Earlier, the AAT had said that it would be unwise to specify 'what may amount to "special circumstances" for the purposes of s.115(4A)': the sub-section allowed the Director-General 'the fullest opportunity to consider the particular circumstances of each case'. The AAT continued:

The reference to special circumstances 'by reason of which' a person liable 'should be released' requires, in our view, that there must exist in the circumstances of the case, a factor or factors which justify the making of an exception in whole or in part to the principle of liability which the Act otherwise establishes. In the exercise of the discretion which s.115(4A) confers, the decision-maker must have regard to whether, by exercising the discretion in a particular case, he will be achieving or frustrating ends or objects which are conformable with the scope and purpose of the Social Services Act 1947: cf. *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J. Thus whilst keeping the dominant principle of s.115 in mind, he must nevertheless be prepared to respond to the special circumstances of any particular case by reason of which strict enforcement of the liability created by the section would be unjust, unreasonable or otherwise inappropriate.

(Reasons for Decision, para. 45.)

Adopting that approach, the AAT decided as follows:

We see no reason consistent with the scope and object of the Act why the applicant should be allowed to retain the double advantage of sickness benefit and damages in respect of the same period of incapacity. On the contrary, the evidence suggests that the applicant has either deliberately or recklessly embarked on a course of conduct which has created the circumstances of hardship on which he now relies. He has chosen to use the money due to the Director-General rather than set it aside pending the outcome of his appeal. To acknowledge those circumstances as 'special circumstances' for the purposes of s.115(4A) would place in jeopardy the consistent application of s.115 of the Act.

(Reasons for Decision, para. 50.)

The AAT concluded with a criticism of Iovic's solicitors (who had 'contributed to the problem' by accounting to their client for all the settlement moneys despite their undertaking and despite the notice from the DSS). If they had retained the \$6607.64 in their trust account, 'much of the applicant's present hardship might thereby have been avoided': Reasons for Decision, para. 51.

However, the AAT recommended that 'the Director-General should allow the applicant every opportunity to re-organise his affairs . . . so as to enable him to meet his liability without undue hardship': Reasons for Decision, para. 54.