

Sickness benefit: workers' compensation settlement

EDWARDS and DIRECTOR-GENERAL OF SOCIAL SERVICES

No. V80/72

Decided: 31 July 1981 by Ewart Smith, W.B. Tickle and I. Prowse.

John Edwards suffered a back injury (apparently in the course of his employment) in November 1973. Between 30 May 1977 and September 1978 he was paid sickness benefit on the basis that he was unfit for work: the reasons for this unfitness were specified in various medical certificates (each covering different periods) as 'back pain', 'back operation' and 'severe mental depression'.

Edwards had, meanwhile, begun common law and workers' compensation proceedings against his former employer. The common law proceedings were settled on 7 April 1978 (no details were provided to the AAT but it is clear that the terms included a payment by way of damages to Edwards).

On 18 April 1978 the Victorian Workers' Compensation Board made a consent award in Edwards' workers' compensation claim. The award included a payment to Edwards by the employer of \$4997 for medical expenses and a lump sum (not specified in the AAT's Reasons for Decision) 'in full settlement of all other forms of future compensation'.

On 12 September 1978, the DSS granted an invalid pension to Edwards, backdated to 22 June 1978. On 11 September 1978 the DSS requested Edwards to repay the sum of \$938.88 being the amount of sickness benefit paid from 18 April 1978 (the date of the compensation award) to 22 June 1978. The DSS took the view that payments before 18 April 1978 were not recoverable because the workers' compensation award included no payment to Edwards for any loss of earnings before 18 April 1978. (See the terms of s.115 of the *Social Services Act*, summarized below.)

In March 1979, the DSS confirmed its decision to demand repayment. On 20 November 1979, Edwards appealed to an SSAT. On 9 December 1980 the SSAT recommended dismissal of this appeal and, on 10 December 1980 a delegate of the Director-General affirmed the decision to demand repayment. Edwards then applied to the AAT for review of that decision.

The issues

Section 115(4) makes a person, who has received both sickness benefit and a compensation payment for the same incapacity (for the same period), liable to repay the sickness benefit. (Section 115(4A) gives the Director-General a discretion to waive

repayment in 'special circumstances': see *Ivovic* in this issue of the *Reporter*.) Section 115(2) was the critical provision in this case. It deals with the difficult question of how to treat a lump sum compensation payment:

(2) Where a person is or has been qualified to receive a sickness benefit in respect of an incapacity and the Director-General is of opinion that the whole or a part of a payment by way of a lump sum that that person has received, or is qualified or entitled to receive, can reasonably be regarded for the purposes of this section as being a payment that —

(a) is by way of compensation in respect of the incapacity; and

(b) is in respect of a period during which that person is or was qualified to receive that sickness benefit,

the payment, or that part of the payment, as the case may be, shall, for the purposes of this section, be deemed to be such a payment.

The AAT isolated two questions which had to be resolved under these provisions:

(1) Were the sickness benefit and the compensation payment for the same incapacity?

(2) What proportion (if any) of the compensation covered the period for which sickness benefit had been paid?

(1) Identity of incapacity

Edwards had argued that some of the sickness benefit payments between 18 April and 22 June were for 'mental depression' rather than 'back pain'; but that the compensation award was for his back injury. Two medical certificates covered different parts of this period: one, for the period to 23 May, specified 'mental depression'; and the second specified 'back operation'.

However, the surgeon who signed these certificates told the AAT that, during the whole April-June period, Edwards 'was suffering from a back injury with associated mental depression'; and that the mental depression 'grew out of and was related to the back problem'.

Therefore, the AAT said, there was an identity of incapacity: that is, the sickness benefit and the compensation award were paid for the same incapacity.

(2) Apportioning the Lump Sum

Where workers' compensation is provided by way of regular weekly payments, there is little difficulty in establishing whether that payment covered the same period as any sickness benefit payment. But the compensation paid to Edwards was a lump sum payment intended to cover future loss of earnings. No doubt some part of that payment was meant to cover the two months immediately after the awards — that is, the period for which the DSS now sought to

recover the sickness benefit payment: but how much of the lump sum payment was intended to cover that period? This was the critical question because s.15(4) limited the DSS's right of recovery to an amount equal to the amount of compensation paid for the relevant period.

Section 115(2) required, said the AAT, 'a deliberate and proper decision' (rather than 'some sort of estimate') about what part of the lump sum could 'reasonably be regarded' as made for the relevant period.

It seems that the DSS had apportioned a substantial amount of the lump sum settlement to the April-June 1978 period — enough to eliminate entirely the payment of sickness benefit in that period. (The basis of this apportionment was not revealed to the AAT.) The AAT referred to its understanding that the workers' compensation settlement was intended to cover loss of future earnings and that its calculation may have been influenced by many factors: including the nature and permanency of Edwards' incapacity and doubts about liability. The Tribunal concluded:

44. In the circumstances of this case, and in light of the foregoing, we think that the proper approach, in ascertaining what part of the lump sum may reasonably be regarded as a payment of compensation in respect of the period of some two months in question, is to take the lump sum as awarded and divide it by the number of weeks of working life (ie to age 65) remaining to the applicant at the date of the award and to multiply the result by the number of weeks in the period during which sickness benefit was paid after 18 April 1978. We point out that s.115(2) refers to the lump sum itself, and not to what it might, if invested, bring in or become. In apportioning the lump sum over the balance of the applicant's working life, we have had regard to the nature and degree of the applicant's injuries and the likelihood that they would, at least in his assessment of the situation, continue indefinitely and possibly permanently. We think that, in arriving at a method of apportionment in cases such as this, where certainty is necessarily elusive and some degree of speculation is involved, a method that favours the individual rather than the Commonwealth is to be preferred. On the basis of the method we have adopted, the amount that will be repayable by the applicant under s.115(4) will be considerably reduced.

45. We think the appropriate course in light of the foregoing is to set aside the decision of the delegate of the Director-General for Social Services and to remit the matter for reconsideration on the basis that the amount of the lump sum to be regarded as payment by way of compensation in respect of the period after the award was made is to be ascertained in accordance with the preceding paragraphs.

Child endowment: late application

de GRAAF and DIRECTOR GENERAL OF SOCIAL SERVICES

(No. N80/125)

Decided: 7 August 1981 by R.K. Todd, I. Prowse, and M.S. McLelland.

Susan de Graaf gave birth to her first child on 21 November 1973. She applied for and received child endowment for this

child. On 29 September 1976 she gave birth to a second child. According to the records of the DSS, she applied for child endowment (now generally called 'family allowance', but still referred to as 'child endowment' in the *Social Services Act*) on 15 April 1980.

The DSS granted the endowment for

the second child from 15 April 1980, saying that there were no 'special circumstances' to justify the late lodgment so as to authorize payment as from the date of birth of the child. Section 102(1) authorizes the Director General to backdate payment of child endowment if the Director General is satisfied that there