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 sun 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 aplicant 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

are 'special circumstances' for the late lodgment of a claim: the terms of the provision are set out in *Wilson*, in this issue of the *Reporter*. The applicant appealed to an SSAT and then to the AAT.

The applicant told the AAT that she had lodged her claim for the second child shortly after the child's birth. At about that time, the quarterly payments of child endowment being credited to her savings bank account had increased and she had assumed that her claim had been processed. It was only in April 1980 that de Graaf discovered that the increase was due to an increase in the rates of child endowment for all children, effective from 15 June 1976, and that she was being paid endowment for her first child only.

The AAT concluded that it was not satisfied that de Graaf had lodged her claim for the second child, as she had claimed; although the AAT said:

> [W]e consider that she honestly believes and at all times believed, that she had lodged the claim. The Tribunal feels that it can accept that a woman who has just gone home with a new baby and to a three year old first child is subject to pressures that may well lead her to make mistakes with the lodging of forms.
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> (Reasons for Decision, para. 5.)

Late lodgment and 'special circumstances'

The AAT observed that the internal DSS Instructions declared that late lodgment should only be allowed (for the purposes of backdating) in 'most exceptional' circumstances. 'These', said the Tribunal, 'are not the words of the Act'. The AAT was 'concerned only with the statutory expression': Reasons for Decision, para. 6.

The AAT took the view that the 'special circumstances' which would justify late lodgment should relate 'to the question of lodgment and not to her circumstances generally': Reasons for Decision, para. 9; but the AAT were clearly prepared to take a relatively non-restrictive view of 'special circumstances' for the purposes of s.102(1):

> 8. What are 'special' circumstances must be judged in the light of all of the relevant circumstances of each particular case as seen in the context of the relevant statutory provisions. In other areas of the law where lapse of time may make it difficult for the circumstances to be investigated or assessed (as for instance in the case of claims for damages in relation to highway or industrial accidents) lapse of time may be very important. Justice to other parties may there demand promptness of action, or at all events compliance with statutory time limits as to giving notice of intended claims or as to commencement of proceedings, as the rule rather than the exception. But how strong should be the demand for promptness in the case of an application for child endowment by a wife and mother in respect of a child of the marriage who has never been out of the custody, care and affection of its parents? The family are not well off. The father is a roof tiler. They cannot afford to send Meegan to pre-school more than two days a week because of the costs involved. We were told by the representative of the respondent that there were reasons why in some cases a longer time should not be allowed, as where a child had been with foster parents or in a home. Departmental instructions which were put before us indicate as factors that would militate against paying arrears over a lengthy period the retention of files and other records for an undue length of time in order to to be satisfied that payment had not been made to another person or institution, and the requirement contained in s.105 that family allowance be applied to the maintenance, training and advancement of the child. But however relevant these factors might be in an appropriate case, none of them are apposite here. The only one that needs to be mentioned relates to the requirements of s.105. We are satisfied from evidence of the applicant directed to this point that her intentions are to use the child endowment for the benefit of Meegan in ways that respect the requirements of the section.
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> 9. It would not be possible to lay down a complete catalogue of the circumstances that should be seen as special in relation to late lodgment. Here, however, the circumstances were in our opinion special enough. The applicant made a mistake. She appears to have failed to lodge her claim, but she did not realise that she had so failed, for reasons which to us are quite explicable.

The AAT concluded that these special circumstances justified extending the time for the lodgment of the claim to 15 April 1980, the day after she actually lodged her claim. Consequently, payment of the endowment would be backdated to the birth of her second child.

Handicapped child's allowance: late application

WILSON and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. V81/40)

Decided: 21 August 1981 by Ewart Smith, W.B. Tickle, and M.J. Cusack.

On 25 January 1974 Valerie Wilson gave birth to a child who was diagnosed as suffering from a 'hole in the heart' defect. The child required a great deal of medical treatment and care from his parents.

On 23 September 1980, Wilson applied to the DSS for a handicapped child's allowance, payable under s.105J of the *Social Services Act:*

> 105J. Subject to this Part, where a person who has the custody, care and control of a severely handicapped child provides, in a private home that is the residence of that person and of that child, constant care and attention in respect of that child, that person is qualified to receive a handicapped child's allowance in respect of that child.

A Commonwealth Medical Officer certified that the child was a severely handicapped child and recommended some back payment – 'e.g. 6 months'.

The DSS accepted that the child had been severely handicapped from shortly after his birth but decided that it would only pay the allowance from the date of Wilson's application. The commencement date for a handicapped child's allowance is controlled by s.102 (dealing with child endowment), which applies to handicapped child's allowance through the operation of s.105R:

> 102. (1) Subject to the next succeeding sub-section, an endowment granted to a person (other than an institution) shall be payable –
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> (a) if a claim is lodged within six months after the date on which the claimant became eligible to claim the endowment, or, in special circumstances, within such longer period as the Director-General allows – from the commencement of the next endowment period after that date; or
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> (b) in any other case – from the commencement of the next endowment period after the date on which the claim for endowment is lodged.

The DSS conceded that Wilson had become eligible for the allowance on 30 December 1974 – the date when the amendment to the *Social Services Act*, introducing handicapped child's allowance, came into effect.

Wilson appealed to an SSAT against the refusal to backdate the allowance. The SSAT rejected this appeal and a delegate of the Director General affirmed the original decision. Wilson then appealed to the AAT.

Late lodgement and 'special circumstances'.

The question before the AAT was whether there were 'special circumstances' to explain the delayed lodgment of the claim so as to justify payment of the allowance from the date of eligibility (30 December 1974). (As the AAT pointed out, 'the terms of s.102(1) do not enable any halfway course to be adopted': the payment could be backdated almost six years if there were 'special circumstances'; if there were not, the payment could not be backdated at all.)

The applicant claimed that there was a variety of 'special circumstances' to explain the late lodgment of her claim. These were summarized by the AAT as follows:

(a) Neither the applicant nor her husband was aware of the existence of the relevant legislation or the availability of the allowance until last year.

(b) The doctors and social workers whom they could have expected to bring the matter to their attention did not at any time do so.

(c) A child suffering from a heart defect as in the case of her child would not be thought of commonly as a handicapped child.

To these might be added (though the point was not made as specifically as (a), (b) and (c)), the point that the Department of Social Security had not adequately brought the existence of the legislation, and in particular the meaning it attributed to "handicapped child", to the attention of the general public, so that persons eligible for assistance would know they could claim.