Sickness benefit: loss of income

S.B. and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N80/131)

Decided: 9 October 1981 by R.K. Todd, I. Prowse, M.S. McLelland.

S.B., a woman born in 1961, enrolled as a full-time student at a college of advanced education in February 1980. At about the same time she became seriously ill and was unable to attend any classes. She spent two months in hospital in March and June 1980.

On 10 July 1980 she applied to the DSS for sickness benefit and this was granted. She then asked for payment of the benefit to be back-dated to February 1980. The Director-General refused to exercise his discretion (under s.119(3) of the *Social Services Act).* S.B. applied to the AAT for review of that decision.

Telephone hearing: S.B. was unable, because of her illness, to travel to Sydney to give evidence to the AAT. The Tribunal overcame this problem by arranging for S.B. to give sworn evidence by telephone; and the AAT indicated that this procedure could be used in other cases – depending 'solely [on] the circumstances of each particular case': Reasons for Decision, para. 8.

Back-payment: Sickness benefit is payable from seven days after the date of incapacity if the claim is lodged within 13 weeks. If the claim is lodged outside that period (as it was here), the benefit is payable from the date of the claim, 'unless the Director-General is satisfied that the failure to lodge the claim within that time was due to the incapacity or to some other sufficient cause': s.119(3) of the *Social Services Act.*

S.B. claimed that there was in her case a 'sufficient cause' for the late claim: she had not known of the availability of sickness benefit until told of it by a hospital cleaner in July 1980.

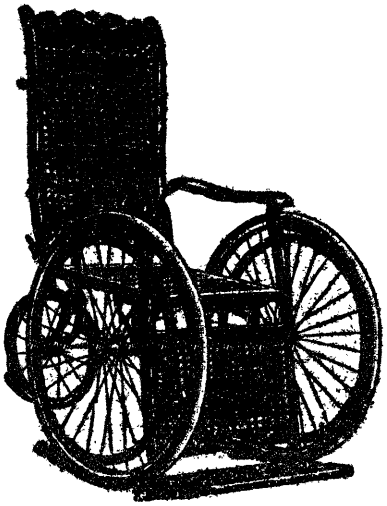
The AAT found it unnecessary to decide whether this ignorance was a 'sufficient cause' within a s.119(3), although it referred to *Wheeler* (1 *SSR,* p.3) where the applicant's ignorance had not been regarded as a 'sufficient cause';

Date of entitlement: It was unnecessary to decide this question because, the AAT said, S.B.'s qualification for sickness benefit only dated from July 1980. Section 108(1) lays down the qualifications for sickness benefit. These are age (para. (a)), residence (para, (b)), temporary incapacity for work (para. (c)) and a consequential loss of salary wages or other income (also para. (c)).

The problem faced by S.B. was that, when she became incapacitated, she was a full-time tertiary student. The Tribunal decided that, at the time of her incapacity, she could not have lost any income. And, so long as she remained a student, she could not be said to have lost income. The AAT continued:

> The position cannot of course be that, having become too sick to be a student, and being unable to enter the work force either, her characterization as a person who 'has . . . suffered a loss of income' through being 'incapacitated for work by reason of sickness' became indefinitely postponed. There must be a point at which it can be said that, at least for the time being, the determination to be a student had been thwarted and that she had become a person who but for the incapacitating sickness would have sought to enter the workforce. Even then a possible illogicality is apparent, for had she not had the incapacity she would not have given up being a student and would not have contemplated entering the workforce. Nevertheless what we have set out seems to be the only sensible solution to the dilemma.

(Reasons for Decision, para. 13)



Reviewing the evidence in this case, the AAT decided that S.B. had hoped to resume her studies until the end of the first semester at her CAE. It was only when the second semester began in July 1980 that she gave up any hope of undertaking her course of studies. That was the critical moment at which entitlement to sickness benefit arose. Fortuitously, it was at about that time that S.B. applied for benefit. Accordingly, 'the decision to grant benefit from 10 July 1980 was justified and proper': Reasons for Decision para. 14.

KEATING and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. W81/6)

Decided: 29 October 1981 by G.D. Clarkson, J.G. Billings and F.A. Pascoe.

On 16 February 1981, Oisin Keating was granted sickness benefit by the DSS. He had been receiving unemployment benefit of $53.45 a week – the appropriate rate for a person over the age of 18 years and without dependants: s.112(b) of the *Social Services Act.* Although the rate of sickness benefit for the same person was $66.65 a week (s.112(1)(c)(iii), as indexed by s.112AA), the DSS fixed Keating's sickness benefit at $53.45 a week.

Keating applied to the AAT for review of this decision.

The AAT pointed out that the rate of sickness benefit payable under s.112 is limited by s.113 which reads:

> 113. Notwithstanding anything contained in this Part, the rate of sickness benefit (including any supplementary allowance) per week payable to a person shall not exceed the rate of salary wages or other income per week which, in the opinion of the Director-General, that person has lost by reason of his incapacity.

In addition, s.109(1) says that, in order to qualify for sickness benefit, a person must satisfy the Director-General that, because of sickness or accident he has 'suffered a loss of salary wages or other income'. Section 122(1) declares that the 'cessation of unemployment benefit' when a person transferred from that benefit to sickness benefit, shall 'be regarded as a loss of income by that person'.

The AAT concluded that these provisions (in particular, s.113), limited the amount of sickness benefit payable to Keating to $53.45 – the rate of his unemployment benefit – and it affirmed the decision under review.

[**Note:** This decision raises a question (not discussed by the AAT) similar to that involved in *S.B.* (noted in this issue of the *Reporter*): if a person is paid sickness benefit over an extended period, should that person's loss of income be determined only by looking at her or his situation at the beginning of that period? Or is it more sensible to assume that the person's circumstances might have changed (if it had not been for the sickness) – that, for example, Keating might have found a job in March 1981? In *S.B.*, the AAT did look carefully at the changes in the applicant's situation during the course of her sickness; and the Tribunal decided that, although she had lost no income when she first became ill, she should be regarded as losing income from about the fourth month of her illness.

It could be argued that, while Keating lost income of only $53.45 a week when he first qualified for sickness benefit, his subsequent loss of income (because of his inability to take any employment which might be offered to him) was very much greater. This type of speculation is difficult, but it is not impossible to attempt a rational estimate. However, the question was not raised by the AAT.]