The Tribunal found that Young may have exerted only minimal control over Tozer's children but that was not 'in any way abnormal or unusual these days in a *de facto* marital-type relationship when the woman concerned has long held the custody of her children who are well grown'.

The AAT said it was 'beside the point' that Tozer and Young claimed their relationship was not permanent and that Young claimed to be unwilling to share his assets with Tozer:

> Both factors could, I apprehend, commonly be found in a *de facto* marital-type relationship these days, and might well, one would think, in many instances provide some of the reasoning behind a decision of the parties not to transmute a '*de facto*' into a 'legal' marriage situation.

(Reasons for Decision, para. 10)

The Tribunal said that factors, such as the household sharing meals, the 'mutual society in watching television', infrequent outings, and the constant use by Tozer of one of Young's cars, would indicate to neighbours and others that Tozer was in a *de facto* 'marital-type relationship'. Thus, Mrs Tozer was 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him'.

Formal decision

The Tribunal affirmed the decision under review.

Sickness benefit: loss of income

RUCEVIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/392)

Decided: 30 September 1982 by E. Smith.

Mirko Rucevic had been dismissed from his job in November 1974, following an industrial injury. In December 1974, he was granted unemployment benefit and this was paid until April 1980, at the rate fixed for a person aged over 18 with no dependents: s.112(1)(b) of the *Social Security Act*.

In April 1980, Rucevic was transferred from unemployment benefit to sickness benefit. This benefit was paid at the same rate as his unemployment benefit. The rate of sickness benefit for a person in Rucevic's position would normally have been higher because it was (and is) adjusted every six months in line with CPI movements: ss.112(1)(c) and 112AA of the *Social Security Act*. (On the other hand, unemployment benefit for a person without dependents is not indexed.)

Rucevic applied to the AAT for review of the decision to pay sickness benefits at this lower rate.

Sickness benefit limited to 'loss of income'

The AAT pointed to s.113 of the Act:

> 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.

Section 122 of the Act provides that, for a person transferring from unemployment to sickness benefit, 'the cessation of the unemployment benefit paid to that person shall, for the purposes of this Act, be regarded as a loss of income by that person . . .'

The Tribunal said that s.113 was 'an overriding provision . . . that operates to limit the amount otherwise payable' to a sickness beneficiary. Therefore,

> the applicant could not, leaving aside for the moment the supplementary allowance he was being paid, lawfuly be paid more than the rate applicable to the unemployment benefit plus any other income he lost by reason of his incapacity . . . There was no evidence before the Tribunal that he was in fact earning any other income at the time he transferred to sickness benefit or was prevented by sickness from earning any other income he was about to earn.

(Reasons for Decision, para. 8)

Furthermore, the supplementary rent allowance (then a maximum of $5 a week) payable to a sickness beneficiary after six weeks (s.112A of the Act) was not payable to unemployment beneficiaries. Therefore, the amount of that allowance 'could not . . . be "income" that the applicant lost by reason of his incapacity' and a person transferring from unemployment to sickness benefit could not be paid this allowance: Reasons for Decision, para. 9.

Law reform

The Tribunal observed that this result 'may seem unjust' but that was the effect of the legislation. It was a matter for the DSS and the Parliament to consider changing the Act.

Formal decision

The AAT affirmed the decision under review.

Overpayment: deduction from current benefit

SCHUSS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/183)

Decided: 28 September 1982 by J. B. K. Williams.

Robert Schuss (who had a dependent wife) had been paid unemployment benefit from July 1978 to July 1979 and from January 1980 to the time of the AAT hearing. When claiming the benefit, Schuss had stated that neither he nor his wife were receiving any income.

In April 1980, the DSS established that Schuss had received income in connection with his CMF training. The DSS decided that, to the end of April 1980, Schuss had been overpaid $1125 and that this should be recovered by deducting $10 a week from Schuss' unemployment benefit.

Schuss applied to the AAT for review of this decision.

The legislation

The AAT accepted that this matter came within s.140(1) of the *Social Security Act*—an argument put, apparently, by the DSS. (The AAT later recognised that s.140(2) allowed the DSS to recover the overpayment from Schuss' current benefit. However, the AAT mistakenly referred to this provision as 's.142'.)

Section 140(1) provides that an overpayment made 'in consequence of a failure or omission to comply with any provision of this Act' is 'recoverable in a court of competent jurisdiction . . .'

Section 130 requires a beneficiary to notify the DSS of the receipt of extra income.

Section 106(1) defines 'income' in terms which (during the relevant period) clearly included the CMF training payments received by Schuss. (An amendment, which came into operation on 19 September 1980, now excludes those payments from the definition of 'income'.)

The cause of the overpayment

Schuss claimed that he had not disclosed the CMF training payments because he was not aware that they should be notified as in-